

REDRESS

Seeking Reparation for Torture Survivors

**UK ARMY IN IRAQ:
TIME TO COME CLEAN ON
CIVILIAN TORTURE**

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87 Vauxhall Walk
London, SE11 5HJ
United Kingdom

Tel: +44 (0)20 7793 1777
Fax: +44 (0)20 7793 1719
WEB: www.redress.org

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This Report was written by Kevin Laue and Adam Lang of REDRESS and edited by Carla Ferstman, REDRESS Executive Director.

The cover photo is attributed to the Birmingham based law firm Public Interest Lawyers and shows the late Baha Mousa's father in front of the High Court in London holding pictures of Baha Mousa's children.

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I. INTRODUCTION

The Redress Trust (REDRESS) is an international NGO which exists to assist individuals and communities who have suffered torture. In this context, and as part of its UK programme, we have been concerned by reported incidences of ill-treatment and torture committed by UK forces against Iraqi citizens. One of the most appalling incidents resulted in the death of Baha Mousa some thirty-six hours after British soldiers took him into custody in September 2003. When litigation commenced in the UK in 2004 on behalf of his family, demanding that there be a proper and effective investigation into this and other cases with a view to reparations, REDRESS was the first and initially only NGO involved which made a third-party intervention supporting the claim.

Subsequently this case, known as *Al Skeini v. SSD*, reached the House of Lords (Appellate Committee) via the Court of Appeal, and at all stages REDRESS continued to be involved, joined by a growing number of other human rights organisations. The final decision on 13 June 2007 was a landmark in human rights jurisprudence, ruling as it did that the reach of obligations under the European Convention on Human Rights extends to Iraq, as does the UK Human Rights Act, in respect of what happens to people in the custody of UK soldiers there.

In parallel to the *Al Skeini* litigation making its way through the civil courts, the UK authorities finally brought a number of soldiers before a court martial in September 2006 on charges relating to the September 2003 tragedy. This case, *R v Payne and others*, lasted more than six months and ended in the acquittal of all concerned, apart from one soldier who pleaded guilty to one charge of inhuman treatment.

What both the civil claim and the court martial revealed should give rise to considerable concern for anyone interested in the UK's reputation for upholding international human rights standards. This Report seeks to highlight some of these concerns, focusing on key aspects of the UK Army's procedures for dealing with detained civilians, particularly during the period when the fighting against Saddam's forces officially stopped and the hand-over to the Iraqi authorities took place: 1 May 2003 to 30 June 2004. This was the period during which Baha Mousa died. Several others were severely tortured and ill-treated in that incident alone, but it was not the only case arising at that time which has entered the public domain. Even before the *R v Payne* court martial the Camp Breadbasket crimes were uncovered and successfully prosecuted, and there have been other incidents and allegations.

The UK authorities have argued that where crimes against civilians did occur these were isolated 'rotten apple' incidents, and that there was and is nothing fundamentally wrong with the UK Army's human rights record in Iraq. However, as the *R v Payne* court martial showed, it is not quite as simple as that. This Report looks closely at that court martial in particular and a number of still unresolved issues: who really was responsible for what happened; what training did the soldiers charged (and others) receive regarding permissible and impermissible conduct; how did clear gaps and confusion in army policy and doctrine arise, and who bears responsibility for that; when things went wrong, did the fault lie with politicians, or the military, or senior civil servants, or all of them; did senior legal advisors always act properly; to what extent were previously banned interrogation techniques used, how did such use come about, when or indeed was the ban effectively re-introduced, and has anyone accepted responsibility for the debacle.

This Report does not purport to answer all these questions, but to show that they legitimately arise from facts revealed so far. However, some documents put before the

court martial have not yet been made available to the public or even the solicitor for the Mousa family, and if they were they might well throw more light on important aspects, including how the banned techniques, especially hooding, came to be used. Other papers should also be disclosed to show who was saying what to whom and when, regarding the human rights standards to be applied by the UK forces to civilians during the Occupation. Without fuller disclosure it will not be feasible to assign responsibility and hold those at fault accountable. The failure of the Government thus far to reveal what it knows suggests it has something to hide.

REDRESS believes that the ill-treatment and even torture of Iraqi civilians at the hands of the UK forces has not yet been properly dealt with. Where courts martial have been conducted, and whether they resulted in convictions or acquittals, they have not got to the bottom of all aspects of these tragic incidents, especially from the perspective of the victims or their families. Indeed, as the case of *R v Payne and other* shows, they have sometimes raised more questions than answers.

We support all those who call for a proper, independent, public and effective inquiry into each and every credible allegation of abuse. What began as a call for a specific inquiry into the Mousa case has now grown, in our view, to the need for a thorough inquiry into the wider issue of how the UK forces dealt with civilian detainees in Iraq.

This Report looks at the problem of the five banned interrogation techniques, as well as the UK's pre-invasion planning or lack of it to deal with civilian detainees; also examined is the way the original approach to civilian detainees was changed in what we argue was an ad hoc manner to deal with problems which arose partially as a result of the lack of proper planning; this changed approach in turn led to further problems which in some respects created the conditions for the Mousa tragedy to occur. Other aspects are the human rights training which was or was not given, not only to ordinary soldiers but to specialised interrogators, and the role of medical personnel and legal advisors.

The Report surveys a number of specific incidents of abuse, seeking to examine in some detail the underlying military policies and doctrines in operation at the time, as well as the steps apparently subsequently taken within the military to prevent future abuses. It is a complex area, but a very important one, and REDRESS believes it is necessary to raise such matters precisely because of their complexity and importance, and the range of issues involved. At the end of the day, however, what emerges most clearly is that only a proper inquiry will get nearer the truth of what happened to Baha Mousa and others, and how the abuse of Iraqi civilians came about.

We therefore call for such an inquiry, as well as specific lines of investigation which we recommend to various Parliamentary Select Committees at the end of the Report. Along with the litigation which is continuing, sustained pressure from inside and outside of Parliament will hopefully lead to a proper resolution of the concerns which to date have not been adequately addressed. Until that happens the legacy of UK abuses of Iraqi civilians will remain a dark one for the British Army and the UK as a whole, but even more significantly for the civilians who suffered and in some cases did not survive.

II. ABUSE OF CIVILIANS

A. The case of Baha Mousa & others

"It disturbs me that it is probable that this trial will conclude and we will not know how Baha Mousa died. For the vast majority of soldiers they feel uncomfortable, even ashamed perhaps that such deeds are alleged to have been made by members of their army"¹

It is still not known who killed Baha Mousa. This is the case despite two military investigations and a UK court martial lasting more than six months, *R v Payne and others*, which ended in the sentencing of one soldier at the end of April 2007. A great deal of evidence of the ill-treatment he and others detained with him suffered was led at the court martial, but all seven soldiers who pleaded not guilty were found not guilty of all charges. A single soldier pleaded guilty to one charge of inhuman treatment and was jailed for one year and dismissed from the army.

In the various hearings that have progressed through the UK civil courts, culminating in the House of Lords (Appellate Committee) decision of 13 June 2007,² witness statements and other documents relating to the ill-treatment were also produced; however, the matters for determination in the civil proceedings concerned the applicability of the European Convention on Human Rights and the Human Rights Act to activities of UK forces in Iraq, and not the details of what exactly happened and who was criminally responsible. Indeed, the essence of the civil case argued on behalf of the Mousa family and other victims was that what happened cannot be known unless and until there is a proper, independent, effective and impartial inquiry which, they argued, the UK Government is obliged to undertake. The case which is ongoing, is likely to go back to the Divisional Court to interpret what such an investigation means under these circumstances and whether indeed further inquiries are required under law.

From the investigations to date and the court martial in particular, as well as in the civil proceedings, enough emerged to show that Baha Mousa and others were subjected to sustained and brutal ill-treatment during much of the thirty-six hour period after their arrest, and that this ill-treatment was carried out by UK soldiers from the morning of Sunday 14 September 2003 to the time of Mr Mousa's death in UK military custody during the evening of Monday 15 September. The prosecution's case was that on that Sunday morning a number of Iraqi civilians were arrested following a raid on the Haitham Hotel in Basra by soldiers of 1 Queen's Lancashire Regiment (1 QLR) in an action known

¹ General Sir Mike Jackson, former head of the Army, during the TV programme Panorama- BBC 15 March 2007: [2007http://news.bbc.co.uk/1/hi/programmes/panorama/6435815.stm](http://news.bbc.co.uk/1/hi/programmes/panorama/6435815.stm)

² *Al Skeini and others v Secretary of State for Defence* [2007] UKHL 26 <http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd070613/skeini-1.pdf>

as 'Operation Salerno.'³ After arrest, they were taken to the 1 QLR Battle Group Main Headquarters and detained there in a Temporary Detention Facility (TDF) in anticipation of a decision to be made as to whether they should be interned on the basis that they posed a threat to the Coalition forces. They were detained in the TDF for about 48 hours before being taken to the Theatre Internment Facility (TIF).

The court martial centred on the treatment of the Iraqi civilians while held in the TDF.

Over the thirty-six hour period, they were repeatedly beaten by being kicked and punched when handcuffed and hooded, made to maintain stress positions for long periods of time, deprived of sleep, continually shouted at and generally abused in temperatures rising to almost 60 degrees centigrade.⁴ During most of this time the detainees were hooded with one or two Hessian sacks.

The precise cause of Baha Mousa's death was said to be postural asphyxia,⁵ but evidence also revealed his body to have at least 93 separate visible external injuries;⁶ additional examination showed, amongst other things, broken ribs, bruised and swollen lips, and a broken nose.⁷ The court martial thus heard that asphyxia was not the only cause, one expert medical witness testifying it was not possible to say that any one particular injury or injuries caused death: as a whole they contributed.⁸ The view of the doctor who performed the post mortem was as follows:

"...[I]f you suffer a large number of injuries then it is bound to take its effect. They hurt and if you are in pain then you do not react terribly well. And he had some broken ribs which would be very painful, he had a broken nose which would be very painful so he would have that physiological -- or pathological and physiological effect of the pain.

*.....
We do not understand the complete mechanisms of postural asphyxia but anything that adversely affects breathing or heart function it could be argued will adversely affect people who are struggling to breathe because of the position that they are in."*⁹

³ As outlined in the Crown's opening address: Transcript 19 September 2006, pp 33-36.

⁴ The court martial was shown an album of photographs of the injuries to Mr. Mousa and others, and it also was given a one minute video of Corporal Payne in the presence of the hooded detainees. This video clip has not been made publicly available to the media, though it was shown in open Court and showed him shouting loudly and abusively at them as they stood in stress positions. It did not show him actually beating any of the detainees. See Transcript 20 September 2006, pg 14.

⁵ Transcript 8 January 2007, pg 70. Postural asphyxia can occur when a person is held face down on the floor with their hands behind their back and pressure is exerted to the upper chest and back of the neck.

⁶ Ibid, pg 59. Not all of these were serious, and none of them individually would have been fatal.

⁷ Ibid, pp 60-64

⁸ Transcript, 13 February 2007, pg 3-4

⁹ Transcript 8 January, p. 72-73. There were also indications that Mr Mousa had not been watered as the post mortem showed that his bladder was empty; his stomach was also empty which was likely to mean he hadn't been fed, although it could have emptied through vomiting. The court martial heard evidence on matters such as the capacity of the kidneys to function properly in the circumstances: see Transcript 9 January 2007, pp 124-125

The picture is of a man dying in agony because he couldn't breathe properly as he was held to the ground face-down with multiple injuries, including broken ribs. Only one soldier was charged with manslaughter, and he was acquitted. In giving detailed reasons for finding that he had no case to answer the Judge Advocate ruled that the accused was not responsible for all or even a substantial number of Mr Mousa's injuries; further, in restraining the deceased on the ground the accused was lawfully entitled to use force to prevent an apparent attempt to escape, and this broke the chain of causation in law and fact.¹⁰

The abuse and ill-treatment began at the hotel after the detainees' arrest, and even before they were taken to the TDF at the British base.

One witness, Mr Baha Malki, told the court martial how he saw a soldier stamping on Baha Mousa's head while lying on the floor in the hotel reception, and heard him screaming in pain.¹¹ All the detainees were verbally abused at the hotel with crude sexual expletives and insults according to the same witness, and the hooding and stressing began soon after they arrived at the TDF.¹² Detainees were punched and kicked when unable to maintain stress positions, and these attacks increased during the Sunday night and intensified on the Monday.¹³ Mr Malki described other abuse including being put in a headlock, hit with an iron bar, being forced along with the others to "dance like Michael Jackson", and of photographs being taken while they were being punched.¹⁴ There was no serious dispute during the court martial that this detainee and the others were hooded, stressed, beaten and abused by several UK soldiers over the period concerned; the defence, for those accused of direct participation in the attacks, was generally to challenge the evidence implicating the specific alleged perpetrators, precisely when during the period concerned the abuses had taken place, and whether or not Mr Malki and the other victims and witnesses had been able to properly identify the men on trial as being the soldiers responsible.

As one defence lawyer put it:

*"Just so Mr Malki is clear: I do not dispute that he was assaulted during that period. The issue I am concerned with is who did it."*¹⁵

One of the Iraqi civilians had such serious kidney injuries that he had renal failure and could have died were it not for the hospital treatment that he received after having been taken to the TIF. He was in hospital for about two months before being discharged. Mr Malki also had serious kidney problems and he too had to go to hospital. Others when examined had identifiable injuries consistent with being assaulted, punched or kicked. They were hooded with their wrists 'plasti-cuffed' in front of them, and forced to maintain stress-positions, for example, standing with their knees bent so that their thighs were

¹⁰ Transcript 13 February 2007, pp 6-7, 14

¹¹ Transcript 10 October 2006, pg 13

¹² Ibid pp 15, 18, 21. They were not hooded while being transported which is somewhat ironic when one considers that some UK authorities (political and military) argue that while hooding is not acceptable for any purposes linked to interrogation it can be used for security purposes so that detainees can't see, for example, where they are being taken.

¹³ Ibid, pp 22, 26, 37

¹⁴ Ibid. pp 23, 40, 50

¹⁵ Ibid, pg 62

almost parallel to the ground, with their arms stretched out in front of them. It was difficult to hold this position for long and when they moved they were assaulted and forced back into it. Another witness described a wide variety of abuse, including the following: how he was put in a stress position involving keeping bottles of water in position on his outstretched arms, continuously shouted at, beaten because he wanted to use the toilet, placed right next to a hot generator which caused him pain, kept in the toilet area for three hours, had fly killer sprayed up his nose when he complained of an asthma attack, and made to drink a soldier's urine from a bottle when he asked for water.¹⁶ Again, the defence was more concerned with specifically when such attacks occurred rather than with what happened. A defence lawyer in cross-examining this witness put it as follows:

"I am suggesting that you are confused and mistaken about when the violence happened to you. I accept -- or I do not challenge -- that you were treated violently."¹⁷

The above is only a selection of the abuse described in the court martial, not a full account of everything alleged. Other detainees described other specific forms of assault and humiliation, but the pattern was broadly consistent. Numerous details were challenged by the defence, and some witnesses were accused of exaggerating or wrongly blaming individual soldiers on trial, but what emerged was that serious abuse and ill-treatment, including use of the banned techniques,¹⁸ took place quite openly. Indeed the Crown described it as an apparent free-for-all with soldiers acting in the belief of total impunity.¹⁹

Conditioning – a deliberate policy

What also emerged was that what took place was in the context of a deliberate policy described as 'conditioning,' an important part of which is known as maintaining 'the shock of capture.' Thus hooding was used partially as a method to disorient a detainee.²⁰ The commanding officer, Colonel Mendonca, who was acquitted of a charge of negligently performing a duty, confirmed that prior to the death of Baha Mousa "hoods, handcuffs and stress positions did feature in the conditioning process."²¹ Another officer said that in addition to those, sleep deprivation was part of conditioning.²² These, it appears were all part of Intelligence Corps doctrine for tactical questioning and interrogation. Some detainees also spoke of food deprivation for up to 24 hours, or when they asked for water it was poured over their hoods.²³

However, the purpose of the court martial was to establish the guilt or innocence of specific soldiers charged with specific criminal offences, and not to fully investigate all the aspects involved in conditioning. Nevertheless, considerable time was spent, for example, trying to ascertain what kind and degree of stressing was used and what would be regarded as acceptable, how stressing could be maintained without using force, and questions of this nature. What emerged were that certain techniques long outlawed were

¹⁶ Transcript, 23 October 2006, pg 39 et seq.

¹⁷ Transcript, 24 October 2006, pg 9.

¹⁸ See Section III below

¹⁹ Transcript 2 February 2007, pg 20.

²⁰ Transcript 13 December 2006, pg 75

²¹ Ibid, pg 119.

²² Transcript, 17 October 2006, pg 30.

²³ Transcript 10 October pp.34-35

in fact regarded as acceptable, rather than any clear consensus as to precisely how this had come about.

It is disturbing that the UK military was using techniques that have been outlawed since 1972. What is also disturbing is that those responsible for making use of the banned techniques believed that they were authorised to do so. Irrespective of how the failure to understand that these techniques had been outlawed arose, the court martial heard that the ill-treatment went beyond 'merely' the use of the five banned techniques. Evidence was presented that the detainees were deliberately and seriously assaulted, some of which has already been described above. Additionally, and for example, reference was made to what was dubbed "the choir" where the hooded detainees were struck one after another, including kicks to the groin/testicles with booted feet to make them utter cries of pain.²⁴ The only conviction arising from 'direct ill-treatment' was a result of Corporal Payne's guilty plea to the one charge of inhuman treatment – others charged with inhuman treatment or assault were acquitted.

There is a need for a full inquiry into the use of the banned techniques, There is an equal need for a full inquiry into all and any ill-treatment, including the assaults, meted out which go beyond the techniques, and to try to establish who was responsible for this as well. Other than Corporal Payne, the result of the court martial was to show who was **not** criminally responsible. In this context the widely-publicised words of Mr Justice McKinnon in his ruling on the "no case to answer submission" bears repeating, where he dealt with the role of other soldiers who had been guarding the detainees during a period of 26 hours when:

"...the beatings and ill-treatment of the detainees continued and intensified. And yet none of those soldiers has been charged with any offence simply because there is no evidence against them as a result of a more or less obvious closing of ranks."²⁵

In addition to the four soldiers who faced charges of direct involvement in the assaults, three others - a warrant officer and two officers, including 1 QLR's Commanding Officer (CO) Colonel Mendonca – were charged with negligently performing their duty. The precise charge in each case is set out in Appendix B, and was in essence an alleged failure to effectively control the soldiers under their command to prevent the ill-treatment of the civilians. They were all found not guilty.

In finding that Colonel Mendonca had no case to answer at the end of the Crown's case, the Judge Advocate reviewed the particulars of negligence which had been alleged, the evidence, and the arguments for both sides, and drew attention to the fact that that it was *not* alleged that the CO was negligent in sanctioning or permitting the practice of 'conditioning' nor that he had improperly delegated the responsibility for the processing and treatment of detainees to either Major Royce or Major Peebles. The former was appointed 1 QLR's Battle Group Internment Review Officer (BGIRO) in July 2003, and the latter took over this role the following month, that is, before Operation Salerno. Major Royce, who gave evidence, was not one of the accused in the court martial, while Major Peebles was. The Crown accepted evidence that "as far as Major Royce was concerned,

²⁴ Transcript 3 November 2006, pp 101-102.; 26 October 2006, pg 106

²⁵ Transcript 13 February 2007, pg 8

he had cleared this process of conditioning as it was called including the use of hooding and stress positions both with Brigade Intelligence and Brigade Legal.²⁶ In reviewing Major Royce's evidence of his discussions with the CO as well as his (Major Royce's) handover to Major Peebles, the Judge Advocate recorded that "the Crown accepts that Major Royce told Colonel Mendonca of this sanctioning, and, critically, that Colonel Mendonca was entitled to rely on it."²⁷ The section of the ruling dealing with the case against Colonel Mendonca runs for more than twenty pages of closely reasoned factual and legal analysis which it is not possible to fairly summarise here, and no attempt is made to deal with all the different legal and factual issues. It is noted, however, that the case against Colonel Mendonca ended up depending entirely upon the evidence of Major Royce,²⁸ who believed the conditioning techniques were sanctioned from above and who had informed his CO accordingly. In the circumstances one returns once more to what is one of the central aspects of the matter: how did it happen that the Brigade sanctioned the banned techniques? This remains a core issue which a proper independent inquiry needs to seek to reveal.

B. Other cases

The abuses beginning at the Haitham Hotel are not the only ones which have occurred in the UK zone of operations, nor were they the first to lead to a court martial.²⁹ The then Solicitor-General, Mr. Mike O'Brien MP, explained the policy as follows:

*"[W]here there is an allegation of wrongdoing and there is supporting evidence following investigation, charges will be brought. Our troops in Iraq continue to perform outstandingly, but they are not above the law."*³⁰

In February 2006 the then Defence Secretary John Reid admitted to "*five sustainable allegations of the mistreatment of civilians.*"³¹ These included the Baha Mousa case as well as those examined below. Before launching a court martial, the Army Prosecuting Authority,³² the military equivalent of the Crown Prosecution Service, needs to determine if there is a realistic prospect of conviction, and whether it is in the public interest to

²⁶ Ibid, pg 32

²⁷ Ibid, pg 36

²⁸ Ibid, pp 46-47. The Crown appears to have been largely unprepared for the evidence of the "Brigade sanction" although it was effectively referred to in a statement made by Colonel Mendonca in 2005. Further, the Crown decided not to call Major Royce as a witness although he was originally listed to be called; this entitled the defence lawyers to call him, but they also declined. The Judge Advocate then decided to call him to give evidence.

²⁹ The then Attorney General Lord Goldsmith gave the following figures in April 2006: "More than 80,000 members of the British Armed Forces have served in Iraq. There have been 184 investigations since the start of operations in Iraq—that covers all types of incidents—100 of those relate to incidents where British forces were fired on by insurgents and returned fire; 164 investigations were closed with no further action; two investigations are still with the service police; five are awaiting trial; one is being considered by the chain of command; five are with prosecuting authorities; three cases have been dealt with summarily by a commanding officer; and five cases have been dealt with by the courts. Those figures were correct as of 7 November 2005; plainly, they have moved to some extent since then, but the broad ball park that very few cases have resulted in a determination to prosecute remains the case" - Hansard, 27 April 2006, Column 274, available at: <http://www.publications.parliament.uk/pa/ld199900/ldhansrd/pdvn/lds06/text/60427-07.htm>

³⁰ Hansard, 27/4 – 06, column 728, available at: http://www.publications.parliament.uk/pa/cm200506/cmhansrd/cm060427/debtext/60427-10.htm#60427-10_spm11

³¹ Reported in news article 'Video fallout hits UK Iraq troops', BBC News Online, 19/2 – 2006, http://news.bbc.co.uk/1/hi/world/middle_east/4729032.stm

³² The APA was set up between 1996 and 1997 to be independent from the military chain of command following challenges to the system of military justice at the ECtHR over independence

proceed.³³ One of the criticisms has been the time-frame between the alleged incidents and the court martial. In the Baha Mousa case it took 22 months for anyone to be charged with an offence,³⁴ and in the case of the soldiers charged and later acquitted of the manslaughter of Abdul Karheem³⁵ this took three years.³⁶

a) Camp Breadbasket

The first incidents of abuse involving British troops in Iraq which resulted in a court martial were that of three soldiers - Corporal Daniel Kenyon, Lance Corporal Mark Cooley and Lance Corporal Darrin Larkin – who were tried in Osnabrück, Germany in January 2005, accused of crimes arising from the abuse of Iraqi civilians held on suspicion of looting at Camp Breadbasket near Basra on 15 May 2003. One of the Iraqis held under suspicion of looting was allegedly a 12 year old boy.³⁷ Evidence of abuse, documented by photographs, included depictions of Iraqis being forced to simulate oral and anal sex, as well as a man being tied up in a cargo net and suspended from a forklift truck. REDRESS has previously noted³⁸ that this treatment appears to fall squarely within the definition of torture as defined in Section 134 of the Criminal Justice Act 1988, a definition which incorporates into UK law the prohibition against torture under the UN Convention against Torture. However, the soldiers were not charged with torture.

Evidence which came out in the court martial was that the soldiers were ordered to bring the suspects into the camp with the intention of "working them hard." Defence lawyers claimed that because of this they were following orders (which, under international law after Nuremberg would not exonerate them from guilt but could be a mitigating factor at the time of sentence), and that their superior's behaviour, allegedly allowing Iraqis to "get physically hurt," had been infecting them.³⁹ It was further claimed that they were charged as scapegoats or 'sacrificial lambs' so that their superior could save his career. This was also said to be the reason why they did not report the abuse – they felt that the chain of command had "broken down."⁴⁰ The Army Prosecution Authority admitted that the order that was given was illegal under the Geneva Convention (the Army Chief of Staff later called the breach "not grave"⁴¹), but stated that the soldiers went beyond the order with

³³ Comments made by Attorney General Lord Goldsmith's spokesperson in news article 'No charge for Scot who shot Iraqi', BBC News Online, 6/9 – 2005 <http://news.bbc.co.uk/1/hi/uk/4218408.stm>

³⁴ Hansard, 12 December 2005, column 1190, available at: <http://www.publications.parliament.uk/pa/cm200506/cmhansrd/cm051212/debtext/51212-29.htm>

³⁵ See below pg 12 et seq

³⁶ The Attorney General in a news article was reported as agreeing that three years was a long time to bring that case matter to court: 'Soldiers quit army in protest after acquittal on boy's death', The Guardian 9 June 2006, available at: <http://www.guardian.co.uk/Iraq/Story/0,,1793463,00.html>. It has also been said that the "heads of the service prosecuting authorities may be too close to the action" - Lord Thomas of Gresford, House of Lords debate 16 February 2006, Hansard, column 1290, available at http://www.parliament.the-stationery-office.co.uk/pa/ld199697/ldhansrd/pdvn/lds06/text/60216-09.htm#60216-09_snews2. Another argument has been that "[w]hen the Army investigates itself, there is a sense of institutional protectionism, [and] it [will attempt] to protect its own interests" - Pete Wishart MP (Scottish National Party), Hansard, 12 December 2005, column 1190, available at: <http://www.publications.parliament.uk/pa/cm200506/cmhansrd/cm051212/debtext/51212-29.htm>

³⁷ News report by Gillan, A., 'Boy among prisoners held by British, court martial told', The Guardian, 3 February 2005 <http://www.guardian.co.uk/Iraq/Story/0,2763,1404472,00.html>

³⁸ Submission to JCHR 30 September 2005 http://www.redress.org/casework/JCHR_CAT_Sept2005.pdf <http://www.guardian.co.uk/Iraq/Story/0,2763,1410689,00.html>

³⁹ News report by Gillan, A., 'Senior's behaviour 'infected' soldiers', The Guardian, 11 February 2005

⁴⁰ Times Online, 'Corporal denies destroying Iraqi abuse photos', the Times, 11 February 2005, <http://www.timesonline.co.uk/article/0,,2-1480136,00.html>

⁴¹ News report by Gillan, A., 'Soldiers in Iraq abuse case sent to prison', The Guardian, 26 February 2005,

their behaviour.⁴² In the event the military exonerated the soldiers' superior before the court martial started.

Despite the Foreign Office's statement⁴³ that soldiers serving in Iraq are given thorough mandatory training courses, which include specific guidance on handling prisoners of war and detainees under international rules, the legal commander of the Division stated that the legal training was "extremely difficult" due to the speed of the deployment.⁴⁴ This same point, how the speed of deployment impacted negatively on international humanitarian law training, also arose repeatedly in the case of *R v Payne and others*.

The soldiers were found guilty on several charges, set out below. In the reasoning behind the sentence, Judge Advocate Michael Hunter referred to the motives for the soldiers' acts:

"Your motive in behaving as you did was not brought about by following an order or by example; what you did was not in order to discourage looters, what you did was done for a key reason of producing trophy photographs. The fact that others may not have been blameless by any means in this episode and the fact that others may be fortunate not yet to have been discovered does not make your behaviour any less serious. You chose to behave as you did and it has never been claimed by anyone that you behaved as you did because you were following orders."⁴⁵

The Judge Advocate also said that it was quite possible that others involved had not been brought to justice.⁴⁶ The soldiers were convicted and sentenced as follows:

- **Corporal Kenyon** - aiding and abetting Lance Corporal Larkin in committing a civil offence contrary to s. 70 of the Army Act 1955 and s. 39 of the Criminal Justice Act 1988, i.e. battery; conduct to the prejudice of good order and military discipline (Army Act, s. 69) by failing to report that soldiers under his command had performed the act relating to the Iraqi being suspended on the forklift; conduct to the prejudice of good order and military discipline by failing to report that soldiers under his command had forced two unknown males to simulate an act of oral sex. As Kenyon was in charge as a session commander, his actions of aiming a camera at the assault of a man demonstrated that he was part of the scheme to produce trophy photographs. The court stated that if he had reported matters to his own commanding officer others involved could perhaps have been brought to justice. He was sentenced to 18 months in prison and dismissed with disgrace from the army.
- **Lance Corporal Cooley** - conduct to the prejudice of good order and military discipline by simulating the punching of an unknown male; disgraceful conduct

<http://www.guardian.co.uk/Iraq/Story/0,2763,1425961,00.html>

⁴² News report by Gillan, A. 'Shocking images revealed at Britain's 'Abu Ghraib trial'', The Guardian, 19 January 2005, <http://www.guardian.co.uk/Iraq/Story/0,2763,1393637,00.html>

⁴³ Available at <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1032786062920>

⁴⁴ News report by Gillan, A., 'Colonel forced to act after reports of abuse', The Guardian, 20 January 2005, <http://www.guardian.co.uk/Iraq/Story/0,2763,1394386,00.html>

⁴⁵ News report by Gillan, A., 'Soldiers in Iraq abuse case sent to prison', The Guardian, 26 February 2005, <http://www.guardian.co.uk/Iraq/Story/0,2763,1425961,00.html>

⁴⁶ Ibid.

of a cruel kind contrary to s. 66 of the Army Act, by placing an unknown, helpless male in a net suspended from the forks of a forklift truck, and driving it. Cooley's use of the forklift truck to amuse himself and others and to enable the taking of trophy photographs was an act of calculated and premeditated cruelty that the court found to be very serious. He was given the maximum punishment of two years imprisonment and dismissed with disgrace from the army. The sentence was subsequently reduced to 18 months by the Army Reviewing Authority.⁴⁷

- **Lance Corporal Larkin** - pleaded guilty to committing battery by assaulting an unknown male and beating him. Because of his plea of guilty Larkin received some deduction from the maximum available sentence of six months, receiving instead 140 days. He was also dismissed with disgrace from the army
- **Fusilier Gary Bartlam**, who took most of the photographs in question, was charged in a separate earlier court martial. He was found guilty of one charge of disgraceful conduct of a cruel kind (aiding and abetting Cooley in the forklift 'stunt') and two charges of disgraceful conduct of an indecent kind (in relation to the photographs of simulated oral and anal sex). Bartlam pled guilty on the basis that his 'aiding and abetting' was limited to merely taking the photographs; as he was under the age of 21 at the relevant time, he was sentenced to 18 months youth custody. This was subsequently reduced to 12 months by the Army Reviewing Authority.⁴⁸

b) **Hassan Abbad Said**

The next case to come before the courts relating to an alleged incident of ill-treatment of an Iraqi civilian was that of Trooper Kevin Williams, charged with killing Hassan Abbad Said, an unarmed father of nine, near Basra on 3 August 2003. The case was dismissed by Williams' commanding officer, ruling out the prospect of a court martial, but after an investigation by Scotland Yard at the request of the Attorney General he was charged in the High Court with murder.

Williams' lawyer stated that the victim attempted to reach for Williams' colleague's handgun, and thus Williams acted in self-defence. The argument was later accepted by the prosecution, which, during the case at the High Court, decided that there was no reasonable chance of conviction, as "the appropriate test in law [was] Trooper Williams' actual perception of danger."⁴⁹ He was therefore acquitted.

The case is important as it shows that it is possible to charge a soldier with a serious offence (including one such as torture) other than in a court martial and independent from the army's 'chain of command.' Section 133 of the Army Act 1955 gives the civilian criminal courts the right to do so; however, this can only happen if the military themselves do not take such cases further.⁵⁰

⁴⁷ BBC news report 1 June 2006 <http://news.bbc.co.uk/1/hi/uk/4598221.stm>

⁴⁸ Ibid

⁴⁹ News report 'Soldier cleared of Iraqi's murder', BBC News Online, 7 April 2005, <http://news.bbc.co.uk/1/hi/uk/4420051.stm>

⁵⁰ See the comments of the Attorney General, Lord Goldsmith, to the House of Lords, Hansard 16 February 2006, column 1294 available at: <http://www.parliament.the-stationery-office.co.uk/pa/ld199697/ldhansrd/pdvn/lds06/text/60216->

c) **Nadhem Abdullah**

In September 2005, seven UK soldiers faced court martial for the murder of 18 year old Nadhem Abdullah on 11 May 2003. They allegedly "beat Mr. Abdullah with feet, fists helmets and rifle butts" until he died, and blood matching Abdullah's DNA was found on the rifle butt of one of the soldiers.⁵¹ The court stated that there might be "sufficient evidence, when taken at its highest, for a court martial board [or jury panel], properly directed, to conclude that Nadhem Abdullah died as a result of an assault carried out by Corporal Evans's section." However, the court martial decided that the evidence was too "weak or vague" to secure a conviction, and that as "the prosecution cannot identify any single defendant who applied unlawful force, then there is no case against any of the defendants." It also found that the investigation by the Royal Military Police was "inadequate," with "serious omissions".⁵² Further, the court felt that the main Iraqi witnesses had lied or exaggerated their evidence to receive more witness compensation from the army.⁵³ According to Lord Drayson speaking in the House of Lords, this did not indicate that the decision of the Army Prosecution Authority to bring the case was wrong, and the judge in the case also stated that it was rightly brought.⁵⁴

d) **Ahmad Jabar Karheem**

Ahmad Jabar Karheem was killed on 8 May 2003, allegedly because he was forced into a canal by British troops, facing the choice to either swim to the other side or be shot.⁵⁵ Despite being asthmatic and not able to swim,⁵⁶ Karheem tried to cross the canal, only to drown while attempting to do so. In July 2005 it was announced that the four soldiers allegedly responsible for this act would face trial for manslaughter.⁵⁷ They all denied the charge.⁵⁸ In the court martial held in Colchester, it was stated that the action took place to "teach [Karheem] a lesson", and despite him being in "obvious distress", the defendants did not help him. A post-mortem established that there was no reason to suspect that the cause of Karheem's death was not drowning.⁵⁹

According to the prosecution:

[10.htm#60216-10_spmi0](#)

⁵¹ New report by Freeman, S., 'Paras cleared of murder in Iraq,' The Times, 3 November 2005, <http://www.timesonline.co.uk/article/0,,7374-1856125,00.html>

⁵² News report by Bowcott, O., and Norton-Taylor, R., 'Paratroopers cleared of murdering Iraqi after judge says there is no case to answer', The Guardian, 4 November 2005, <http://www.guardian.co.uk/Iraq/Story/0,2763,1627538,00.html>

⁵³ News report by Harding, T., 'The Iraqi lies that put the Paras in court', The Telegraph, 4 November 2005, <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2005/11/04/nirq104.xml&sSheet=/news/2005/11/04/ixnewstop.html>

⁵⁴ House of Lords, Hansard, 7 November 2005, columns 415 and 417, available at <http://www.publications.parliament.uk/pa/ld199697/ldhansrd/pdvn/lds05/text/51107-09.htm>

⁵⁵ News report by McDougall, D., 'Fog of war envelops Blair', The Scotsman, 1 March 2004, <http://thescotsman.scotsman.com/index.cfm?id=240372004>

⁵⁶ News report 'Guardsmen 'let boy drown to teach him a lesson'', The Telegraph, 2 May 2006, <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/05/02/ukareem.xml>

⁵⁷ 'British troops face war crimes charges over Iraq prisoners', David Carter, The Times, July 20th, 2005, available at <http://www.timesonline.co.uk/article/0,,7374-1701353,00.html>

⁵⁸ 'Guardsmen 'let boy drown to teach him a lesson'', the Telegraph, 2 May 2006, <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/05/02/ukareem.xml>

⁵⁹ News report 'UK soldiers saw Iraqi boy drown', BBC News Online, 2 May 2006, <http://news.bbc.co.uk/1/hi/uk/4966046.stm>

“the activities of the four accused fell significantly and unlawfully outside what could be described as minimum necessary force. There was no need to use any force at all. That is not what happened and the consequence of that is that a 15-year-old died needlessly and unlawfully.”

A witness, Mr. Aiad Salim Hanon, stated that Karheem was “physically assaulted by the four soldiers and, after falling on the floor, was dragged along the ground, injuring his arm and knee.” Further, according to Mr. Hanon, it was clear that Karheem could not swim. One of the soldiers allegedly attempted to help, but the others would not let him. The defence questioned Mr. Hanon on what it said were inconsistencies in his evidence, and accused him of fabricating the story to earn witness compensation.⁶⁰

Colonel Nicholas Mercer, the senior UK legal officer in Iraq at the time of the invasion, gave evidence of a lack of planning prior to the invasion of Iraq, stating that while he made it clear that only non-lethal force was to be used in dealing with looters, the number of troops on the ground were too few to carry the responsibilities of an occupying power in a belligerent occupation. Apparently no detailed plans were drawn up by the Government through Permanent Joint Headquarters or the National Component Command because it was thought that a second United Nations Security Council Resolution would authorise the invasion and thus the UN would become responsible for the Occupation.⁶¹ This of course never happened.

On 25 May 2006 Vice-Judge Advocate General Michael Hunter found one of the defendants, Lance Corporal James Cooke, not guilty. On 6 June 2006 the remaining three soldiers were also found not guilty, when the court martial determined that the use of “wetting” - submerging looters in rivers and canals to persuade them to go home - constituted minimum use of force in the circumstances.⁶²

The defence lawyers criticised the court martial proceedings after this case. The soldiers’ solicitors claimed that the case should never have been brought and that they were victims of a “scalp-taking” mentality which had taken root in the prosecution system which made “a detached judgment very difficult”.⁶³ However, Mr Phil Shiner, solicitor for the victim’s family, was also critical for other reasons: he blamed the “huge structural problems with the military system of investigating itself”, stating that the court-martial system “lacks independence, rigour [and] a strong rationale to get to the bottom of this type of incident.”⁶⁴

To all of these criticisms, Attorney General Goldsmith stated that the charges were not politically motivated, but decided by “independent, professional people;” further, he said,

⁶⁰ News report ‘UK soldiers ‘beat Iraqi looters’’, BBC News Online, 3 May 2006, <http://news.bbc.co.uk/1/hi/uk/4968700.stm>

⁶¹ News report by Mackey, D., ‘Desert Sham: Officer admits Iraq occupation shambles’, The Daily Mirror, May 18th, 2006, available at: http://www.mirror.co.uk/news/tm_objectid=17095584&method=full&siteid=94762&headline=desert-sham--name_page.html

⁶² News report ‘Soldier’s cleared of Iraqi boy’s death’, The Guardian, 6 June 2006, available at: <http://www.guardian.co.uk/Iraq/Story/0,,1791630,00.html>

⁶³ News report by Fenton, B., ‘Attorney General defends court martial’, The Telegraph, 12 June 2006, available at <http://www.telegraph.co.uk/news/main.jhtml;jsessionid=XEQFHOMGN4W5TQFIQMGCFF4AVCBQUIV0?xml=/news/2006/06/12/nirq12.xml>

⁶⁴ News report by Vasagar, J., ‘Soldiers cleared of Iraqi teenager’s manslaughter’, The Guardian, 7 June 2006, available at: <http://www.guardian.co.uk/Iraq/Story/0,,1791820,00.html>

the fact that the soldiers were acquitted did not mean that there never was a case.⁶⁵ The Ministry of Defence stated that the troops had received the necessary training and that it takes all allegations of abuse and failure to work within the guidelines of the law "extremely seriously."⁶⁶

e) **Al-Amarah incident April 2004: the video exposé**

On 12 February 2006 the UK Sunday newspaper *News of the World* revealed that it had been given a tape containing footage of British soldiers viciously attacking and mistreating Iraqi teenagers whom they had captured, the victims apparently had been picked at random from a group of protestors.⁶⁷ According to the newspaper the tape contained several disturbing images, including of the soldiers "beating [the captured teenagers] senseless with vicious blows from batons, boots and fists ... until the incident climaxes with what appears to be an NCO delivering a sickening full-force kick in the genitals of a cringing lad pinned to the ground – [a]ll the while the callous cameraman delivers a stomach-churning commentary urging his mates on..."⁶⁸ The footage was subsequently widely shown on television. The incident apparently took place in Al-Amarah in January 2004.⁶⁹

Then Prime Minister Tony Blair and Home Office Minister Andy Burnham stated that the claims would be subject to a "full in-depth and very quick investigation."⁷⁰ Amnesty International urged that the investigation should take place independently of the military police, calling it a "complex matter that needs to be investigated by a competent organisation."⁷¹ Regardless of this, the Royal Military Police started looking into the allegations, three arrests were apparently initially made, and it was stated that these soldiers, one of whom was identified as Cpl. Martin Webster of the 1st Battalion Light Infantry, "might be implicated" in the abuse allegations.⁷²

While the Prime Minister's office spoke of the necessity of keeping the incident in perspective,⁷³ other organisations stated that the latest allegations were just the "tip of the iceberg of abuse of Iraqis,"⁷⁴ and "not isolated but symptomatic of the military occupation of Iraq."⁷⁵ This view was also said to concur with statements made by ordinary Iraqis in Basra, who said that "[i]t reflects exactly the real situation in Iraq ... [t]he beating happens behind walls."⁷⁶ A spokesman for the Iraqi opposition party al-Fadhila also said that

⁶⁵ News report 'Goldsmith defends courts martial', BBC News Online, 12 June 2006, available at: <http://news.bbc.co.uk/1/hi/uk/5070548.stm>

⁶⁶ Ibid.

⁶⁷ 'Two more held over Iraq 'abuse' video', Mark Oliver and agencies, The Guardian, 14/2 – 06, <http://politics.guardian.co.uk/iraq/story/0,,1709536,00.html>

⁶⁸ 'Shamed by 42 brainless blows', Robert Kellaway, The News of the World, 12/2 – 06, http://www.newsoftheworld.co.uk/story_pages/news/news1.shtml

⁶⁹ 'Video of eight soldiers beating Iraqi youths will be investigated, says Blair', Terri Judd and Kim Sengupta, The Independent, 13/2 – 06, <http://news.independent.co.uk/uk/politics/article345115.ece>

⁷⁰ 'Blair promises Iraq 'abuse' probe', BBC News Online, 12/2 – 06, <http://news.bbc.co.uk/1/hi/uk/4705482.stm>

⁷¹ Statement made by Mike Blakemore, *ibid.*

⁷² 'Two more held over 'abuse' video', BBC News Online, 14/2 – 06, <http://news.bbc.co.uk/1/hi/uk/4713846.stm>

⁷³ 'Man held over Iraq abuse claims', BBC News Online, 14/2 – 06, <http://news.bbc.co.uk/1/hi/uk/4708866.stm>

⁷⁴ Statement made by Dr. Imran Waheed, of the "radical Islamic group" Hizb ut-Tahrir, taken from: 'Blair promises Iraq 'abuse' probe', BBC News Online, 12/2 – 06, <http://news.bbc.co.uk/1/hi/uk/4705482.stm>

⁷⁵ Statement made by the Islamic Human Rights Commission, *ibid.*

"[m]any of [their] supporters have reported ill treatment at the hands of some of the British forces."⁷⁷ The head of the Iraqi Islamic Party agreed with this, stating:

*"Abuses and atrocities committed against Iraqi civilians have been a regular, at times daily, occurrence throughout the country, including in Basra. These have been committed by American, British and Iraqi official forces... Britain has had a significant hand in every episode that has heaped misery on Iraqis."*⁷⁸

A political opposition party in the UK asked whether the abuse video is a "one-off ... or evidence of wider abuses."⁷⁹ However, on 15 December 2006 the Army Prosecuting Authority issued a press release explaining that there would be no prosecutions, which is reproduced here in full:

"On 12 February 2006 a newspaper and several TV stations published video footage and still images of an incident in April 2004 in Al-Amarah, Iraq depicting British soldiers allegedly assaulting Iraqi civilians. It appeared that four Iraqi civilians had been snatched from a rioting crowd and brought inside a military compound where they were assaulted. The video has a commentary appearing to encourage what was being done.

The incident was investigated by the Special Investigation Branch of the Royal Military Police (RMP). The recovered video footage shows, immediately before the alleged assaults, the soldiers being attacked by mortar blast bombs and confronted by a riotous mob throwing stones. The soldiers were accordingly dressed in full riot gear. The video footage also shows an alleged kick to the body of a deceased Iraqi civilian.

The RMP produced a comprehensive report following a thorough investigation and nine servicemen, members of the Light Infantry, were referred under the Army Act 1955 to the independent Army Prosecuting Authority (APA), following the usual procedures through the Commanding Officer and his Higher Authority.

Having carefully considered all the evidence, and having sought the opinion of independent leading counsel, the APA has decided that the servicemen should not be tried by court-martial.

In reaching this decision the APA applied the same tests of evidential sufficiency and public interest which are applied by the APA and the Crown Prosecution Service in all criminal cases. In other words, is there a realistic prospect of conviction on the available evidence and, if so, is it in the public interest to prosecute? These tests are set out in the Code for Service Prosecutors.

In respect of six servicemen, the APA concluded that there was insufficient evidence against them to afford a realistic prospect of conviction on any criminal charge.

It was possible to establish the identity of only two of the servicemen shown on the video footage apparently engaged in assaults footage, and the evidence would support charges of assault by battery against these two servicemen. There was no reliable evidence of injuries caused by the assaults, therefore there was no evidence to support charges of assault occasioning actual or grievous bodily harm. Charges of battery are, however, summary only offences in civilian law and are currently subject to a 6 month time-limit. This

⁷⁶ 'Liberators' have shown their true face, say critics', Anthony Lloyd, with additional reporting from Ali Hamdani and Ali al-Khafaji, The Times, 13/2 – 06, <http://www.timesonline.co.uk/article/0,,7374-2038156,00.html>

⁷⁷ 'Army's image in Iraq under the spotlight', Richard Norton-Taylor, Michael Howard and Sam Jones, The Guardian, 13/2 – 06, <http://www.guardian.co.uk/Iraq/Story/0,,1708551,00.html>

⁷⁸ al-Aqrab, J., 'The Basra video should lay to rest a scurrilous lie', The Guardian, 16/2 – 06, <http://politics.guardian.co.uk/iraq/comment/0,,1710839,00.html>

⁷⁹ Statement made by Liberal Democrats' defence spokesman, Michael Moore, available at:

'Video of eight soldiers beating Iraqi youths will be investigated, says Blair', Terri Judd and Kim Sengupta, The Independent, 13/2 – 06, <http://news.independent.co.uk/uk/politics/article345115.ece>

would also apply to proceedings in a civilian court. It has been established that the incident in question took place in April 2004. It follows that charges of assault by battery were time barred after October 2004, and criminal prosecutions on these charges could not be brought. The military authorities were not aware of the incident until February 2006. The APA concluded, therefore, that there was no realistic prospect of conviction on charges of battery. There were no other appropriate charges which carried a realistic prospect of conviction.

There was also evidence to support charges of conduct to the prejudice of good order and military discipline under the Army Act 1955 against two servicemen in respect of the body of the deceased Iraqi and the commentary on the video. These charges do have a realistic prospect of conviction, but the APA took the view that the public interest did not require them to be tried by court martial. They could be dealt with summarily by the commanding officer, or by internal Army administrative action which can impose a range of sanctions including termination of service.

The APA has referred the case back to the Army who will now consider taking internal disciplinary and administrative action in respect of these matters."⁸⁰

Although this development was reported in the UK media some three weeks later, early in 2007,⁸¹ there do not appear to be any subsequent reports in the public domain as to whether any internal disciplinary and administrative action has in fact been taken.

C. General

In the court martial relating to the death of Baha Mousa reference was made to a document called FRAGO 152⁸² which in May 2003 drew attention to other civilian deaths in custody:

*"There have recently been a number of deaths in custody where Iraqi civilians have died whilst being held by various units in theatre."*⁸³

It is not clear which cases are being referred to here or whether the cases in question have ever been adequately investigated. This document and the other cases in which UK soldiers have been charged and/or investigated for criminal conduct involving physical harm to Iraqi civilians - including conduct which could amount to torture or other cruel, inhuman or degrading treatment or punishment – as well as others which seem not to have reached the public domain, suggest the problem may not be lone soldiers carrying out these acts for amusement purposes, but are very potentially part of a bigger picture of abuse. This emerges especially from the Camp Breadbasket and Mousa cases but also from the video, even though no charges have followed from the latter.

Mention is also made of the alleged torture of Iraqi civilians in mid-May 2004 near the Southern Iraqi town of Al-Majar Al-Kabir Al-Amara. According to a UK newspaper report near the time,⁸⁴ military police were investigating claims that UK soldiers mutilated the

⁸⁰ http://www.army.mod.uk/linkedfiles/apa/press_releases/20061215pressrelease1li.doc

⁸¹ See for example BBC news report 4 January 2007 at <http://news.bbc.co.uk/1/hi/uk/6230711.stm> and report in The Independent newspaper on 5 January 2007 at <http://news.independent.co.uk/uk/crime/article2125421.ece>

⁸² FRAGO 152 – 1 (UK) ARMD DIV issued 20 MAY. This was the order banning hooding during Telic 1.

⁸³ Transcript 19 October 2006, pg 19

⁸⁴ See Guardian report of June 21 2004 "UK troops accused of mutilating bodies" <http://www.guardian.co.uk/Iraq/Story/0,2763,1243712,00.html>

bodies of Iraqi insurgents after a firefight, the allegations being contained in official death certificates issued by an Iraqi doctor. According to the report seven of the certificates stated that corpses handed over to hospital authorities by UK troops showed signs of "mutilation" and "torture", which allegations a British army spokesman in Basra dismissed as "absurd".⁸⁵ Nevertheless, a solicitor's letter has very recently been sent to the UK Government's lawyers on behalf of a number of relatives, arising from this incident; the letter refers to 22 body bags delivered by UK soldiers to Iraqis on 15 May 2004, each containing a dead Iraqi, most of whom appeared to have been tortured before death. The letter indicates further that it seems clear that all those returned in body bags were alive when taken into custody by British troops, and did not have injuries on being detained, or if they were injured did not have life-threatening injuries. The letter calls for an independent and effective investigation, relying on the *Al Skeini* ruling that as the men were apparently tortured and killed whilst in detention at a UK military facility, they were within the UK's jurisdiction for the purposes of articles 2 and 3 of the ECHR.⁸⁶

There is a powerful argument that all investigations of claims of abuse of Iraqi civilians by UK soldiers should be done independently of the military system, as that would prevent the perception of the military protecting its own. Further, an independent public inquiry could reveal whether these incidents did indeed form part of a bigger, more systematic abuse of Iraqis at the hands of UK troops, and if so the extent of such abuse, and what has been done to deal with it.

The Government is aware of the criticisms that have been made, some of which, as has been shown, emerged from courts martial which even preceded the death of Baha Mousa. It is likely that this is one of the reasons why the Crown Prosecution Service Inspectorate (HMCPSI) recently carried out an inspection of the Army Prosecuting Authority (APA), which report was published in June 2007.⁸⁷ In a press statement Mr Stephen Wooler, Chief Inspector of HMCPSI said:

*"...the establishment of the Army Prosecuting Authority has been successful in making the prosecution process independent of the military chain of command. This was essential to ensure compliance with the UK's obligation under the European Convention of Human Rights. The standard of casework reflects well on the professionalism of the prosecuting officers. Nonetheless there is scope for some further improvement and I am confident that the APA will build on our report to achieve that."*⁸⁸

Human rights organisations did not make representations when the report was being compiled and do not appear to have been given an opportunity to do so. The report deals with the role of the APA in providing advice to the Special Investigations Branch (SIB) and found that there was some lack of clarity amongst investigators as to the circumstances in which this can occur, leading to inconsistent approaches and a lesser

⁸⁵ Ibid

⁸⁶ Letter before action from Mr Shiner of Public Interest Lawyers, 13 September 2007

⁸⁷ <http://www.hmcpsi.gov.uk/reports/APARepJun07.pdf>

⁸⁸ Available at <http://www.army.mod.uk/linkedfiles/apa/20070627hmcpsireportapapressnotice28june07.pdf>

take up than might be appropriate.⁸⁹ Specific reference is also made to some high profile cases:

“A number of high profile cases have attracted attention to the investigation and prosecution of British soldiers on operations in Iraq for offences involving the death of Iraqi civilians. Two such cases formed part of our file sample, although they were not examined as part of any specific brief to do so. In each one, the decision to prosecute had been taken with the benefit of leading counsel’s advice that the evidential test was met. Although the prosecution failed in both cases, the APA had reviewed and handled the cases appropriately, being proactive in trying to reinforce evidential deficiencies which stemmed from investigations undertaken in difficult circumstances.”⁹⁰

The two civilians were Nadhem Abdullah and Ahmad Jabar Karheem whose cases have been looked at above, and the report analyses issues arising.⁹¹ The report confirms that the Baha Mousa case (*R v Payne and others*) was not examined specifically as the inspection commenced before that case. The report deals with a range of relevant issues and recommendations including the role of the APA in investigations, the quality of decision-making, the quality and timeliness of casework handling, the presenting and progressing of cases, disclosure, the service to victims and witnesses, and other matters. Given the most controversial court martial, an independent investigation into the death of Baha Mousa would need to look closely at the role of the APA as well as the SIB in that particular case to see what further lessons are to be learned, and if mistakes were made where the responsibility lies.

III. BACKGROUND OF CONDITIONING TECHNIQUES

A. Banning of the five techniques

One of the most disturbing aspects emerging from the role of UK troops in Iraq was the use of practices applied in Northern Ireland in the early seventies and banned more than thirty years ago. It is useful to recall the background to this banning. What became known as the “five techniques” were the subject of two UK inquiries and a subsequent case brought before the European Commission on Human Rights which was finally ruled upon by the European Court of Human Rights (ECtHR) in 1978.

In the final ruling, *Ireland v The United Kingdom*,⁹² the ECtHR described the interrogation

⁸⁹ Report, page 8 paragraph 3.8

⁹⁰ Ibid, page 8 paragraph 3.10

⁹¹ Ibid, page 25-27. In the first case it found that there was a 12 month gap between the SIB starting the investigation and the eventual referral to the APA, during which time the SIB did not consult with the APA. The report emphasises that both investigations were made in difficult situations which can hardly be appreciated in the normal circumstances of civilian investigations.

⁹² *Ireland v United Kingdom* - 5310/71 [1978] ECtHR 1 (18 January 1978), <http://www.worldlii.org/eu/cases/ECHR/1978/1.html>

techniques which the UK had originally authorised as follows:⁹³

- (a) wall-standing: forcing the detainees to remain for periods of some hours in a "stress position", described by those who underwent it as being "spread-eagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers";*
- (b) hooding: putting a black or navy coloured bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation;*
- (c) subjection to noise: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise;*
- (d) deprivation of sleep: pending their interrogations, depriving the detainees of sleep;*
- (e) deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations.*

Seven years earlier in 1971, when reports alleging physical brutality and ill-treatment by the security forces were first made public, the UK Government appointed a committee under the chairmanship of Sir Edmund Compton to investigate the allegations. Among the forty cases examined were eleven of persons subjected to the five techniques. The Compton report found that interrogation in depth by means of the techniques constituted physical ill-treatment but not physical brutality as it understood that term. The report was made public, as was the supplemental report later that year in relation to three further cases, one of which involved the techniques.

The Compton reports came under criticism in the UK both in and out of Parliament, and the Government set up a three-man committee under the chairmanship of Lord Parker of Waddington to consider "whether, and if so in what respects, the procedures currently authorised for interrogation of persons suspected of terrorism and for their custody while subject to interrogation require amendment." The Parker report⁹⁴ contained a majority and a minority opinion. The majority concluded that the application of the techniques, subject to recommended safeguards against excessive use, need not be ruled out on moral grounds, but the minority (Lord Gardiner) disagreed that such interrogation procedures were morally justifiable, even in emergency terrorist conditions. Both the majority and the minority considered the methods to be illegal under domestic law. The Parker report was published on 2 March 1972, and that same day Prime Minister Heath stated in Parliament:

"[The] Government, having reviewed the whole matter with great care and with reference to any future operations, have decided that the techniques ... will not be used in future as an aid to interrogation..... The statement that I have made covers all future

⁹³ Ibid, § 96

⁹⁴ "Report of the Committee of Privy Counsellors appointed to consider authorised procedures for the interrogation of persons suspected of terrorism" at <http://cain.ulst.ac.uk/hms0/parker.htm>

*circumstances. If a Government did decide ... that additional techniques were required for interrogation, then I think that ... they would probably have to come to the House and ask for the powers to do it.*⁹⁵

The Government then issued directives to the security services expressly prohibiting the use of the techniques. This was noted in the ECtHR judgment in *Ireland v United Kingdom* as follows:

*“Following the Parker report and the Prime Minister’s statement to Parliament (see paragraph 101 above), a directive on interrogation was issued prohibiting the use of coercion and, in particular, of the five techniques. In addition, it made mandatory medical examinations, the keeping of comprehensive records and the immediate reporting of any complaints of ill-treatment.... Shortly after the introduction of direct rule, the United Kingdom Attorney-General gave a ministerial directive on the proper treatment of persons in custody, making it clear that where any form of ill-treatment was reported the Director of Public Prosecutions would prosecute.”*⁹⁶

At the hearing before the ECtHR on 8 February 1977, the UK Attorney-General also made the following declaration:

*“The Government of the United Kingdom have considered the question of the use of the ‘five techniques’ with very great care and with particular regard to Article 3 of the Convention. They now give this unqualified undertaking, that the ‘five techniques’ will not in any circumstances be reintroduced as an aid to interrogation.”*⁹⁷

After the Parker report and Mr Heath’s 1972 statement to Parliament, Ireland had taken the matter to the European Commission on Human Rights⁹⁸ which considered that the combined use of the five methods amounted to torture, but thereafter the ECtHR ruled:

*“Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood. ...The Court concludes that recourse to the five techniques amounted to a practice of inhuman and degrading treatment which practice was in breach of Article 3 [of the ECHR]”*⁹⁹

⁹⁵ *Ireland v United Kingdom*, loc .cit.’ paragraph 101

⁹⁶ *Ibid.* § 135

⁹⁷ *Ibid.* § 153

⁹⁸ *Ireland v. United Kingdom*, 1976 Year Book on the European Convention on Human Rights 512, 748, 788-94

⁹⁹ *Loc. cit* at § 167-168

It is significant that in the recent House of Lords (Appellate Committee) decision which ruled that under no circumstances could evidence obtained under torture be admissible in UK courts,¹⁰⁰ Lord Bingham was of the view that the five techniques which the ECtHR had ruled do not constitute torture but inhuman and degrading treatment might well “now be held to fall within the definition [of torture] in article 1 of the Torture Convention.”¹⁰¹

B. The use of the ‘5 techniques’ in Iraq

This brief historical review shows that not only did the ECtHR rule on the illegality of the techniques but the UK Government undertook never to use them again. In the circumstances it is a matter of grave concern how hooding, sleep deprivation and stressing came to be used in Iraq. How this happened is not clear. During the court martial considerable oral evidence, particularly relating to hooding, was given and examined, and numerous military documents were put into the record. However, the documents have not all been disclosed, and some aspects of the court martial were heard *in camera*. The transcript of what was said in open court indicates, nevertheless, that the issue of hooding in particular in Iraq was raised from an early stage, and certainly well before the events of September 2003 leading to the death of Baha Mousa.

Lieutenant Colonel Nicholas Justin Mercer, the senior UK military lawyer in Iraq at the time of the invasion, told the Mousa court martial that in March 2003 he saw approximately forty Iraqi prisoners kneeling in the sand, cuffed behind their backs, in the sun with bags over their heads next to an interrogation tent.¹⁰² He was “extremely surprised” to see this going on as he viewed it to be in conflict with the law of armed conflict, and he drew this to the attention of the General Officer Commanding. Lt. Col. Mercer indicated further in his testimony that the Military Intelligence Branch said it was part of their doctrine, and, as he put it “we got into a staffing fight over the legality of hooding, for want of a better word.”¹⁰³ As a result it was resolved that Mercer’s 1 (UK) Division could make their own ‘Theatre policy’ on hooding, which was to ban it. Lt. Col. Mercer later learned that the International Committee of the Red Cross (ICRC) had also raised the issue of hooding and the duration of hooding with the UK Government.¹⁰⁴ He noted that this came to light independent of his complaint, so obviously the ICRC had observed it themselves. The Chief of Staff gave a direction that hooding was not to be practised during 1 (UK) Division’s period of tenure in Theatre which ended in July 2003. Crucially, however, this order was ‘lost’ in the process of 3 (UK) Division’s takeover from 1 (UK) Division for Telic 2, which is examined in Section VIII D below.

Even after the death of Baha Mousa there remained confusion on the policy of hooding, as is made clear in the debate in Permanent Joint Headquarters (PJHQ) which continued until as late as May 2004.¹⁰⁵ Even after the death of Baha Mousa, therefore, there is no reason to conclude that in practice hooding ceased virtually immediately.

¹⁰⁰ A (FC) v Secretary of State for the Home department (No 2) [2005] UKHL 71. The only exception is evidence given in the trial of a person accused of committing the torture

¹⁰¹ Loc. cit paragraph 59. The UN Committee against Torture has also said that such techniques, particularly when applied in combination, constitute torture - see “Consideration of a Special Report by Israel,” (CAT/C/SR.297/Add.1) paragraph 5.

¹⁰² Transcript 8 December 2006 pg 11

¹⁰³ Ibid, pg 12

¹⁰⁴ Ibid, pg 13

¹⁰⁵ Transcript 16 January 2007, pp 45-47. REDRESS has also been informed of an Iraqi who has complained of being hooded in 2006 - telephone conversation between REDRESS and solicitor Phil Shiner on 18 September 2007.

However, it was not only within military and political circles that the issue of hooding was raised at an early stage. A prominent UK newspaper, for example, carried a story in April 2003 under the headline “UK troops ‘break law’ by hooding Iraqi prisoners.”¹⁰⁶ In a detailed analysis by legal academic Matthew Happold of Nottingham University specific reference was made in the report to the events of the seventies:

“The last time British security forces hooded suspects, was as one of the so-called “five techniques” used in Northern Ireland in the early 1970s. The four other techniques were wall-standing, subjection to white noise, and deprivation of sleep and of food and drink. These “five techniques” were found by the European Court of Human Rights to constitute inhuman treatment, in breach of the UK’s obligations under the European Convention on Human Rights. British forces’ present conduct similarly risks being in breach of our international obligations.”¹⁰⁷

This press report pre-dates by some seven weeks what Parliament’s Intelligence and Security Committee found in 2005 to be “the first public suggestion that Iraqis detained by the UK had been abused [which] occurred on 30 May 2003 when *The Sun* newspaper published photographs of British soldiers allegedly abusing Iraqi prisoners earlier that month.”¹⁰⁸ In any event, it is clear that several months *before* September 2003 it ought to have been known to all concerned that hooding was not permitted, certainly as an aspect of interrogation. Nevertheless, something went very wrong:

*“The use of hooding during interrogation or tactical questioning is regarded as unacceptable and contrary to the Geneva Conventions and the Laws of Armed Conflict. The hooding of detainees during capture/arrest or transit was permitted if there was a clearly justifiable military reason. However, the Chief of Joint Operations issued a formal direction in September 2003 that hooding was to cease. We were also told that a similar order had been given by the General Officer Commanding 1 (UK) Armoured Division in Iraq during April 2003 **but that this direction was lost when responsibility was handed over to 3 (UK) Armoured Division in July 2003.**”¹⁰⁹*

Baha Mousa and others detained with him were severely assaulted, and hooding, sleep deprivation and stressing were only part of their ill-treatment. It has never been suggested that the use of these banned techniques in themselves led to Baha Mousa’s death or the injuries sustained by the others, but obviously the fact that they were used and permitted to be used still remains one of the most disconcerting issues to have arisen from the court martial.

¹⁰⁶ The Guardian, 11 April 2003: <http://www.guardian.co.uk/Iraq/Story/0,,934550,00.html>

¹⁰⁷ Ibid

¹⁰⁸ Intelligence and Security Committee “The Handling of Detainees by UK Intelligence Personnel in Afghanistan, Guantanamo Bay and Iraq” at paragraph 85, pg 22 <http://www.swyddfa-cabinet.gov.uk/publications/reports/intelligence/treatdetainees.pdf>. These were the soldiers prosecuted in the Camp Breadbasket case: supra at page 10.

¹⁰⁹ Ibid. at paragraph 30, pg 9. [emphasis added]

IV. INTERNATIONAL LAW AND UK POLICY AND DOCTRINE ON STATUS AND TREATMENT OF PERSONS DEPRIVED OF THEIR LIBERTY

This section outlines the international law regarding the status of various categories of persons deprived of their liberty during both the war fighting stage of an armed conflict and any subsequent occupation. What emerges is how a lack of planning and doctrine for the detention programme in Iraq led to poor policy being adopted by troops on the ground. The resulting system was deficient in many ways. While parts of the doctrine has changed since the death of Baha Mousa, it remains lacking in several respects, most notably on systems for reviewing the status of persons deprived of their liberty and on the treatment of persons held as “criminal detainees,” a common issue during occupation. Further, attention is drawn to how the UK authorities prevented systems from being adopted that would have provided high standards of independent status review for detainees.

It is also important to note that doctrine is not binding on the forces on the ground so although certain provisions have changed it does not necessarily mean that procedures on the ground have also changed. However, given that the doctrinal advice to those on the ground was very weak it is useful to explore specific details both before and since the changes.

A. Overview of humanitarian law and the status of people deprived of their liberty

During armed conflict persons can be deprived of their liberty for a variety of reasons, whether or not they are actively taking part in hostilities. The conditions they face, over and above certain fundamental guarantees,¹¹⁰ depend on their status. Members of the armed forces of a party to a conflict are to be held as prisoners of war (POW).¹¹¹ Any persons, including civilians, who have committed a belligerent act and fall into the hands of the enemy, should enjoy the protection of a POW if doubt arises as to whether they belong to a group that should be afforded POW status, until a competent tribunal has determined their status as one not protected as a POW.¹¹² Civilians who have no right to take part in the conflict, excluding *levée en masse* and other entities who should be treated as POWs, can be held for imperative reasons of security only as “internees” or subjected to assigned residence.¹¹³ A civilian who commits an offence solely against the “occupying power” which does not threaten the life of members of the occupying power

¹¹⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. [hereinafter API] Art. 75, applicable in Iraq to the extent that Article 75 reflects customary law

¹¹¹ Geneva Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949 [hereinafter GCIII] Article 4 (1)

¹¹² GC III, article 5

¹¹³ Geneva Convention (IV) relative to the Treatment of Civilians [hereafter GCIV], article 78

can only face internment or imprisonment.¹¹⁴

The UK does not acknowledge the ‘unlawful enemy combatant’¹¹⁵ category applied by the US to terrorist suspects, which creates a gap between a POW and a civilian, such that neither set of protective rules applies. However, civilians who “under definite suspicion of activity hostile to the security of the occupying power [can if] absolutely military security so requires be, be regarded as having forfeited rights of communication”¹¹⁶ under ordinary Geneva law. It is not clear though whether the UK has used this forfeiture of communication procedure in Iraq which could include the prevention of ICRC visits.¹¹⁷

UK forces in Iraq also detained “criminal detainees” for criminal offences (other than those committed against the occupying power) as part of its duty to maintain law and order, or legally speaking “public order and safety.”¹¹⁸ This is the main area where the UK’s doctrine and policy was and remains deficient, especially with regard to handing over criminal detainees to the Iraq authorities.

Determining a person’s status and hence the conditions afforded to them is not a straight forward process, and the conditions afforded to persons of indeterminate status is an important issue. As dealt with below the “article 5 tribunals,” set up originally to determine the status of civilians claiming to be POWs, probably did not comply with the necessary standards of competence. The relevant planning and policy advice given to soldiers on the ground should be investigated to discover how doctors with little knowledge of the various categories of prisoner came to form panels for article 5 tribunals.

UN Security Council Resolution 1546 of 8 June 2004 had the effect of “conferr[ing] on the Multi-National Force the power which [it] had previously held as a belligerent occupant to intern those suspected of conduct creating a serious threat to security in Iraq.”¹¹⁹ Thus the detainee program of the UK forces in Iraq continued past the official end of occupation (30 June 2004) and continues to this day.

By 1 June 2003 criminal detainees already held by UK forces were handed over to the Iraqi authorities. As Colonel Mercer put it in the Baha Mousa court martial proceedings, it was these authorities “whose prisons, courts, judges we had all put back in place so they could do law and order for themselves, because there was no way we could even begin to take on that task.”¹²⁰ To what extent the ‘rebuilt’ Iraqi system could and did protect the human rights of these detainees is unknown, and the decision to hand them over to the Iraqis ought to be investigated further - Colonel Mercer’s comments indicate that the decision may have reflected UK capacity, or rather the lack of it, rather than any duty of care it owed to those detainees.

¹¹⁴ GC IV, article 68

¹¹⁵ JDP 1-10, June 2006, pg 1-4 (13 in pdf) see also Manual of the Law of Armed Conflict, UK Ministry of Defence, § 9.18.1 pg 225

¹¹⁶ GV IV, article 5

¹¹⁷ GC IV, article 143

¹¹⁸ Regulations Annexed to the 1907 Hague Convention IV on Laws and Customs of War on Land [Hereafter Hague Regulations] article 43

¹¹⁹ See the case of *Al Jeddah v Secretary of State for Defence* [2005] EWHC 1809, § 93

¹²⁰ Transcript 08/12/06, pg 40

B. Status review

Clearly, any lack of policy or gaps in it, or inadequate prior planning on an issue, meant that in practice officers on the ground in Iraq had to spend precious time and resources discussing the matter and to make decisions on issues as and when they arose. It was apparently this ad hoc process that led to some things not being fully thought-out, such as when the Brigade authorised the conditioning techniques. Additionally, there was confusion between those in Theatre and those based at the Permanent Joint Headquarters (PJHQ) in the UK, on the extent to which human rights law applied in Iraq. This was especially so in respect to the procedure for reviewing the status of detainees. At one point before the occupation officially began the article 5 tribunals¹²¹ were, according to Lieutenant Colonel Mercer, severely deficient both from a legal point of view as well as from the point of view of security. He described the system thus:

“It consisted of three doctors who had been given the task for the day of determining the status of [prisoners of war]. They had no knowledge of the categories of combatants under the Geneva Conventions nor did they make adequate enquiry and, in the case I watched, released the [prisoner of war]. Both myself and the Intelligence Corps observer had no doubt that the POW was lying and, legally, he should have remained a POW until proper inquiry has been made.¹²² ... [T]he article 5 tribunals were being conducted ... with 250 names appended per day. In other words, job lots of people potentially being turfed out of the door of the POW camp.”¹²³

Colonel Mercer proposed using what he regarded as the tried and tested system of “Detainee and Internee Management Units” (DIMU) used by the UK in East Timor,¹²⁴ which had been given a “tick plus plus” by the UN who had said it conformed to the highest standards of human rights. However, the DIMU system was “constantly blocked,”¹²⁵ by PJHQ. One of the reasons it was blocked was that it would involve an independent “reviewing authority,” a UK judge, to review the cases; it seems there was difficulty finding a suitable judge. The existence of a belief that it would create a threshold that was too high, which in turn would lead to the release of most of the detainees and internees, was another reason it was never adopted.¹²⁶ Colonel Mercer said this of the system that was eventually adopted:

“[It] required the Provost Marshall to certify detention/internment within 48 hours of detention. Thereafter, the detainee/internee would be given legal representation and then written representations would be made within twenty one days by both a Defending Officer and a Prosecuting Officer

¹²¹ The system for reviewing the status of POW's claiming to be civilians and thus wanting to be released. At this stage there was little capacity to hold civilians; thus if the tribunals found them not entitled to POW status they were released.

¹²² Transcript, 08/12/06, pg 25

¹²³ Transcript, 08/12/06, pg 27. There is a further issue, not referred to by Colonel Mercer, arising from the manner in which persons were released, namely, their own safety. Thus REDRESS understands there is a case of a man detained and then released from Camp Bucca only to be killed, apparently by a militia, raising questions as to the circumstances of his detention/release and what steps were or ought to have been taken to prevent him falling into the hands of those who killed him, and whether the UK bears any responsibility in these regards— telephone conversation with solicitor Mr Phil Shiner 18 September 2007.

¹²⁴ Transcript, 08/12/06. pg 23; pg 33 details the process Colonel Mercer proposed for Iraq

¹²⁵ Transcript, 08/12/06, pg 24

¹²⁶ Transcript, 08/12/06, pg 34-35

*(Commander Legal). The case would then be reviewed within 28 days by the GOC/COS.*¹²⁷

He was clearly not happy with this mechanism which he described in the court martial as “crude,”¹²⁸ and he continued to believe that the reviewing authority should be independent of the army. Colonel Mercer left the Theatre towards the end of June 2003 when 3 (UK) Mechanised Division replaced 1 (UK) Armoured Division.

From the arguments the Government made in the *al-Jedda*¹²⁹ case it is clear that it did not accept that it owed a duty of care, along *Soering* and *Chahal* lines, to detainees in Iraq. The Government argues that these principles are not relevant in time of war and thus international humanitarian law acts as *lex specialis* and takes over regarding detainees. These principles (which the UK Government seeks to water down) prevent detainees being transferred to jurisdictions “where substantial grounds have been shown for believing that the person concerned...faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment.”¹³⁰ So it would seem that a major factor in procedures not being adopted to protect detainees was the Government’s assertion that these principles did not apply.¹³¹

C. Decentralised detention policy after 3 (UK) Mechanised Division took over

In June 2003 the system of detention was decentralised with the issuance of an order termed “FRAGO 29.”¹³² This document increased the role for the Battle Groups in holding detainees, as detainees were now to be tactically questioned as they have their status determined at the Battle Group level before being sent to the Theatre Internment Facility (TIF). The document created the post of Battle Group Internment Review Officer (BGIRO)¹³³ whose function was to review the status of detainees and to decide whether to send them for internment at the TIF, hand them over to the Iraqi criminal justice

¹²⁷ Transcript, 08/12/06, pg 34

¹²⁸ Transcript, 08/12/06, pg 34

¹²⁹ *Al Jedda v Secretary of State for Defence*, [2006] EWCA Civ 327
http://www.publicinterestlawyers.co.uk/uploaded_documents/al_jedda_court_of_appeal_judgment.doc

¹³⁰ *Soering v United Kingdom* 1989, ECHR, § 91

¹³¹ The United Nations Assistance Mission in Iraq has an ongoing concern regarding domestic detention in Iraq. For example in its report for the period 1 March to 30 April 2006, it stated that “the general conditions are not consistent with human rights standards.” In its report for the period 1st May to 30 June 2006 it stated “during the last months, new evidence has continued to emerge pointing to torture and other cruel, inhumane or degrading treatment in detention centres administered by the Ministry on the Interior (MOI) or affiliated forces throughout Iraq.” See <http://www.uniraq.org/docsmaps/undocuments.asp?pagename=undocuments>

¹³² HQ 1 (UK) Armd Div FRAGO 29 to OpO 005/03-26 Jun 03. It has not yet been made public. The ‘ad hoc’ nature of FRAGO 29 and the role of the BGIRO, particularly the interaction with tactical questioning emerged in the cases against Major Peebles, the BGIRO at 1 QLR and Warrant Officer Davies, the Brigade tactical questioner, accused of negligently not being in “effective control” of men under them. In his summing up of the case against WO Davies the Judge Advocate referred to chain of command issues: “The Crown say that the strict chain of command is not decisive. The Crown maintains that WO2 Davies as tactical questioner had the ability, right and duty to give -- and did give -- instructions as to the correct handling of detainees and was thus in effective control of the RP staff and the guards in his capacity as tactical questioner. The defence say that WO2 Davies is plainly outside the 1 QLR chain of command and thus could not be in control or effective control of soldiers in 1 QLR in their guarding of detainees. There are the same problems for the Crown as there were in the case against Major Peebles. Namely, how do the words “effective control” make any sense in a military context unless they are tied to the recognised well-understood concept of chain of command?” Transcript 12 March 2007, p 76. WO Davies was found not guilty.

¹³³ The precise nature of the BGIRO is unknown because FRAGO 29 has not yet been made public. However, inferences of the role can be made from 1 QLR Internment Procedures and the Transcript, both public documents.

system, or release them. Such a decision in each case would take some time, far longer than Colonel Mercer's recommended six to twelve hours for holding at this level, and would also necessitate questioning the detainee, which was also against Colonel Mercer's previous recommendations.

There were a number of problems with this ad hoc decentralisation procedure which are examined further below.¹³⁴ The key issue is the fact that Battle Groups were not fully prepared for holding and tactically questioning detainees for this length of time, both in terms of the training of guards and officers, as well as resources and procedures.

D. The current review system

Under the current system Coalition Provisional Authority Memo No. 3 (revised) is still in force, stipulating that if an internee is held for more than 72 hours a review must be held by the seventh day; thereafter, further reviews must take place every six months.¹³⁵ The current system, as of 27 February 2007, is outlined in a memorandum from the Ministry of Defence to the Defence Select Committee.¹³⁶ According to this memorandum in practice reviews are carried out by the Divisional Internment Review Committee (DIRC) within 48 hours and then every 28 days. The DIRC is made up of four officers, including the General Officer Commanding (GOC), Multi-National Division (South East), Commander Legal, and one civilian adviser to the GOC. They vote on whether to keep the civilian interned on security grounds. There is also an element of independence brought in by the involvement of Iraqi officials on the Combined Review and Release Board which sits every three months: this body, however, can only make representations to the DIRC. If an internee is to be held past 18 months the case must go to the Joint Detainee Review Committee to whom the Joint Detainee Committee¹³⁷ delegated its authority under CPA Memo No. 3. There is a separate system for criminal detainees whereby they must be handed over to the Iraqi authorities "as soon as reasonably practical" and be brought before a judicial officer no later than ninety days after the induction to the detention centre.¹³⁸

The complexity of the current system shows that a detailed system for review should have been decided upon during the planning stages of the invasion. This is especially important for future operations given that the ECHR now applies to all UK places of detention abroad, including outside the Council of Europe. If the review system is left for those in Theatre to decide it takes resources away from other activities and increases the likelihood that the system will be deficient in some way. A properly planned and detailed review procedure also allows for adequate personnel to be put in place and trained for their role.

¹³⁴ See Chapter VI The Decentralised System for Internees/ Detainees during Occupation

¹³⁵ Coalition Provisional Authority Memorandum Number 3 (Revised) 27th June 2004, [Hereafter CPA MEMO No 3] Section 6 article 1,2 and 3 http://www.cpa-iraq.org/regulations/20040627_CPAMEMO_3_Criminal_Procedures_Rev_.pdf

¹³⁶ At <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmdfence/209/7011108.htm>

¹³⁷ The Joint Detainee Committee is made up of representatives from the Multi-National Force, the Iraqi Government, and states exercising custody over internees, neither the voting rights of members of this body nor the Joint Detainee Review Committee are mentioned in the Government's Memo

¹³⁸ CPA Memo No. 3, Section 5 Article 1

E. Conditioning techniques and questioning in Iraq

The term 'conditioning' refers to a wide range of techniques used to obtain information. As detailed above, five of these techniques were banned by the UK Government in 1972. It should be noted, however, that not all conditioning techniques involve mistreatment; indeed, we know from US documents that the term includes giving incentives and manipulation such as attempting to trick the detainee.¹³⁹ Two notable differences between how the US approaches conditioning compared to the UK are firstly, the openness of the techniques that are used and authorised by the US,¹⁴⁰ and secondly, direct US Governmental authorisation and accountability for certain techniques.¹⁴¹ As mentioned previously many of the UK documents on conditioning remain secret and thus the authorisation for their use is not openly accountable.

However, it is also the case that US forces are authorised to use harsher techniques than UK troops;¹⁴² indeed in Iraq, they were putting some pressure on UK interrogators to use more forceful techniques as they believed that UK personnel were "not getting as much information and intelligence out of the prisoners which the UK forces held as we should ... members of the UK intelligence community, military and civilian held a similar view."¹⁴³ It is therefore disconcerting to learn that US troops were involved in guarding detainees held by the UK at the Joint Forward Intelligence Team (JFIT) at the TIF,¹⁴⁴ where they would have been undergoing conditioning. It is important to discover how this came about, what techniques the US used on detainees for which the UK was responsible,¹⁴⁵ what authority UK interrogators had over the US guards, and whether the UK breached any legal obligations by putting the detainees under US control.

UK interrogation and tactical questioning techniques were kept largely secret during the *R v Payne* court martial. It appears that only a small number of soldiers would have received training in tactical questioning techniques; however, when asked how ordinary soldiers guarding detainees could be expected to use these techniques Colonel Barnett (who took over from Colonel Mercer as Commander Legal on 7 July 2003 as TELIC 2, the occupation phase, began), stated that the "training would be cascaded down to the soldiers."¹⁴⁶ It seems this was in the form of informal, brief instructions given to soldiers in Theatre who would then pass them on to others. Instructions given in this way failed to

¹³⁹ For a range of techniques used by the United States see the Final Report of the Independent Panel to Review DoD Detention operations .Final Report of the Independent Panel to Review DoD Detention Operations, August 2004 <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>, pg 112. For other US reports on detention abuse see http://www.defenselink.mil/news/detainee_investigations.html and http://www.dod.mil/pubs/foi/detainees/other_related.html

¹⁴⁰ The policy document on interrogation – Field Manual 34-52 Intelligence Interrogation is publicly available at http://www.loc.gov/rr/frd/Military_Law/pdf/intel_interrogation_sept-1992.pdf further far more reports on the issue of detainee abuse by the Americans have been published see footnote 139; see also <http://www.defenselink.mil/releases/release.aspx?releaseid=7487>

¹⁴¹ Secretary of Defence's approval for interrogation techniques January 15 2003, <http://www.defenselink.mil/news/Jun2004/d20040622doc8.pdf>

¹⁴² See JCTF-7 Interrogation and Counter-Resistance policy where environmental manipulation (incl. heat) sleep adjustment, use of dogs, sleep management (4 hours sleep per 24 hours over 72 hours) stress positions (1 hour in each for max of 4 hours) is authorised for use in Iraq <http://www.aclu.org/FilesPDFs/september%20sanchez%20memo.pdf>

¹⁴³ Transcript, 13/12/06 pg, 96

¹⁴⁴ Transcript, 14/11/06, pp 4-5

¹⁴⁵ There is strong evidence that very harsh treatment authorised by the US Government only for use in Guantanamo Bay against 'illegal enemy commandants' spilled over into Iraq and Afghanistan where it would have almost certainly been illegal even by US standards, see The Independent Panel to Review Dept of Defence Detention Operations, pg 68

¹⁴⁶ Transcript, 19/12/06, pg 126

take into account and safeguard against issues such as the heat factor¹⁴⁷ in relation to hooding or the length of time for which conditioning techniques could be used. The use of this ‘cascading down’ of instructions, rather than the issuing of detailed written instructions, should also be investigated.

It also came to light during the court martial that the Intelligence Corps generally operates under a different chain of command from the rest of a detention facility.¹⁴⁸ The joint chain of command at 1 QLR occurred because Major Radbourne took on a tactical questioner role. Even though his training was carried out 8 years earlier, he was sometimes used because of the shortage.¹⁴⁹ This was not such a problem at the TIF as the JFIT operated largely independent of the TIF guards. However it does appear to be a problem when tactical questioners operate within the Battle Groups. There is some evidence to suggest that guards were shown how to apply the banned conditioning techniques (such as stress positions, sleep deprivation and hooding) to maintain ‘the shock of capture’ during periods of questioning.¹⁵⁰ Many guards appearing as witnesses could not remember who had told them to keep detainees in these conditions; given Colonel Mercer’s evidence of discussions with the Intelligence Corps that this was the Corps’ doctrine it seems likely that these requests would have come from the tactical questioners. If this is correct, then there is a case for guards and tactical questioners to be put in the same chain of command so that the tactical questioner becomes responsible for the conditioning process that he requests to occur, and the guards carry out no more than they are told to with each detainee. Improper control by the tactical questioner over the guards is also likely to reduce the intelligence obtained from some detainees who but for the conditioning may have willingly given up intelligence.

As guard duties are so closely linked with intelligence operations, guard training should cover what is and is not allowed during the conditioning process. This would enable guards to know if they are being asked to carry out techniques that are illegal or have otherwise been banned. Further, linking intelligence operations to the same chain of command as guard operations would help prevent misunderstanding of what is allowed during conditioning. This could be achieved by placing tactical questioners and interrogators within a Battle Group holding detainees, or by placing specially trained guards within the Intelligence Corps. The use of guards specially trained in the conditioning process could improve intelligence gathering without resorting to banned techniques or other cruel, inhumane or degrading treatment, or torture.

F. UK doctrine and training

The doctrine available at the time for handling detainees of all types was a single document, *Joint Warfare Publication 1-10 “Prisoner Of War Handling”* of March 2001.¹⁵¹ This 164-page document covered mainly Prisoner Of War issues and only briefly mentioned the other categories. The document was developed into four new Joint Doctrine Publications after Baha Mousa’s mistreatment and death which were published

¹⁴⁷ The heat was intense in Iraq, never falling below 38 degrees, and rising to much higher temperatures at times. In such heat, to be hooded with one or more bags, particularly for hours at a time, is in itself of serious concern.

¹⁴⁸ Transcript, 18/12/06, pg 33 and 08/12/06 pg 27

¹⁴⁹ Transcript, 13/12/06, pg 136-7

¹⁵⁰ Transcript, 01/11/06, pg 45, 22/11/06 pg 6

¹⁵¹ JWP 1-10 Prisoner of War Handling, March 2001, obtained by Redress through a request for information to the Development, Concepts and Doctrine Centre, Ministry of Defence

in 2006.¹⁵² However, problems remain with this new doctrine and in any event doctrine is not binding on troops on the ground, so further flaws could become apparent in practice. These new documents are as follows:

a) JDP 1-10 “Prisoners of War, Internees and Detainees” 2006

This 84-page document brought together the three categories of detainee, and to some extent corrects the lack of doctrine on issues such as responsibility for planning and resources for a “Prisoner Handling Organisation,”¹⁵³ as well as regarding investigations for deaths in custody and allegations of torture.¹⁵⁴ Such measures certainly need to be closely monitored during any new operations. Given the recent ruling that the ECHR and Human Rights Act apply extraterritorially to all UK places of detention, significant guidelines should be developed to help ensure that the procedural obligations under articles 2 and 3 of the ECHR will be met, in particular, that anybody witnessing signs of abuse has a duty to report it.

Although there is a chapter on status determination¹⁵⁵ it is only four pages long. The wide experience that UK forces have in conducting status review tribunals should be collected and analysed so that best practices that are consistent with the UK’s human rights obligations can be passed on. In particular, the Detainee and Internee Management Units (DIMU) used by the UK in East Timor, mentioned by Colonel Mercer¹⁵⁶ should be analysed, especially taking into account its apparent UN approval. As well as doctrine on article 5 tribunals, review systems for civilians of indeterminate status should be developed so that there is a clear understanding of how status reviews should be carried out, especially important when a person could fall into a number of different categories. Some countries, such as Canada, incorporate status reviews into their statutes on the Geneva Conventions.¹⁵⁷ The UK Prisoner of War Status Determination Regulations 1958 are contained in the Royal Warrant Governing the Maintenance of Discipline among Prisoners of War 1958. It is unclear though what provisions exist for civilians. Given the complexity of issues surrounding status during occupations and complex peace-keeping operations, with the possibility of detaining civilians on a number of grounds, doctrine should be developed designing a system to clearly determine the status of civilians, whether they have committed a belligerent act and thus are entitled to an article 5 tribunal, or not. When there is a possibility that detainees will be transferred to a local jurisdiction to face criminal proceedings, the tribunal should satisfy itself on a case by case basis that the local system will respect the person’s human rights and that the transfer would not be in breach of the UK’s human rights obligations.

Given the links between prisoner handling and intelligence operations involving detainees, and as noted above, the doctrine and training for detainee handling should also cover what techniques are permissible during conditioning, together with the relevant safeguards. It appears this is currently not done, so that details on conditioning are

¹⁵² These document are available at <http://www.mod.uk/DefenceInternet/AboutDefence/CorporatePublications/DoctrineOperationsandDiplomacyPublications/JDP/>

¹⁵³ JDP 10-1, chapter 5 Planning, Training and Advise, pg 5-1 to 5E-3 (pg -50-78 in the PDF)

¹⁵⁴ JDP 10-1, § 503, pg 5-1 (pg 50 in the PDF)

¹⁵⁵ JDP 10-1, Chapter 4, (pp 44-49 in the PDF)

¹⁵⁶ Transcript, 08/12/06. pg 23, pg 33 details the process Mercer proposed for Iraq

¹⁵⁷ See Prisoners-of-War Status Determination Regulations 1991, Annexed to the Geneva Conventions Act. <http://www.canlii.org/ca/requ/sor91-134/whole.html>

restricted to those with interrogation and tactical questioning training. This puts ordinary soldiers in the position of having to carry out functions the legality of which they cannot know, and where safeguards might have been missing from very brief instructions given and received and/or when passed on to or from other guards.

b) JDP 10-1.1 “Prisoners of War”

The current doctrine on Prisoners of War is *JDP 10-1.1 “Prisoners of War,”* a 140- page document from which a number of issues arise. The transfer of POWs between other nations’ POW handling systems¹⁵⁸ is one such issue. The requirement for express MOD authorisation on a case by case basis for international POW transfer to take place is to be welcomed, in the hope that it will bring about accountability. This should also be the case for other categories of persons, including civilians, who while not eligible for the privileged conditions that POW status affords no less in terms of accountability for their treatment. One of the arguable results of the Appellate Committee of the House of Lords’ decision in *Al Skeini* which is unfortunate is that the ECHR may not apply to persons apprehended by UK forces but who are then handed to US forces for detention, thereby never setting foot in UK detention facilities. UK policy should not take advantage of this anomaly and MOD authorisations should be investigated to see how often this has occurred for all categories of persons, and whether and what assurances were sought and followed up so that the same standard of treatment would apply, including those based on the ECHR, as if they had been detained in UK facilities.

c) JDP 10-1.2 “Internees”

The current doctrine on security internees is to be found in *JDP 10-1.2 “Internees,”* a 78- page document. The doctrine on the length of time for detention at various levels is outlined in Annex 1A¹⁵⁹ of the document. What is to be welcomed is the indication that evidence should be collected at the point of apprehension which could help justify any subsequent internment or detention.¹⁶⁰ However, given the concerns HM Inspectorate of Constabulary had over evidence gathering by the Royal Military Police (Special Investigations Branch),¹⁶¹ one could ask what training and equipment ordinary soldiers are given for collecting evidence, and whether this is sufficient if it is to be used to justify a deprivation of liberty.

There should be concern, however, with the length of time that internees can be kept at each level, as well as the lack of indication in the Annex of what type of questioning can take place and what conditions can be imposed as an aid to questioning. Conditioning techniques allowable at each stage should vary as the necessary safeguards, in terms of oversight, medical treatment and other safeguards, are likely to be different at the point of apprehension through to a central facility designed for questioning. Such concern arises largely from Colonel Mercer’s “danger point” comments.¹⁶²

Similar concern should be expressed that questioning is allowed immediately upon

¹⁵⁸ JDP 1-10.1, para 129, pg 2-24 and annex 2E.

¹⁵⁹ JDP 1-10.2, Annex 1A, pg 1A-1

¹⁶⁰ JDP 1-10.2, Annex 1B, pg 1B-1

¹⁶¹ An Inspection of the Royal Military Police: Special Investigations Branch, HMIC, 2006, <http://inspectors.homeoffice.gov.uk/hmic/inspections/special/rmp-sib06/rmp-sib.pdf?view=Binary>

¹⁶² See Section V Part D

apprehension for status determination as well as to “elicit information vital to preserve force protection.”¹⁶³ There are two such aspects arising while the detainee is being held for up to eight hours: firstly, questioning for status determination can probably take place later unless the issue is whether to release a person straight away; secondly, the conditions to be afforded to persons deprived of their liberty such as the ban on “physical or moral coercion especially with a view to obtaining information”¹⁶⁴ need to be examined. Further, it should be noted that conditioning techniques used at this level may be very different from those allowed at permanent facilities.¹⁶⁵

After an eight hour period the annex states that the person must be taken to the Unit Holding Area, the equivalent to the Battle Group Temporary Detention Facility previously mentioned; under the doctrine, internees can stay here for 24 hours, less than the three days that occurred at the 1 QLR centre. The notion that any further time at this level must be authorised by Theatre legal staff is welcomed. In such cases it would also be important for the legal staff to assure themselves, preferably by inspection, that risk of abuse at the facility in question is low. Doctrine should be developed for the operation of these Unit Holding Areas to alleviate the criticisms of the decentralised detention systems later in this report.¹⁶⁶ Steps should include strict guard rotas, visitor records, and joined-up responsibility between tactical questioning and guard multiples.

A collection point can be set up between Battle Group and Division level, at Brigade level, where internees can be held for around 24 hours. This helps alleviate the resource requirement difficulties of Battle Groups in transporting internees to the internment camp, one of the reasons for the prolonged internment at Battle Group level. It is unclear whether all or any of the other difficulties have been alleviated, such as poor communication of tactical intelligence. In any event, under this doctrine internees should reach the internment camp 72 hours after being apprehended, which is still far longer than Colonel Mercer recommended following the Camp Breadbasket abuse cases.

The issue of where official, ECHR-compliant status reviews are to take place, and how they are to be carried out, is not well illustrated in this doctrine. The policy in FRAGO 29 was that review was to take place at the Battle Group level to ease the flow of internees and criminal detainees to the Theatre Internment Facility. To help avoid abuse of status reviews, where they are needed prior to the internment camp, they could take place at a collection point by personnel independent of the arresting Battle Group. The short period of time for transferring internees to the internment camp or collection point imposed by Colonel Mercer during Telic 1 should also be adopted as general doctrine, to prevent the risk of any further abuse at the Battle Group level.

d) JDP 10-1.3 “Detainees”

The current doctrine on criminal detainees is *JDP 10-1.3 “Detainees,”* a 34-page document which only applies to non-international armed conflicts, such as when UK forces are operating abroad under Host Nation authority which might allow them to detain war crimes suspects. It is quite brief and is not meant to cover detention of civilians for

¹⁶³ JDP 1-10.2, Annex 1B, pg 1B-2

¹⁶⁴ GC IV Art 31, quoted from *The Manual of the Law of Armed Conflict*, UK Ministry of Defence, Oxford 2004, pg 227

¹⁶⁵ This point is based from comments from the US independent report stating that different techniques were authorised at different facilities depending on safeguards as well as legal considerations, *Independent Panel to review DoD Detention Operations*, 2004, pg 68

¹⁶⁶ See Chapter VI Decentralised System for Internees and Detainees

law and order reasons under the law of occupation. Criminal detainees are treated as internees during international armed conflict.¹⁶⁷ However, separate doctrine on criminal detainees in international armed conflict needs to be developed to reflect the difference between holding someone on suspicion of committing a domestic criminal offence and holding someone on security grounds.

Regulations on passing criminal detainees to local authorities needs to be developed, including inspections of local detention facilities and review of legal systems. Transfers of detainees must be ECHR-compliant, and the preconditions for transfer should respect in particular Article 2 and 3 considerations on transfer. Given that local laws and procedures generally remain in place during occupation, translations of the relevant laws need to be sought during planning so that they can be dispersed. In Iraq the Penal Code was still to be translated during the discussions Colonel Mercer had with Permanent Joint Headquarters after the invasion.¹⁶⁸ Further, a review of laws that might need to be amended because they conflict with human rights or security objectives should take place during the planning stages if time allows. Although it also defers to local domestic systems, the 2001 doctrine also states that criminal detainees should be kept in accordance with UK national standards.¹⁶⁹ This should also be the starting point for developing doctrine on holding criminal detainees during occupation.

Holding civilians as criminal detainees is rare in international armed conflicts but common during military occupation. Little UK doctrine on this was available at the time, a problem that still persists. Planning for the Iraq operation should have taken this into account and clear policy should have been developed, along with incorporation into training programmes. The planning of the Iraq operation is discussed below but an important issue is the pre-deployment training on handling of prisoners. It transpired during the Baha Mousa court martial that Operational Training and Advisory Group (Op Tag) comes in two distinct packages: one for War Fighting Operations which deals only with POW handling, and one for Peace Support Operations which includes training for handling criminal detainees as well as security internees.¹⁷⁰ Training for complex operations where a period of occupation is likely should include the proper treatment of all three categories of person.

V. PRE-DEPLOYMENT PLANNING AND THE ORIGINAL SYSTEM FOR DETAINEES

A. Introduction

As indicated periodically in this Report, many aspects relating to abuse are connected to the issue of planning. A properly planned detention programme for Iraq should have led to a Theatre level detention facility with adequate resources to hold and process all of the civilians likely to be detained by the Battle Groups. It would have had adequate

¹⁶⁷ JDP 1-10.3, pg 1-1

¹⁶⁸ Transcript, 08/12/06, pg 21

¹⁶⁹ Encapsulated in JSP 469 "Codes of Practice for the Management of Personnel in Service Custody," JWP 1-10, 2001, para 128, pg 1-10

¹⁷⁰ Transcript, 18/12/06, pp 18 -19

communication systems to pass tactical intelligence back to the Battle Groups that needed it. The plan should have involved comprehensive training in the handling of civilian detainees whether or not they were being tactically questioned and conditioned. In the build-up to the invasion, training for tactical questioners should have increased to prevent the shortage that would follow, leaving soldiers whose training was out of date to take on the role.

While it is easy to criticise with hindsight, many of the issues of running a detention programme were in fact brought up during the planning stages, but an adequate programme failed to emerge. The root of the problem seems to have been a misguided expectation that the United Nations Security Council would pass the second resolution authorising the invasion and would then be responsible for the post conflict reconstruction, including law and order.¹⁷¹ This never occurred, and forces on the ground were left with the resulting problem.

Further, the problems also relate to how the UK planned the joint operation with the US. The UK's contingency plan was to rely on US plans for detention facilities which failed to come to fruition, leaving the UK's already over worked officers in Theatre to develop and implement a detention system for civilians almost from scratch and without adequate resources and time for what was needed. In this section some of the problems to which the court martial drew attention are examined, problems caused by the failure to develop a comprehensive plan as well as the system subsequently developed. In the next section how this failure to develop a comprehensive plan necessitated the development of the original system into a decentralised system is explored. This too became a contributory factor in detainee abuse.

B. Pre-deployment resource planning

Colonel Mercer highlighted the problems with the UK plan for POWs, specifically the resources being devoted to it, as early as March 2003, to the Commander of 1 Division:

"I appreciate that the manning and resources estimate for [prisoners of war] is difficult to evaluate but, as your legal adviser, I am professionally obliged to point out any legal risks that you or the Division may run in any area of military operations and, in my opinion, the failure to find additional manning and resources with regard to [prisoners of war] now brings a real risk of potentially violating International Law.

I have already raised the issue of manning for [prisoners of war] on a number of Assess Rep and this matter has been briefed to CJO and others. In addition, as you know, liaison has also been made with the ICRC who, although understanding of the difficulties of military operations, have indicated that there will be very serious questions if the lives or health [of prisoners of war] are jeopardised. It should also be noted that the ICRC will, in default of the appointment of a Protecting Power, assume this role during any conflict. The media implications are also obvious.

¹⁷¹ News report by Mackey, D., 'Desert Sham: Officer admits Iraq occupation shambles', The Daily Mirror, May 18th, 2006, available at: http://www.mirror.co.uk/news/tm_objectid=17095584&method=full&siteid=94762&headline=desert-sham--name_page.html

*Clearly the situation has now deteriorated further and, in my opinion, to avoid a potential violation of International Law remedial action will be required as soon as possible. I have spoken to the NCC about this matter this morning and they will be speaking to CENTCOM today.*¹⁷²

Prior to the deployment Colonel Mercer had been promised a whole battalion for Prisoners of War but it was struck off the Orders of Battle in January 2003 with only a company replacing it; he described this as “legally amber” in reports called “UPREPS to NCC,” and the issue was never resolved to his satisfaction.¹⁷³ The contingency plan was to rely on facilities and resources provided by the US, who would build three to four POW camps, but these plans were also scrapped.¹⁷⁴ Clearly there were problems between UK and US planners. This problem also stretched to the US not sending enough troops to deal with law and order after the invasion. The forces on the ground were “left in the lurch.”¹⁷⁵ A similar view has also been mentioned recently by General Sir Mike Jackson stating that the failures in Iraq were political ones not military ones.¹⁷⁶ Such comments are also reflective of remarks made by senior officers throughout the *R V Payne and others* court martial.

There is also evidence to suggest that the army took on a much fuller role in Iraq than the military has in recent reconstruction attempts. Brigadier Moore, the Commander of 19 Mechanised Brigade stated at the court martial that they were under resourced, having to begin with only 4000 troops to cover an area the size of Scotland, later increased to 5500. Further “UK and the coalition forces had not properly planned for the aftermath of the war... [and the Army was] not supported by any Government departments.”¹⁷⁷

“The Foreign Office was there but was largely inactive. DFID were the first organisation to pull out of the UN even before the UN decided to leave. The Home Office had two advisers, police advisers, in the country. There was nobody from the Department of Trade Industry.

*So the Brigade ended up having to provide -- to do all the reconstruction work, to pay public service workers, to get the judiciary running, to try to regenerate the economy as well as doing its normal stability and security tasks. Simply put we were the only show in town and there was a lack of support across the rest of Whitehall.*¹⁷⁸

In recent reconstruction attempts many of these tasks were often left to civilian administrators; in Iraq they were left to the military already struggling with the security situation. It is also important to question the capacity of the military to achieve many of these tasks in terms of their training and experience.

Additionally, the Battle Groups had the task of collecting intelligence regarding criminal activity as there was no centralised intelligence institution set up for this. This meant that

¹⁷² Memorandum from Lt Col Mercer to GOC, 6th March 2003, read into the Transcript 08/12/06, pp 15-17

¹⁷³ Transcript, 08/12/06 pg 17

¹⁷⁴ Transcript, 08/12/06 pp 17-18, 14/12/06, pg 82

¹⁷⁵ Transcript, 08/12/06 pg 18

¹⁷⁶ See <http://www.msnbc.msn.com/id/20629345/site/newsweek/page/0/>

¹⁷⁷ Transcript, 14/12/06, pg 102

¹⁷⁸ Transcript, 14/12/06, pp 102-3

in some cases Provost Staff involved in guarding detainees often had a dual role of collating criminal intelligence. Concerns were raised by one sergeant at 1 QLR that he could not do both tasks effectively.¹⁷⁹

Brigadier Aitken, the Director of Army Personnel Strategy, has been compiling a report on “what measures the army need[s] to take in order to restore its operational effectiveness and reputation in the light of instances of abuse in Iraq and criticisms of the individual training organisation here and back in the United Kingdom.”¹⁸⁰ The review, which began in February 2005, has still not been completed.¹⁸¹ However, during the court martial Brigadier Aitken did make some statements which could indicate preliminary findings:

“...some of the conditions in Iraq which exacerbated the likelihood of acts of abuse being committed could have been avoided if there had been more thorough joined up planning for what would happen after the war fighting phase...”

...the failure by the UK to plan for what would happen after the war had a significant impact on the manner in which British troops conducted themselves...

...difficult to avoid concluding that they were insufficiently prepared for the challenge represented by the insurgency...”¹⁸²

If it is largely the Government and the strategic level military that is responsible for the failures in Iraq, then any effective review should be independent of both the Government and the military.

C. Pre-deployment at 1st Queens Lancashire Regiment

Colonel Mendonca, the Commanding Officer of the 1st Queen Lancashire Regiment (1 QLR) at the time of the Baha Mousa abuse, wrote to Brigadier Aitken as part of his collection of evidence for the above mentioned report. The letter outlines a number of problems relating specifically to the 1 QLR, the short notice given to deploy, the pre-deployment training, and lack of Coalition planning for the aftermath.

1 QLR were given only five weeks to deploy, compounded by their involvement in Operation Fresco, the taking over of civilian fire fighting duties during the 2002-03 strikes, something many of the other Battle Groups in TELIC 2 were also involved with. The delay in formal warning and Operation Fresco, said Colonel Mendonca, prevented them from conducting proper resource training, which was conducted without the Operational Training and Advisory Group (OPTAG). Also, despite Colonel Mendonca’s wishes, there was not time for 1 QLR to train any tactical questioners; thus during the relevant period no staff in 1 QLR had completed the tactical questioning course, and there had been no training in this area,¹⁸³ which meant that they were beholden to Brigade for tactical

¹⁷⁹ See Sergeant Smith’s testimony, Transcript, 11/12/06, pp 78-79

¹⁸⁰ Transcript, 13/12/06 pp 115- 125

¹⁸¹ Letter from British Army, replying to REDRESS’ Freedom of Information request, 24 July 2007

¹⁸² Transcript 13/12/06 pp 129-130

¹⁸³ Transcript, 05/03/07, pg 41

questioners who would set the rules for conditioning.

D. Original system for detainees

Because of lack of planning for the detention programme, many of the procedures had to be worked out by those in Theatre. During TELIC 1 significant positive changes were made to the detention system by Colonel Mercer who had in mind previous instances of abuse specifically at the Battle Group level as had emerged at Camp Breadbasket.¹⁸⁴ He attempted to reduce the risk of detainee abuse by reducing the length of time they were held by the Battle Groups before they are brought to the Theatre Internment Facility (TIF). The TIF at Umm Qasr was the central facility. Under Colonel Mercer's system detainees were only allowed to be held by the Battle Groups, which he described as the "danger point,"¹⁸⁵ for a maximum of six hours¹⁸⁶ before being taken for tactical questioning and holding at the TIF. Due to an alleged difficulty in getting the US to process detainees during the night he allowed a 14-hour limit, but the general rule that detainees should be brought to the TIF as soon as possible remained.¹⁸⁷ However, lack of resources, often in terms of helicopter transportation during the day, meant that Battle Groups frequently found the 14-hour deadline almost impossible to meet during TELIC 1 and to a larger extent during TELIC 2;¹⁸⁸ the rule was also not well understood by some Battle Groups.¹⁸⁹

VI. DECENTRALISED SYSTEM FOR INTERNEES/DETAINEES DURING OCCUPATION

A. Problems with the decentralised policy instigated under FRAGO 29

By the beginning of TELIC 2 the problems with transporting POWs to the TIF was exacerbated by a number of unexpected factors as the focus moved away from POWs towards detaining civilians. The result was that detainees were to be filtered at the Battle Group level, who would decide what to do with them. The options were to release them, transfer them to the Iraqi system for criminal prosecution, or send them to the TIF for internment.

FRAGO 29¹⁹⁰ has not been released to REDRESS but from the court martial transcript,

¹⁸⁴ Transcript, 08/12/06, pg 60 and 63

¹⁸⁵ Transcript, 08/12/06, pg 60

¹⁸⁶ Transcript, 08/12/06, pg 42

¹⁸⁷ Transcript 08/12/06, pg 43

¹⁸⁸ Transcript 14/11/06, pp 8-9, 43, regarding the KOSB 64, 75, 19/12/06 pg 123

¹⁸⁹ For example 1st Kings Regiment, transcript 14/11/06, pg 104-5

¹⁹⁰ HQ 1 (UK) Armoured Division Fragmentary Order 029 to OpO 005/03, 26th June 03. On the difficulties which solicitor Mr Phil Shiner has had in obtaining documents, see Guardian newspaper article of 22 August 2007 under the heading

where it was partly read out, a number of inferences can be made. It lacked clarity as to the treatment of detainees being held by the Battle Groups, and it also seems to have lacked detail as to what conditioning techniques, if any, could be used. It was mentioned in the court martial that Brigade HQ could have cleared up the problem by elaborating on FRAGO 29 before passing it down the chain of command, but they did not.¹⁹¹ This was at a time when the only doctrine on detainee handling was the 2001 JWP 1-10 which as mentioned previously has since been deemed inadequate. It is also unclear to what extent the lack of doctrine on the subject of conditioning has subsequently been corrected as the Government has not released the relevant documents.

B. Why questioning of detainees was decentralised

a) Opening hours of the Theatre Internment Facility

The compound of Camp Bucca, where the TIF was based, was run by the US who insisted on processing, checking in and giving detainees brought in by British forces an ID tag. This meant that British detainees had to be processed twice. There was a perception within the Battle Groups that Camp Bucca was not open during the night, between the hours of 1900 and 0600, though the staff at the JFIT believed that this was often used as an excuse for missing the 14 hour deadline.¹⁹² This caused the Battle Groups to hold their detainees overnight when otherwise they would have transferred them. In reality, however the Camp Bucca was open, but US soldiers appeared at best reluctant to process detainees out of their normal hours, and it seems that a standby unit was tasked to do this when it did occur.¹⁹³ However, the Battle Groups were not officially notified that the Camp was in fact open during the night. This was in part due to compatibility problems with the UK communications system and the US system at the TIF.¹⁹⁴ Those at the TIF, particularly the JFIT, felt that it was not worth mentioning the point to Battle Group staff when junior NCOs dropped off detainees outside of the 14-hour limit imposed under FRAGO 29, because they were not of sufficient rank.¹⁹⁵ It is unclear whether the obvious option of using these Battle Group staff to pass letters on to their officers regarding the opening hours was explored.

b) Unexpected numbers of detainees at the Joint Forward Intelligence Team

The JFIT, the intelligence unit within the TIF, was unable to cope with the large number of detainees being brought to Camp Bucca. Troops had previously been briefed that some military personnel might prove valuable intelligence assets as members of the Security Services or involvement in some military activity other than conventional military activity if found wearing civilian clothing. However, a "significant proportion of Iraqi military had abandoned their weapons and their uniforms and had therefore been captured in civilian

"Lawyers accuse MoD of retaining evidence on abused Iraqi detainees:"
<http://www.guardian.co.uk/Iraq/Story/0,,2153605,00.html>

¹⁹¹ Transcript 14/12/06, pg 143

¹⁹² Transcript, 14/11/06, pg 23

¹⁹³ Transcript, 14/11/06, pg 7

¹⁹⁴ Transcript, 14/11/06, pp 44-45

¹⁹⁵ Transcript, 14/11/06, 43

clothing,¹⁹⁶ thus increasing the number of those who needed to be questioned. One of the resulting problems seems to have been that JFIT were unable to segregate them during conditioning.

c) Shortage of tactical questioners

These extra detainees increased the pressure on the tactical questioners. However, since it was rare for Battle Group to have their own tactical questioners, Brigade had to provide them, probably from the JFIT itself. Having tactical questioners travelling around for hours between various locations would have probably reduced their effectiveness. Indeed, there was a notable case of a tactical questioner being kept at one Battle Group for three weeks because of a planned operation which in the end did not need him.¹⁹⁷ Clearly in this respect, given the limited numbers of tactical questioners, it would have been more efficient to carry it out centrally.

d) Communications problems at the JFIT and TIF

Intelligence was often not passed back down to the Battle Groups,¹⁹⁸ who frequently need tactical intelligence on which to take action. However, at one stage the only source of communication between the TIF and the Battle Groups was a mobile phone. Further, as a norm, intelligence reports had to be couriered between the JFIT and the port at Umm Qsar, a three mile drive, where as a matter of course they were only passed up to Brigade and not down to the Battle Groups. These communication difficulties at JFIT are difficult to understand considering Major Radbourne's primary role with "the Bowman system."¹⁹⁹

"Q. What was your role there? Your chief role, your principal role –

A. My principal role, I was SO3 Land Digitisation -- basically the Bowman(?) system and Nuclear, Biological and Chemical Warfare Officer. However due to the nature of the deployment those two issues were not particularly important at the time so I mixed between the G2 cell and the G3 cell."²⁰⁰

Rather than resorting to holding detainees longer at the Battle Groups, the "danger point", and tactically questioning them there, it is not understood why the communication problems at JFIT were not solved so that tactical intelligence could be collected by JFIT and passed back to the Battle Groups.²⁰¹ Instead, Major Radbourne took on the role of tactical questioner, even though his training was eight years old.

All of these issues meant that the Battle Groups were expected to gain intelligence from their detainees while it was being determined whether they should be interned at the TIF. The need for tactical questioning to be used at the Battle Group level seems to have been endorsed by Brigade, because routine questioning could probably have been used simply to decide whether there was a case for internment or for treating the detainee as a

¹⁹⁶ Transcript 14/12/06, pp 86-87

¹⁹⁷ The regiment was the Kings own Scottish Borderers Transcript 14/11/06, pg 67

¹⁹⁸ Transcript, 13/11/06, pg 38, transcript 28/02/07, pg 15 and 14/11/06 pg 37

¹⁹⁹ The new radio system being used by the UK Armed Forces: see <http://www.army.mod.uk/bowman/index.htm>

²⁰⁰ Transcript 13/12/06, pg 136

²⁰¹ It may have been related to the change over in systems as the UK system was removed and the Multinational Coalition Force Iraq System was awaited, see Section VII Part D below.

criminal suspect. This use of tactical questioning was very specific to intelligence gathering: the Battle Groups took on an intelligence role from the JFIT because the latter could not cope. As will be shown, however, insufficient safeguards were put in place for this type of questioning.

C. Tactical Questioning and Detention at the Battle Groups

As previously mentioned the Battle Groups were unprepared to hold detainees for extended periods of time. It should be investigated whether tactical questioning should take place at the Battle Groups at all. Further, many of the procedures that would normally be put in place at a detention centre, were not.

a) Tactical questioning

It appears that oversight and supervision of tactical questioners, and thus the conditioning process and techniques, was almost inevitably reduced when they operated at the Battle Groups. This was because almost nobody there would know what the rules they operated under were. Indeed, Colonel Mendonca described it as a “black art.”

“Late formal warning (and therefore a lack of priority for courses) prevented us from getting anyone trained in tactical questioning. This proved to be a serious shortfall as we were always beholden to brigade-provided TQ trained personnel and therefore the basic principles of the process remained something of a 'black art'. The brigade-provided [tactical questioning] officer or senior NCO would set the rules for 'conditioning' any potential internee prior to questioning and, prior to Baha Musa, hoods, handcuffs and stress positions did feature in the conditioning process.”²⁰²

The question arises how a Battle Group commander was expected to be fully responsible for his detainees if the rules governing a particular aspect of their treatment were not clear.²⁰³

The use of tactical questioning at other Battle Groups seemed to range from not at all²⁰⁴ to officers having a lack of knowledge on the topic.²⁰⁵ This reflects the different conditions the Battle Groups faced in different parts of Iraq; for example, some detained far more persons than others. 1 QLR in Basra seems to have had to detain a relatively high number. The fact that the banned techniques reappeared after the ban on hooding during Telic 1, with different personnel in Telic 2, indicates that there is a culture of using these banned conditioning techniques within the Intelligence Corps.

b) Detention

²⁰² Transcript, 13/12/06, pp 118-119

²⁰³ See Section VIII Part C below

²⁰⁴ Transcript, 14/11/06, pg 82, though the Kings own Scottish Borderers appear to have had a JFIT on their base see pg 85-86

²⁰⁵ Transcript, 14/11/06, pp 108-109

Although conditioning was clearly a factor in the abuse at 1 QLR, the treatment the victims suffered went beyond that which was authorised. The ‘choir,’ for example, was not part of any effort to gain intelligence, and was merely for the perpetrators’ own gratification. One of the important issues to emerge, however, is how this mistreatment could take place in front of numerous people with nobody telling them that it was wrong or reporting it. Evidence was also given that Battle Group Main was on a relatively small site, and that noise coming from the TDF (shouting by the guards and cries from detainees) could be heard over a considerable distance including the officers’ living quarters.²⁰⁶ The procedures for record keeping and responsibility for detainees at 1 QLR was clearly too relaxed. One witness to abuse described it as a “free for all.”²⁰⁷ Such issues go back to lack of training and lack of policy regarding detainee treatment.

The capability of the Battle Groups to detain civilians for periods of up to three days is questionable. The Battle Groups were not prepared to detain persons for long periods; one Battle Group, the 1st Kings Regiment, appears to have had only three members of their regimental police in Theatre,²⁰⁸ and as a result the patrols that arrested persons would often end up guarding them. No procedures were put in place at 1 QLR to prevent this either. At another Battle Group there was both awareness and sufficient resources to prevent the arresting unit from guarding their detainees. Colonel Wilson, 2nd in Command at the Kings Own Scottish Borderers, knew from his experience in Northern Ireland that arresting units should not then end up guarding them back at the base.²⁰⁹

Guards (at least at 1 QLR) also had many tasks, maybe too many to be able to provide an adequate duty of care to the detainees. Sgt Smith, a Provost Sergeant at 1 QLR involved with detention, also had a desk job collating criminal intelligence. It is probably a reflection of the limited time he spent at the detention centre that he knew nothing about the use of stress positions at the facility.²¹⁰ Sgt Smith raised these concerns at the time, that he could not do both tasks effectively, with an officer but it was not changed.²¹¹ This left Corporal Payne, the only person to admit to mistreatment, in charge of the detention facility.

The BGIRO was responsible under FRAGO 29 for “maintaining an audit trail which will start following the point of capture through to sustained internment or release of individuals.”²¹² However, the court martial revealed that there was no clear individual responsibility for supervision of detainees undergoing conditioning. The tactical questioner argued that he rarely visited the detention facility run by 1 QLR, and thus he was not responsible for their treatment. There was lack of clarity arising from the new post of BGIRO in terms of the extent to which he was responsible for the welfare of the detainees.

There was a lack of training of both guards and officers in terms of the procedures that should have been put in place. Thus there was neither an official rota of guards, no permanent officer present at the TDF at 1 QLR, nor regular paperwork on the detainees,

²⁰⁶ For example, a witness was woken but what seemed like wailing: Transcript 24 November 2006, p 15.

²⁰⁷ Transcript, 27/11/06, pg 65

²⁰⁸ Transcript, 14/11/06

²⁰⁹ Transcript 14/11/06, pp 83-84

²¹⁰ Transcript, 11/12/06, pg 83

²¹¹ Transcript, 11/12/06, pp 78-79

²¹² Transcript 05/03/07, pg 43

such as visitors, nor details of treatment sufficient to ensure accountability.²¹³ This, together with the closing of ranks, is the main reason why it is still not known exactly who was in the TDF at all times on the night when the abuse towards Baha Mousa and the others increased.²¹⁴ Several of these shortcomings are now partially dealt with by the custody record provisions in the new JDP's, but what records were and are kept in practice, remains unclear.

If detainees are held at the Battle Groups for long periods of time the effectiveness of the ICRC may be reduced because they will be unable to visit detainees as often as those taken quickly to the TIF. Also the speed with which family are notified of the detention is reduced as it is unlikely that the Battle Groups would have links to the National Information Bureau.²¹⁵

The Regimental Medical Officer at 1 QLR was unprepared for a role involving foreign detainees. Indeed, his own remarks show that when deployed he expected only to be dealing with British troops;²¹⁶ he had little in the way of information from the outgoing RMO, and knew little about the conditions that the detainees were facing during the conditioning.²¹⁷ This important issue is examined in Section VII below.

D. Conclusion

The ad hoc, dynamic nature of the detainee programme in Iraq should be investigated itself as a contributing factor in detainee abuse. Over the course of the Iraq war and Occupation the detainee operation was fluid: procedures for how long detainees could be held at various levels, where they could be questioned, who would guard them, and the review process changed over time. There is less likelihood of organising proper procedures when processes are constantly changing. This is precisely why the detainee operation should have been planned in full prior to the deployment, and sufficient resources devoted to it, so that dramatic and detrimental compromises did not have to be made.

Further, the protection detainees had largely depended on the knowledge of the officers in charge of them. Colonel Mercer was aware, for example, that detainees should not be held at the Battle Groups for too long. Also, Colonel Wilson knew not to allow arresting soldiers to guard detainees from his experience in Northern Ireland, while Colonel Mendonca was apparently unaware of these principles. It is not solely the individual officers who were at fault but rather the apparent lack of training and planning on these issues to which attention is drawn.

²¹³ This stands in contrast to the regulations for UK military personnel in UK service custody under JSP 469 'Code of Practice for the Management of Personnel in Service Custody,' which has strict procedures on treatment, paper work and other procedures.

²¹⁴ Some evidence was led as to who was on duty: see Transcript 25 September 2006, p 36. However, there were also soldiers loitering outside the TDF, some of whom entered the TDF, who remain unknown. The fact that these people were allowed into the TDF for no official purpose shows the weakness of the procedures.

²¹⁵ "The NIB exists to gather and pass on important information used to monitor the details, whereabouts and health of POWs, internees and detainees, and to facilitate contact with their next-of-kin." JDP 1-10, para 124

²¹⁶ Transcript 11/12/06, pg 5

²¹⁷ Transcript 11/12/06, pg 6

VII. MEDICAL TREATMENT AND THE ROLE OF MEDICAL PERSONNEL

A. The general procedure for examining detainees

During the court martial arising from the death of Baha Mousa some attention was paid to the procedures for medical assistance to detainees, both generally and to those apprehended as part of Operation Salerno. Evidence was led from different Battle Groups deployed at the same time as 1QLR as to how they dealt with such aspects. An officer from the Kings Own Scottish Borderers, for example, was asked if he could recall what happened when detainees arrived at his unit's Temporary Detention Facility, and he replied:

"...[T]he doctor would visit the detention facility, if we had someone who was detained, and would carry out a medical examination if the person was injured or looked visibly injured. As a result of one particular arrest operation, he conducted I think 11 medical examinations at the end of it in order to allow for a due process of compensation."²¹⁸

An officer from another unit, the King's Regiment, was asked a similar question. This officer was the Battle Group Internment Review Officer (BGIRO), the post created in around July 2003,²¹⁹ whose unit was based at a hotel (nothing to do with Hotel Haitham):

"Q. In relation to medical assistance, what would the procedure be in relation to a prisoner who was brought in?"

A. Um, when they were brought in they would be checked over to make sure they did not have any injuries or any particularly threatening illnesses. And one of the medics or a doctor would quickly check them over and treat them if necessary.

Q. Do you recall of the hundred roughly or so that you processed any problems, any serious problems, in relation to people suffering injury or anything of that nature?"

A. I certainly do not recall anybody receiving any injuries whilst they were - - whilst they were in detention in the hotel. On a couple of occasions people were brought in and had injuries that had either been caused earlier on during that day or they were long term injuries and where possible the doctor would treat them on a localised basis and then they would be sent out to the TIF with instructions as to the state of their health."²²⁰

What emerged from such witnesses, therefore, was that there was a procedure for doctors or medical orderlies to examine detainees once they arrived at their Battle Group camps.

²¹⁸ Transcript 14 November 2006, page 77.

²¹⁹ See above page 19

²²⁰ Ibid, page 114-5

B. Procedure used by 1 Queen's Lancashire Regiment

This issue was then looked at more thoroughly to ascertain how things were handled by the 1 QLR. According to one 1 QLR witness, a medical NCO, "there was not actually a procedure set in stone because nothing had come down..."²²¹ On being questioned further it emerged that what he meant was that the origin of the procedure was not clear and seemed to have come from the previous Regimental Medical Officer (RMO). There was thus no evidence given of any written procedure, and what would happen was that after detainees were brought in somebody, usually from the arresting party, would inform the medical orderlies and they would do a basic check on the detainees – blood pressure, breathing, no obvious injuries – and that they were generally healthy.²²² However, the time between being notified of the detainees' arrival at the TDF and such a check could vary from about 15 minutes after the medical personnel had been informed to "hours," depending on man power and other commitments.²²³ Further, there was no clear evidence as to how soon after their arrival the information that they were there would be given to the medical personnel. Concerning the specific events of Sunday 14 September 2003, the witness could not remember how long after the detainees arrived he saw them.

Different evidence was given regarding the paperwork to be completed after such an initial routine examination. The witness referred to above said a form (FMed 5) would have to be completed by the examining orderly even if there were no injuries or medical conditions to note; this was to show that the examination had taken place and in case of any future issues.²²⁴ However, other medical orderlies said that if there were no injuries or medical conditions at that first examination no form had to be completed, and they only had to complete the FMed 5 if they went back to examine a detainee a second time for any reason.²²⁵

According to the 1QLR Regimental Medical Officer (RMO), Major Keilloh, who joined the unit a few weeks after its deployment in Basra, he anticipated his duties to be "primarily and almost exclusively" to look after the Regiment's troops; only after his arrival he became aware of the issue of Iraqi civilian detainees, and any role on his part regarding their welfare:

"Q. When did you come to know that detainees would be brought into the camp, Iraqi civilians?"

A. Well, it was certainly well within the first sort of month of conducting my duties I was made aware that a role that was explained to me by the RP [Regimental Police] staff was that I would be required on request to examine detainees as they came into the -- the detention facility.

Q. Had you heard anything about that from the outgoing RMO?"

A. No.

Q. So, tell us please what you understood your duties to be so far as these Iraqi detainees were concerned?"

²²¹ Transcript 6 December 2006 pg 37

²²² Ibid

²²³ Ibid page 39

²²⁴ Ibid page 40

²²⁵ Ibid, page 61 et seq.

A. As I say, informally I was instructed that when Iraqi civilians were taken into the camp location to be detained for a period of what I was led to believe again was about 48 hours that they would need to be of a suitable condition for them to be held in that detention facility. And that again was then intimated to me that this was a very sort of low-key concern that did not rely any specific documentation and that it was really more or less a sort of cursory examination to ensure that these people were physically able to sit in a room for a limited period of time.

Q. Suitable to be held for, you were told, 48 hours. Were you told that they would be restrained?

A. It was not made clear to me what they were going to be doing, other than they were going to be held in that area for a period of up to 48-hours.²²⁶

Major Keilloh said he was not told about conditioning procedures or the use of hooding or stress positions or anything else concerning the banned techniques, until after Baha Mousa's death.²²⁷ He was the doctor called to try to resuscitate Baha Mousa at about 9.30pm on Monday 15 September 2003, which he attempted for some 25 minutes. In regard to whether he saw any injuries at this time, when the man was naked from the waist up, he told the court martial:

"When I was attending to him the only injury which is documented on my statement was there was a small trace of old dried blood around one of his nostrils and other than that I did not see any other external injuries.

Q. Did you make any inquiries as to how he got just that single injury?

A. No, it is -- it was not something I expressed a concern at the time and there could have been disruption when we were intubating and performing what can be sometimes a very traumatic procedure when you do enter into advanced resuscitative techniques so I did not question anything at that point.²²⁸

From evidence given at the court martial some of the detainees, including Mr. Mousa, were examined a second time by medical orderlies, that is, after the initial examination. Precisely when these examinations took place was not altogether clear, but they could have been on the Sunday although there was also evidence that it was on the Monday in one case; in any event, these examinations did not lead to any significant injuries being noted or any action being taken to look into how the detainees were being treated by those in whose custody they were. The times of these examinations were not entered in the records although they ought to have been, and in one case the name was not filled in because the orderly did not know what the man's name was.²²⁹ Other issues also arise.

Thus the role of Major Keilloh and the medical orderlies involved who saw Mr Mousa and other detainees, as well as what was seen and noted at the time and after the death, has been sharply questioned by Mr Shiner, the solicitor representing Baha Mousa's family and other Iraqi civilians caught up in Operation Salerno. Mr. Shiner has reported the "disgraceful behaviour" to the General Medical Council,²³⁰ highlighting, for example, the failure to note any of the other injuries to Mr. Mousa's body at the time of the resuscitation attempts. Dr Keilloh (who is now in civilian practice) told the press:

²²⁶ Transcript 11 December 2006, page 5-6.

²²⁷ Ibid, page 6-7.

²²⁸ Ibid, page 11.

²²⁹ Transcript 6 December 2006, page 50

²³⁰ Newspaper report by Andrew Johnson "UK Army doctors in Baha Mousa case 'colluded in cover-up,'" UK Independent 22 July 2007. The complaint to the GMC is against Dr Keilloh only, as the GMC does not have jurisdiction over the medical operatives.

“What I saw is what I saw. I wasn’t there to conduct a forensic examination on [Mousa]. I passed him to the relevant authorities and a post mortem was carried out. That examiner saw what he saw. I can’t explain any discrepancies.”²³¹

It again needs to be emphasized that the evidence led and which emerged in the court martial as to the medical procedures and examinations and what was or was not done, was all in the context of establishing any criminal liability of those on trial, none of whom were doctors or medical orderlies. It was not an inquiry into whether any others – those not on trial – had behaved wrongly. Nevertheless, enough did emerge, and some of this has been set out above, showing that whatever systems were in place from a medical point of view were clearly inadequate. How and why this occurred was also not gone into in any depth; again, although certain clear discrepancies did emerge – for example, between the photographs which showed Mr. Mousa’s body had 93 separate visible injuries and what Major Keilloh (and the orderlies) said they saw – this too was not explored in any detail as it was not relevant to the cases against the men on trial. However, the fact that these issues surfaced adds to the need for a substantive, independent inquiry into such aspects and others which came to light.

C. International standards and current UK doctrine and policy

Any comprehensive examination of the role of medical personnel in the Baha Mousa case, as well as any proposals which might be made to ensure that abuses and tragedies are prevented in future, should reflect the international law standards expected of medical professionals involved with detainees. Steps ought to be taken to inculcate these standards into all UK military medical personnel, and to ensure that proper training is now being implemented. The most comprehensive compilation of these standards is found in the *“Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Istanbul Protocol)”*. The Istanbul Protocol was finalised in August 1999 and has since been endorsed by the United Nations, regional organisations and other bodies.²³²

Health professionals have a moral duty to protect the physical and mental health of detainees, and it is a gross contravention of health-care ethics to participate, actively or passively, in torture or to condone it in any way;²³³ furthermore, “participation in torture” includes evaluating an individual’s capacity to withstand ill-treatment, as well as intentionally neglecting evidence and falsifying reports, such as death certificates and autopsy reports.²³⁴ The Istanbul Protocol goes further, recording the dual obligations of health professionals – a primary duty to the patient to promote that person’s best interests, and a general duty to society to ensure that justice is done and violations of human rights are defended:²³⁵

²³¹ Ibid.

²³² Available at <http://www.unhcr.ch/pdf/8istprot.pdf>.

²³³ Istanbul Protocol, loc. cit. paragraph 51

²³⁴ Ibid paragraph 52

²³⁵ Ibid paragraph 65

“Whatever the circumstances of their employment, all health professionals owe a fundamental duty to care for the people they are asked to examine or treat. They cannot be obliged by contractual or other considerations to compromise their professional independence. They must make an unbiased assessment of the patient’s health interests and act accordingly.”²³⁶

Section IV above looked at some aspects arising from what are called the UK’s Joint Doctrine Publications (JDPs) for handling detainees of all types, developed after the death of Baha Mousa and published in 2006.²³⁷ One of these, *JDP 1-10 “Prisoners of War, Internees and Detainees” 2006*, which has thus been examined already in some detail, includes an Annex 5D entitled “Medical Support to Persons Captured or Detained by UK Forces on Operations.” This Annex makes it clear that the highest ethical standards are indeed required of health personnel, especially registered medical practitioners, charged with the medical care of captured or detained persons. They have a duty to protect their physical and mental health and provide treatment of the same quality and standard as is afforded to others within their care. Specific reference is made to the UN ethical standards²³⁸ including those just referred to in this sub-section above, as well as drawing attention to the fact that it is not only grossly unethical to engage actively or passively in torture but it is a criminal offence under both international and UK law.²³⁹

Other obligations for health personnel are also clearly laid out in the Annex, and include the following:

- if they become aware of mistreatment they have a responsibility to report this to the Commander of the facility and also up the medical chain of command;
- they are only to be involved in professional relationships with captured or detained persons for the purpose of evaluating, protecting or improving their physical and mental health;
- they are not to apply their knowledge and skills to assist in interrogation in a way that may prejudice the detainee’s health, and this prohibition includes certifying or stating that a subject meets a specific mental or physical standard for interrogation.²⁴⁰

This policy document goes a long way towards dealing with the issues involved, and is to be commended. What is not known is the extent to which the policy is now being implemented.

D. US approach

It is not within the parameters of this Report to assess the way in which the US Armed Forces have dealt with the role of their medical personnel when it comes to detainees.

²³⁶ Ibid.

²³⁷ See section IV F

²³⁸ Including those referred to in the Istanbul Protocol, especially United Nations (1982) “Principles of Medical Ethics in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment”, General Assembly Resolution 37/194.

²³⁹ JDP 1-10, Annex 5D.

²⁴⁰ Ibid, page 5D-3

Nevertheless, mention is made here of a comprehensive report released in 2005 after the US Army Surgeon General directed a team to assess “detainee medical operations” in Afghanistan, Guantanamo Bay and Iraq.²⁴¹ The medical assessment focused on detainee medical policies and procedures, medical records management, the incidence and reporting of alleged detainee abuse by medical personnel, and the training of medical personnel for the detainee health care mission.

The report runs to 245-pages, and amongst other things involved interviewing 1,182 personnel from 180 military units in 22 states and 5 countries.²⁴² It was noted that in Iraq more than 50,000 detainees were moved from point of capture and collection points through brigade and division internment facilities to the major prison facilities.²⁴³ Some of the issues recorded include the following:

- In the early stages of the Iraq war there was confusion among both leadership and lower ranking medical personnel regarding the required standard of care for detainees, who were unsure if it was the same as for US/Coalition forces in Theatre, or the standard of care available in the Iraqi health care system.²⁴⁴ This confusion arose by the use of different classifications for detained persons (Enemy Prisoners of War, detainees, Retained Personnel and Civilian Internees) who under existing guidelines received different levels of care. Because Theatre-level guidance was not provided in a timely manner for deployment many units developed their own policies.²⁴⁵
- The report recommended that although it was not legally required, guidance should be given to standardise detainee medical operations for all Theatres, clearly establishing that all detained personnel are treated to the same standards of care as US patients in Theatre; all medical personnel should be required to be trained on this policy and evaluated for competency.²⁴⁶
- There were inconsistencies in guidance for pre- and post-interrogation screening, and medical care (including screenings at or near the time of interrogation) was neither consistently documented nor consistently included in detainee medical records. Some medical personal were unclear whether interrogations could be continued if a detainee required medical care during interrogation.²⁴⁷
- The report recommended that all detainee medical records where detainees were receiving high levels of care should be generated in the same way as those for US patients in Theatre, while it was even more important that guidance be given “to define the appropriate generation, maintenance, storage and final disposition of detainee medical records” at units delivering lower levels of care.²⁴⁸

²⁴¹ Final Report: Assessment of Detainee Medical Operations For OEF, GTMO and OIF: Office of the Surgeon General Army, 13 April 2005: <http://www.armymedicine.army.mil/news/detmedopsrprt/detmedopsrpt.pdf>

²⁴² Ibid. These figures are obtained from the Executive Summary, pages 1-1 to 1-2

²⁴³ Ibid, page 1-2.

²⁴⁴ Ibid, page 1-3.

²⁴⁵ Ibid

²⁴⁶ Ibid

²⁴⁷ Ibid, page 1-4.

²⁴⁸ Ibid, pages 1-5.

- It also recommended that medical personnel at all levels of professional training should receive instruction on the requirement to detect, document and report actual or suspected detainee abuse, which should include training on the definition and signs of suspected abuse; this training should be given to all deploying medical personnel prior to their arrival in Theatre.²⁴⁹
- Another recommendation was that there should be standardised use of restraints for detainees in units delivering medical care with clear guidance rules for security –based restraint versus medically-based restraints; medical personnel should not be encumbered with duties related to security of detainees.²⁵⁰
- While the team was very impressed with the current medical operations in Afghanistan, Guantanamo Bay and Iraq, there had been “definite shortcomings” in the early phases.²⁵¹

This very brief glance at the US experience is of interest in itself but more significantly it shows that in general terms some of the issues were similar to those which appear to have arisen in regard to the role of some UK medical personnel. Clearly the numbers involved in the US report - of detainees dealt with, allegations of abuse, and medical personnel interviewed – are very different; in this REDRESS Report the focus has been only on some specific medical concerns arising from one court martial. However, US analysis relating to lack of training and proper clear guidelines, and the duties of medical personnel, bear close examination to see what lessons can be applied to UK medical personnel. That the US has carried out several reports as a result of allegations of abuse, including this one specifically into the role of medical personnel, which reports have been made public, is to its credit. There has not been the same attempt at transparency in the UK.

VIII. ISSUES REGARDING LEGAL ADVICE AND POLICY

A. Introduction

The capacity of military intelligence to conduct tactical questioning and interrogation “is only held in the reserves and it has frankly languished for many years,”²⁵² according to Major Fenton, giving evidence in the court martial. It is unclear exactly what Major Fenton meant by “languished,” though prior to Iraq the military has perhaps not needed to perform widespread tactical questioning and interrogation for a long time, since it has been years since the UK was involved in a conflict of the nature and intensity of Iraq. However, it is also the case that policy on tactical questioning and interrogation doesn’t appear to have been developed, and this may to some extent explain why the 1972 ban on certain conditioning techniques seems to have become ‘lost corporate knowledge’ at

²⁴⁹ Ibid, page 1-6

²⁵⁰ Ibid, page 1-7.

²⁵¹ Ibid, page 1-9.

²⁵² Transcript, 14/11/06, pg 38

some levels. An examination is made below how lack of direction at the Governmental level led to a shortage of policy from Permanent Joint Headquarters down: PJHQ left the issue of conditioning to be decided upon at the Theatre level while it spent around a year working through legal arguments - because it was apparently not aware of the 1972 ban.

B. Deciding and legally vetting policy on the conditioning process

If conditioning techniques including hooding, stressing, sleep deprivation, and noise were indeed standard Intelligence Corps doctrine, it seems likely that the document authorising their use was Joint Doctrine Note 3/05 "Tactical Questioning, Debriefing and Interrogation."²⁵³ Joint Doctrine Notes (JDNs) are designed to cater for short-term urgent doctrine requirements which do not represent an agreed or fully staffed position.²⁵⁴ If this is the case, then the techniques may have been adopted as a short-term policy that was not fully considered and vetted for legality. However, JDN 3/05 has made its way into the new doctrine publications on prisoner handling,²⁵⁵ and appears to be Chief of Defence Intelligence (CDI) Policy.²⁵⁶ It is possible that this document was the one shown to Colonel Mercer by Intelligence Corps officers,²⁵⁷ and could explain how the illegal techniques were adopted.

Nevertheless, this would still not explain comments that the techniques were ordinary Intelligence Corps doctrine taught on various courses. It is possible that they were taught as standard but needed specific authorisation for their use. At best, this document was a mistake by the military, while at worst it could show direct authorisation for the banned techniques. The use of JDN's in general should be further examined, especially regarding how such a document can override clear existing policy on a matter as fundamental as the five banned techniques; further, a specific investigation of JDN 3/05 is needed, including where the doctrine came from and who authorised it. Given the previous Governmental ban of the techniques it seems likely than any such authorisation, if it was to be in any way 'legitimate', must have come from the Government.²⁵⁸

C. Confusion of policy on conditioning at PJHQ

Permanent Joint Headquarters (PJHQ) is responsible for the planning and execution of UK-led joint, potentially joint, combined and multi-national operations. PJHQ and the Ministry of Defence form the Defence Crisis Management Organisation (DCMO), which acts as a link between the Armed Forces and the Government "ensur[ing] that decisions of a strategic nature and guidance of a strategic nature [is] pushed down to the commanders through PJHQ and into the field and similarly receives information back out

²⁵³ REDRESS has not seen JDN 3/05, which is the subject of a Freedom of Information request REDRESS has made to the MOD. The basis for believing it deals with these techniques is that to our knowledge it is the only doctrine document on conditioning.

²⁵⁴ Joint Warfare Publication 3-48 "Legal Support to Joint Operations," pg vi

²⁵⁵ JDP 1-10, pp 1-1, 5-2, and 5-3

²⁵⁶ JDP 1-10, footnote 1 of chapter 1 at pg 1-1

²⁵⁷ Transcript, 08/12/06 pp 45-55

²⁵⁸ <http://www.mod.uk/DefenceInternet/AboutDefence/WhatWeDo/DoctrineOperationsandDiplomacy/PJHQ/NorthwoodHeadquarters.htm>

from them and puts it together to ensure that politicians and Parliament are kept informed of what is going on.”²⁵⁹

On the issue of conditioning, however, JPHQ was apparently unaware of the 1972 ban until May 2004²⁶⁰ when they were deciding on its applicability outside the United Kingdom and Northern Ireland.²⁶¹ This debate continued past September 2004 at “the highest levels,”²⁶² clearly showing that the position on conditioning was a gap in official doctrine. One of the reasons for PJHQ apparent lack of knowledge of the 1972 ban may be the fact that it is not involved in operations in Northern Ireland.²⁶³ However, this leads to the important issue of the extent to which the ban had (or hadn’t) found its way into military corporate knowledge. If the Government issued a directive to the military outlawing these conditioning techniques “with reference to any future operations,”²⁶⁴ then why was there such confusion at various levels in the military on such techniques over many months? What is the current status on such a directive, to what extent is it reflected in Intelligence Corps training? These questions need to be answered by an independent review.

Operational requirements necessitated policy to be developed and since PJHQ was still pondering the issue it was left to those in Theatre. The first policy document was drawn up by Major Radbourne²⁶⁵ and is dated after Baha Mousa’s death on 27 September 2003. This document states:

*“Detainees must not be allowed to relax or lie down...[Reading to the words]... in order to continue the shock of capture and the conditioning process obviously prior to tactical questioning.”*²⁶⁶

Even this document, presumably drawn up to help clear away confusion on conditioning, failed to deal with a number of practical issues, such as the length of time a detainee should be kept in these conditions (clearly pertaining to sleep deprivation),²⁶⁷ or any guidance on exactly how guards were to force detainees to stand up.²⁶⁸ This is somewhat surprising, given that Major Radbourne expressed knowledge of the 1972 ban during the court martial,²⁶⁹ and yet he did not apparently consider the risk that some might use the banned techniques thinking his policy authorised them, though it is still unclear the extent to which the ban was known at the time. This deficiency made its way into Division’s Standard Operating Procedure 390 “Tactical questioning of detainees” on 30 September 2003 which while again prohibiting hooding and stress positions still spoke of the guarding and holding of detainees during tactical questioning as an important part of the

²⁵⁹ Sir Kevin Tebbit, Permanent under-secretary at the MOD until 2005, giving evidence to the Select Committee on Defence 17 December 2003, <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmdfence/57/3121703.htm> Q1703

²⁶⁰ Transcript, 16/01/07, pg 47

²⁶¹ Transcript, 19/01/07, pg 45

²⁶² Transcript, 25/09/06, pg 101

²⁶³ <http://www.mod.uk/NR/exeres/23AC2679-B008-4FB5-BF39-E391A9F3DC33.htm>

²⁶⁴ Hansard 2 March 1972, col. 744

²⁶⁵ Major Radbourne was working on the communication system Bowman, and was Nuclear, Biological and Chemical Warfare Officer; however, these issues were not a high priority at the time and despite being trained in 1995 and without a refresher course he took on a role as a Tactical Questioner - Transcript, 13/12/06 pg 135-138

²⁶⁶ Transcript, 25/09/06, pg, 105

²⁶⁷ Transcript, 25/09/06, pg, 105

²⁶⁸ Transcript, 25/09/06, pg, 105

²⁶⁹ Transcript, 13/12/06, pg, 142

"conditioning process which allows a detainee to be susceptible to the approaches of the tactical questioner...[T]hey are to be made to sit or stand depending on the situation."²⁷⁰ Again, there was no mention of how this is to be achieved - precisely the problem in not having a comprehensively vetted doctrine on the issue of conditioning.

D. FRAGO 152 and the ban on hooding during Telic 1

1 QLR were authorised to use conditioning techniques by Brigade HQ who also provided tactical questioners to 1 QLR, and "set the rules for 'conditioning' any potential internee prior to questioning and, prior to Baha Mousa, hoods, handcuffs and stress positions did feature in the conditioning process."²⁷¹ This came after the previous deployment to Iraq under Telic 1, when 1st (UK) Armoured Division had already banned the use of hooding as part of the conditioning process by issuing FRAGO 152. Why then was this order not carried over to 3rd (UK) Mechanised Division who took over for Telic 2?²⁷²

FRAGO 152 was the order issued by General Brims on 20 May 2003 which banned the use of hooding in response to Colonel Mercer's discovery that hooding was being used during periods of intense heat during the day. It states that "faces are not to be covered as it might impair breathing",²⁷³ it doesn't say that under certain conditions hooding may be illegal. The order also acknowledges that "there have recently been a number of deaths in custody where Iraqi civilians have died whilst being held by various units in theatre."²⁷⁴ For a document apparently meant to help prevent future deaths and cases of abuse among detainees it is surprising that the conditioning process is not clarified. It failed to set out exactly what is permissible under the Geneva Conventions; for example, it does not mention stress positions or sleep deprivation. This presumably reflects the lack of clarity on what was allowed between the legal and intelligence branches, and right up to PJHQ.

Colonel Mercer pointed out that orders from his 1 Division had no way to structurally bind 3 Division, and that it would be a matter for PJHQ as to whether to carry the order over to the next deployment. However, PJHQ took a number of months to reach conclusions on the legal status of the conditioning techniques, and thus no directive reached the new Division as it deployed to Iraq. Colonel Barnett mentioned that if the ban on hooding was in the form of a Standard Operating Procedure it would have been much more likely to have been followed by 3 Division.²⁷⁵

It should also be noted that Colonel Barnett, disagreed with Colonel Mercer's view that there was a clear cut ban on the use of the conditioning techniques, particularly stress positions:

²⁷⁰ Transcript, 25/09/07, pg. 106 and 05/03/07

²⁷¹ Letter from Col Mendonca to Brigadier Aitken, Transcript 13/12/06, pp 118-119

²⁷² Transcript, 01/02/07, pg. 56

²⁷³ Transcript, 01/02/07, pg 56

²⁷⁴ Transcript, 19/10/06, pg 19

²⁷⁵ Transcript, 19/12/06, pg 143

“Q. Since you were effectively the head of the Army Legal Service when you were there, as you understand it, what was your own position? Your own position as a lawyer as to whether stress positions were acceptable or not?”

A. As a lawyer, whether stress positions are acceptable or not is slightly technical. The interpretation of the relevant provision of the Geneva Convention depends upon whether you feel that they contravene public insult, intimidation or curiosity and the like, depending on whether it is a prisoner of war or an internee or a detainee, or a protected person.

....

Q. So far as you are concerned, Colonel, as I understand it, it is a question of the Geneva Convention and interpretation?

*A. That is correct.*²⁷⁶

The fact that a senior legal officer in the British Army was apparently unaware of the Governmental ban on these conditioning techniques raises important questions regarding the status of the Directive issued to the army. This testimony and that of others shows that the Geneva Conventions seemed more important than the domestic ban on the issue of acceptable treatment, and contradicts the evidence given by Lieutenant General Brims to the Joint Human Rights Committee that soldiers were aware of the ban on the five techniques.²⁷⁷ This evidence strongly reinforces the view, put forward elsewhere in this report, that the ban needs to be reiterated by the Government and in training, doctrine and policy. Guidance, particularly regarding the Intelligence Corps and the international effect of the ban, should be given, and the Directive itself should be made public.

Colonel Barnett also stated another reason why the order was not continued: after the death of Baha Mousa the policy on hooding was revisited, with Colonel Barnett wanting to reissue the ban by 1 Division; however, due to a problem with an electronic filling system this was difficult, because the order:

*“was not in electronic format. It was in a paper copy. When we arrived there was no electronic filing because most of the documentation was “Secret UK eyes” and the equipment was “Secret UK eyes” and it was being removed back to the United Kingdom pending the placement of the Multinational Coalition Force Iraq system. So we were dependent on digging out the old orders continuously. What I had in my file was a copy of the order. I did not have the final version which had been stamped and issued, so what I wished to see at that stage was the order that had actually been issued and disseminated Division-wide.”*²⁷⁸

It seems that “corporate knowledge” was not lost in the sense that the order was missing so much as there was a problem with the transfer from 1 Division to 3 Division. 3 Division Headquarters entered Iraq three weeks after 19 Brigade was deployed, the unit under which the Battle Groups worked. So, for this three week period, as the Battle Groups were changing over, 1 QLR and the other new Battle Groups, and 19 Brigade, were under the control of 1 Division. The problem was that due to a lack of an electronic filling system 3 Division had no way of knowing what orders had been issued to the Battle Groups over this period. Colonel Barnett had two concerns: firstly, whether FRAGO 152 had been issued, and secondly, whether the troops were aware that the order was still

²⁷⁶ Transcript 19/12/06, pp 117-119

²⁷⁷ Joint Committee on Human Rights, The UNCAT Nineteenth Report of session 2005-06 Vol II Oral and Written Evidence, Ev 60, Q 239, at <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/185/185-ii.pdf>

²⁷⁸ Transcript, 19/12/06, 142

operable.²⁷⁹ The problem was that a UK “Secret UK eyes” electronic system was being packed up and sent home before the replacement “Multinational Coalition Force Iraq System” was installed.

E. Wider issue of Government legal advice

An Intelligence and Security Committee report noted that advice was given to a UK SIS officer operating in Afghanistan on 11 January 2002 that the Human Rights Act *did* apply to them in Afghanistan, warning officers not to be involved in mistreatment, and that no mistreatment should occur in conjunction with their questioning.²⁸⁰ Why was the advice to UK armed forces in Iraq a year later different?

To fully review this issue it would be necessary to know exactly what and when advice was sought by the military on the applicability of the ECHR and the Human Rights Act, whether this was just with regard to a particular issue, or whether in the general context. Also, of course, it would be necessary to know what the advice actually was from the Attorney General and others. While little of this information is in the public domain what is known is that there was confusion as to what the advice actually was, and that the full advice had not been transmitted at least to Colonel Mercer in Theatre when he was discussing advice with Ms Quick at PJHQ.²⁸¹ At issue was why PJHQ was only concentrating on the impact of Geneva Conventions III and IV and the Hague Regulations,²⁸² and not other applicable international human rights law. The Attorney General’s advice appears to have been that the *lex specialis* operates to oust the ECHR,²⁸³ but it is unclear whether this advice was provided generally or only in relation to the issue of status reviews. Lord Goldsmith suggested to the JCHR that his advice, as discussed in the emails at the court martial, was only related to status review:

*“They are referring to the procedures for review of detention. That was the issue that, as I understand it from the emails, was in question: whether or not, once people had been detained, the procedure for review of their detention should be having a High Court judge looking at it or whether it should be something else... The *lex specialis* in question is the United Nations Charter and the United Nations Security Council resolution which authorises and indeed requires a multinational force to hold people for security purposes, which of course is not an ECHR ground for detention. It has nothing at all to do with the standards of treatment. I want to be very clear about this because I am absolutely clear that at all times the obligations relating to the treatment of detainees in Iraq by British soldiers in British-run detention facilities has been not to apply any form of inhuman, degrading treatment, let alone of course torture. That is enforced by our criminal law which applies the Convention Against Torture, the Geneva Convention and this is of course why prosecutions have been brought against British soldiers who are alleged to have broken those*

²⁷⁹ Transcript, 19/12/06, pg 143

²⁸⁰ The Handling of detainees by UK Intelligence Personnel in Afghanistan, Guantanamo Bay and Iraq, March 2005
<http://www.cabinetoffice.gov.uk/publications/reports/intelligence/treatdetainees.pdf>, pp 13-14

²⁸¹ Transcript 08/12/06, pg 21

²⁸² Transcript 08/12/06, pg 21 [emphasis added]

²⁸³ Transcript 08/12/06, pg 21

rules”²⁸⁴

However, a fuller reading of the transcript indicates that the issue being discussed was much wider than standards of treatment, and appears to be whether the ECHR applies as a whole to Iraq, but with specific areas at issue. It also appears, though it is difficult to be certain without the full correspondence, that PJHQ was under the impression that the advice from the Attorney General’s office meant that the ECHR did not apply as a whole, as they were only concentrating on humanitarian law. The legal adviser to the National Component Commander also appeared to believe that the ECHR “has no application”²⁸⁵ in terms of issues such as respecting Iraqi national laws on the lawful disciplining of wives, the death penalty, and what the effect of US leadership on such issues would be in relation to the ECHR.²⁸⁶

Lord Goldsmith argued that he was “not responsible for what people thought;”²⁸⁷ however, if the reason for this uncertainty or confusion related to his advice then he is responsible for how people interpreted it. It should be investigated whether this advice was clear as to whether the ECHR was “ousted” generally or just for specific issues such as status reviews. Further, it should be investigated whether anybody misrepresented or misinterpreted the Attorney General’s advice by passing it on to others in an abridged or edited form. This issue goes to the heart of the role of the Attorney General in giving advice to the Government, and how that advice is used to develop policy and passed on to others. It should be investigated whether appropriate advice was requested of the Attorney General, if the request was limited to the application of the ECHR and the HRA in Iraq, and whether the advice given reflected that international humanitarian law and Convention against Torture, insofar as substantive detainee treatment is concerned, were the same as the ECHR.

The procedural obligations under Articles 2 and 3 of the ECHR add considerable weight to the prohibition of torture and other mistreatment and unlawful killing, and puts an enforceable duty on those that otherwise might not so clearly emerge. This would include a responsibility for training on a wide variety of issues such as whether doctors were aware of the extra responsibility of treating detainees, reporting mistreatment, and strict procedural requirements for how breaches should be investigated. Given the importance of these issues and the doubt within the Government as to whether the ECHR or the HRA applied in Iraq and to what extent, there is a strong argument that a cautionary approach should have been adopted: procedures and training ought to have been put in place as if the ECHR and HRA *did* apply, at the very least, regarding detention procedures and facilities. It should be investigated whether the Attorney General’s advice indicated that it would be appropriate for such a cautionary approach to be adopted. Colonel Mercer seemed to agree with this view stating:

*“Well, it seemed to me that if there is a moot point over a point of law, then the default -- obvious default setting is to go for the highest standard.”*²⁸⁸

²⁸⁴ Uncorrected oral evidence from Lord Goldsmith to Joint Select Committee on Human Rights, 26-07-07, <http://www.publications.parliament.uk/pa/jt/200607/jtselect/jtrights/uc394-iii/uc39402.htm> Q190

²⁸⁵ Transcript 08/12/06, pg 20

²⁸⁶ Transcript 08/12/06, pg 19

²⁸⁷ Uncorrected oral evidence from Lord Goldsmith to Joint Select Committee on Human Rights, Q226

²⁸⁸ Transcript, 08/12/07, pg 18

IX. CONCLUSIONS

Throughout this Report we have shown that the use of conditioning techniques in Iraq was rampant. The Government's assertions that the directive given to the army banning the five techniques remains in force is just not good enough; as has been shown this directive has disappeared from the military's corporate knowledge. How else did PJHQ spend over a year deciding on a position to take?

If the UK Government considers it necessary to re-examine or revise the interrogation regime including the principles which emerged in the 1970's, then there should be a full open debate on the issue, and all relevant safeguards as set out in UK domestic law and international law must be reflected within the regime.

More needs to be done to ensure that legally dubious techniques are not used, including the introduction of sanctions for teaching of the techniques, in addition to the obvious need to ensure appropriate investigation and prosecution of all incidents of reported use. By its failure to act decisively the UK Government has in effect authorised the techniques by the back door, putting civilians in danger of abuse and UK soldiers in danger of prosecution.

To put it differently, the Parker report gave two options for the treatment of detainees during interrogation and conditioning process: the majority opinion recommended that if the five techniques were to be used there should be adequate safeguards, while the minority opinion called for a ban. Whilst the UK Government did put in place a ban in the 70's, through poor planning and oversight as well as weak policy advice the majority view allowing the use of the five techniques during conditioning seems to now be in place, but without the recommended safeguards.

A comprehensive plan for POW's, Internees, and Criminal Detainees, as well as proper status review procedures should have been thoroughly thought out beforehand and sufficient resources provided to support it. The failure to have and implement such a plan is likely to have contributed to the lack of security in Iraq, typified by widespread looting and other crimes seen across the country during the end of the war fighting stage and into the Occupation, as well as creating conditions for the abuse of detainees. Brigadier Aitken also formed this view that some of the conditions in Iraq which exacerbated the likelihood of acts of abuse being committed could have been avoided if there had been more thorough joined up planning for what would happen after the war fighting phase.²⁸⁹

In 2006 the Joint Committee on Human Rights examined the issue of conditioning techniques, but did not appear to specifically deal with documents from the military Intelligence Corps. It also mentioned the Government's lack of disclosure of documents on training generally.²⁹⁰

In the light of what emerged during the *R v Payne and others* court martial which we have illustrated in this Report, the need for a full independent public inquiry is now more urgent than ever. It is imperative that such an inquiry looks at not only the Baha Mousa case but *all* the allegations of abuse of Iraqi civilians by UK troops – those which have entered the

²⁸⁹ Transcript, 13/12/06, pg 129

²⁹⁰ See the Joint Committee on Human Rights' Nineteenth Report on The UN Convention Against Torture (UNCAT) <http://www.publications.parliament.uk/pa/jt/200506/jtselect/jtrights/185/185-i.pdf>, para 83-85

public domain as well as those which may not yet have done so. Such an investigation is ultimately in the interests of the British Army as a whole.

Significantly General Sir Mike Jackson, Chief of the General Staff during the Invasion of Iraq made the following point in his autobiography:

“During my time as CGS I came in for a certain amount of stick for not ‘standing up for soldiers’ accused of prisoner abuse. It beats me what people who say such things think should happen. Do they want cases of alleged prisoner abuse swept under the carpet? I am certain that any cover up would do the Army great harm; we must adhere to the rule of law. The British public must be able to trust our soldiers at all times.”²⁹¹

X. RECOMMENDATIONS

A. To the Joint Committee on Human Rights and to the Defence Committee

1. Conduct a full review of all the courts martial transcripts dealing with detainee abuse relevant to their respective remits, and make public any concerns that arise.

B. To the Joint Committee on Human Rights

1. Conduct a “Parker style” inquiry into the conditioning process including the status of the five banned techniques:
 - a. Has a need for certain techniques reappeared and if so are they compatible with Human Rights Law? What safeguards need to be put in place, perhaps modelled on the Parker majority report?
 - b. Has the Government authorised conditioning in Iraq or elsewhere; what is the extent; is it human rights compatible?

C. To the Defence Committee

1. Investigate why the best practices and procedures of 1 (UK) Division in terms of a centralised detention policy and Colonel Mercer's efforts to "design out" detention by individual units of detainee/internees were not passed on to 3 (UK) Division by PJHQ Northwood or National Component Command in Qatar
2. Review the way in which ad hoc policies are initiated by the military and whether all doctrinal gaps in the detention policy have been filled, particularly

²⁹¹ General Sir Mike Jackson, “Solider, The Autobiography”, Bantam Press, 2007, pg 344

with regard to detention of criminals during international armed conflicts, including during Occupation.

3. Investigate how the order banning hooding in the conditioning process came to be lost in the handover to 3 (UK) Division.
4. Investigate the way in which the military receives legal advice and turns it into policy.
5. Investigate if/how the Intelligence Corps were authorised to use conditioning techniques in Iraq

D. To the UK Government

1. Release to the public in a timely fashion all documents relating to detainee abuse in Iraq:
 - a. Release the preliminary findings and evidence which led to such findings, of Brigadier Aitken, the Director of Army Personnel Strategy. Ensure that the report that Brig. Aitken has been compiling is released to the public once finalised; if the Report is not scheduled for release in the near future, ensure that an interim report is promptly made available to the public;
 - b. Release the 'Fenton Report' entitled: "Death in detention," dated 18th September 2003. Major Fenton was Chief of Staff for 19 Mechanical Brigade and following the death of Baha Mousa he compiled a report of the events for his commanding officer;
 - c. Release documents produced in courts martial (In the court martial relating to Baha Mousa, apart from the transcript, none of the approximately 50 A4 Arch-lever folders that were tendered into evidence by the Prosecution and Defence have been disclosed to the public or to the family members of the victims, despite ongoing Freedom of Information Act requests and litigation);
 - d. Release documents relating to interrogation techniques (including policy documents, doctrine documents and standing orders drawn up by various levels of the military as well as NATO documents that relate to detainee handling).
2. Following the decision of the Appellate Committee of the House of Lords in *Al Skeini v. SSD*, in which the extraterritorial applicability of the ECHR and HRA was recognised at least in respect of UK-controlled places of detention, specifically incorporate the ECHR and HRA standards into relevant policy documents, doctrine and standing orders. The UK Government should also formally recognise that in addition to the ECHR and HRA, other human rights obligations, including those arising under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also have extraterritorial effect.
3. Ensure that all UK troops are properly trained in human rights and humanitarian law. An independent review should be conducted of all existing training materials, curricula and guides in circulation throughout the military to assess whether they comply with international standards, and to prompt amendments as appropriate. In addition, in addition to new recruits, all members of the military should receive regular training on

international standards at frequent intervals.

4. Safeguards and procedures must be specifically put in place to ensure that all victims of UK military abuse and/or their families are treated with respect for their dignity, safety and privacy. Those that have filed complaints with the military must at a minimum be provided with regular updates on the progress of their complaints and given the opportunity to participate in proceedings, including by expressing their views and concerns. Effective measures of reparation should be instituted including restitution, compensation and rehabilitation as well as satisfaction and guarantees of non-repetition.
5. A full independent, public inquiry should be held into detainee abuse in Iraq and other locations as appropriate, including instances in which the UK military can be said to have participated in, acquiesced or otherwise facilitated or condoned detainee abuse carried out by non-UK military or civil personnel. Issues to be considered by such an inquiry should include:

a. Training

- Is existing training sufficient for detainee protection (considering time and staffing, curricula, frequency and format of training, including follow up and evaluation)?
- Are all officers aware of the procedural safeguards that need to be put in place to give adequate protection to detainees?
- Is Op Tag training regarding detainee status and handling adequate (in the two distinct packages one for War Fighting Operations and one for Peace Support Operations)
- What further training is required regarding the handling and interrogation of civilian detainees, particularly in an occupation context?
- Are all personnel aware of the duty to report suspected detainee abuse particularly medical staff? Is this duty enforced criminally?

b. Policy and doctrine

- Was policy adequate at the time of the invasion?
- Is current doctrine adequate for protection of detainees (particularly criminal detainees during occupation operations and transfer of detainees to other jurisdictions)?
- What is the exact wording of the directive banning the 5 conditioning techniques
 - Does it/ did it apply to Iraq?
 - Does it ban the techniques at all times?
 - What conditioning techniques are allowed?
 - Why were various units including PJHQ, 1st Armoured Division (Telic 1) and 3rd Mechanised Division (Telic 2) unaware of the ban?
 - How did the 5 Techniques come to be used in Iraq?
 - To what extent were policy and doctrine documents regarding conditioning authorised by the Government?
- Should tactical questioners and interrogators be integrated into the same chain of command as those guarding the detainees and actually carrying out conditioning techniques?
- To what extent are policies, orders, military advice, Doctrine, and temporary Doctrine Notes vetted for legality?

- Given that Brigade HQ during Telic 2 allowed the banned techniques to be used is this adequate?
- Is the cascading down of instructions regarding conditioning to untrained guards an acceptable method?
- To what extent have officers and NCO's issued illegal orders regarding detainee treatment?
- Should 1st Armoured Division (Telic 1) have been able to bind 3rd Mechanised Division (Telic 2) in terms of standard operating procedures and thus banned conditioning techniques for other deployments? Was it able to?
- Why were many soldiers left to carry out detention functions with little experience or instructions for how to do this?
- Why was the number of Regimental Police, who normally carry out detention functions, so varied between different battle groups?

c. Legal advice

- What advice did the Government Law Officers (AG and SG) give regarding applicability of International Human Rights Law, particularly ECHR and UNCAT, to Iraq, and did this advice change over time?
- To what extent did this advice come to be interpreted as not needing to confer rights to detainees regarding matters such as status review, substantive treatment and conditioning and procedural requirements such as the investigation of abuse?

d. Planning for Iraq

- Were sufficient resources devoted to the detention programme in Iraq?
 - Helicopters for detainee transport to the Theatre Internment Facility
 - Numbers of Tactical Questioners, and trained guards
- Who was responsible for planning for the detention program in Iraq?
- Were UK and US planning mechanisms integrated sufficiently enough to ensure an adequate detention programme?
- Who made the decision to strike a whole Battalion devoted to detainees off the Iraq Orders of Battle in early 2003, and why?
- Why were some units, such as 1 QLR given only 4 weeks formal warning to deploy? Why did they find it difficult to train their soldiers in this time frame?
- Why were units not able to get personnel on courses before formal warning?
- Should the invasion have been delayed while training was conducted?
- Why was there no centralised criminal intelligence in Iraq, was the fact that Battle Groups would have to do this factored into the resources given to the battle groups?

e. Logistical issues

- What caused the communication problems at the Temporary Internment Facility? Why was this not fixed quickly?
- Why was the order banning hooding by 1st Armoured Division 'lost' in that 3rd Mechanised Division did not have the right version, nor know whether it was applied or should have been applied by the battle groups under their command?
- Why were UK computer systems shut down before the Multinational system was ready?

f. Other issues

- What conditioning techniques are the Intelligence Corps authorised to use? Who authorised and is accountable for them? What safeguards are in place for their use? Are different techniques allowable in different circumstances? Should interrogation or even tactical questioning take place at all at the battle group level?
- Why was the Intelligence Corps capacity to tactically question and carry out interrogations left to dwindle before Iraq? Is the use of temporary doctrine for example Joint Doctrine Notes acceptable, given that it contributed to the use of banned techniques in Iraq?
- Why were US guards conditioning detainees for which the UK was responsible? What techniques were they using? What control did UK authorities have over them and this process? What safeguards were put in place?
- To what extent have ICRC visits to detainees in Iraq been restricted on grounds of security?
- Should other Government departments have been more active in Iraq during the occupation to relieve the lack of capacity of the overstretched battle groups?

6. Publicly identify and hold accountable those responsible for all the strategic failures which led to the abuse and institute appropriate safeguards to ensure that the abuse is not repeated.

APPENDIX A: ANSWERS TO THE SPECIFIC QUESTIONS OF THE JOINT SELECT COMMITTEE ON HUMAN RIGHTS

Please find below answers to several of the specific questions posed by the Joint Committee on Human Rights in its call for evidence dated 8 August 2007: **UNCAT: Allegations of Torture and Inhuman Treatment Carried out by British Troops in Iraq.**

1. Why were some troops in Iraq apparently ignorant of the long-standing ban on the five 'conditioning' techniques? Was this a problem in relation to one brigade, or more widespread?

a. There is strong evidence, from a number of witnesses that some of the banned techniques have continued to be taught in the intelligence corps²⁹² and other courses.²⁹³ The Committee may wish to ask the Government for Joint Doctrine Note 3/05 "Tactical Questioning, Debriefing and Interrogation;" we believe this document outlines Chief of Defence Intelligence (CDI) Policy on conditioning, including the banned techniques, and will show that the problem was widespread. In any event 19 Mechanized Brigade was in charge of five Battle Groups as well as other regiments, and elements of four others.

b. However, representatives from various courses appeared and stated that certain techniques are not taught on their courses,²⁹⁴ though much of these sessions were held *in camera*.²⁹⁵ There are a number of possibilities:

- i. That someone is mistaken as to what they were taught, or those responsible for the courses cannot say publicly what techniques are taught.
- ii. There has been a change in the last 10 years or so on what is taught, but some in the Intelligence Corps are still under the impression that they can use the techniques.
- iii. The techniques are taught informally during these courses. Clearly this would lead to techniques being used without proper safeguards such as time limits and medical oversight.²⁹⁶

c. In addition there seems to have been an expectation that those with "specialist training" such as interrogator or tactical questioning training, which includes conditioning techniques some of which are banned, would cascade their training down to "ordinary soldiers." For example, soldiers with no previous experience of guarding prisoners, were shown how to use stress positions, hooding for interrogation purposes, and sleep deprivation.

d. The lack of training, coupled with the psychological effect of guarding without strict oversight,²⁹⁷ led to abuse outside what was taught to be permissible during conditioning.

²⁹² Transcript, 19/12/06, pp 117, 125

²⁹³ Transcript, 18/09/03, pg 83

²⁹⁴ Transcript, 12/12/06, pp 85-87, 18/12/06 pp 52-53, 56,

²⁹⁵ Transcript, 18/12/06, pg 57

²⁹⁶ See Parker Report 1972, Cmnd 4901, pg 7-9 for a full list of safeguards

e. The lack of oversight was especially apparent in Temporary Detention Facilities run by Battle Groups such as 1 Queens Lancashire Regiment. This was realised by Colonel Mercer who tried to filter out the problem by forcing Battle Groups to deliver detainees to a central Theatre Internment Facility (TIF), first within two hours, then rising to six hours.

f. For a number of reasons the role of Battle Groups in detaining and questioning detainee increased during Telic 2 as 3 (UK) Mechanised Division took over from 1 (UK) Armoured Division for the occupation phase - despite it being a known “danger point”²⁹⁸ and not necessarily the best place for such activities to be carried out. The factors leading to this were:

- i. A problem getting tactical intelligence back to the Battle Group level, due to communication difficulties at the TIF,²⁹⁹ and hence the use of tactical questioners.
- ii. A perception that the US, who ran Camp Bucca in which the TIF was based, would not accept and receive detainees during the night. Detainees captured by the British had to be administered by both the US and UK and should have had two wrist bands.³⁰⁰
- iii. It was difficult to meet the six hour transfer target due to a lack of available helicopters which could fly in the heat of the day, and other wheeled transport.³⁰¹

g. Part of the reason the ban on hooding by 1 (UK) Armoured Division was not carried over during the occupation was that it was “lost.” There was only a paper version as the electronic filling system was not operational; the paper copy was lost and it was not known whether it had been passed to the Brigades and Battle Groups.³⁰²

2. Why was legal advice given to 1st Battalion Queen's Lancashire Regiment that the illegal conditioning techniques could be used? Who was ultimately responsible for that advice?

a. Despite the 1972 ban, the question of techniques such as hooding, the use of stress positions, sleep deprivation, and noise remains disputed territory in the Army, and amongst the Army Legal Service.³⁰³ This reflects the disparity between the ban and the policy for which the Government needs to take responsibility.

b. As mentioned previously the “illegal conditioning techniques” have continued to be taught in the Intelligence Corps, and should therefore be found in Intelligence Corps doctrinal and training documents if they were examined.

c. It is likely, since they were taught techniques, that the Government authorised them at some point. If it was policy to carry out these techniques the Ministry of Defence must be ultimately responsible for legal advice based on that policy.

d. On the general issue of policy for the Iraq occupation, Brigadier Aitken was asked to compile a report in February 2005 by the Assistant Chief of the General Staff, a report

²⁹⁷ Transcript, 22/11/06, pg 18 indicates a lack of a strict, planned guard rota

²⁹⁸ Transcript, 08/12/06, pg 60

²⁹⁹ Transcript, 19/12/06, pp 139-140

³⁰⁰ Transcript, 19/12/06, pg 146-147

³⁰¹ Transcript 19/12/06, pg 123

³⁰² Transcript, 19/12/06, pp 142-143

³⁰³ Transcript 19/12/06 pg 118 Col. Barnett thought it was open to interpretation, 08/12/06 pg 46 Mercer thought that it was illegal under Geneva conventions

which seemingly still has not been finished.³⁰⁴ During his evidence in the court martial he mentions “significant gaps in doctrine with regard to POW’s and detainee handling;”³⁰⁵ he also speaks of a “grand strategic failure” with regard to planning for what would happen after the war, and that this had a significant impact on the manner in which British troops conducted themselves.³⁰⁶

3. Did the Attorney General advise that the European Convention on Human Rights (ECHR) and the Human Rights Act did not apply in Iraq? If so, was there any connection between that advice and the legal advice that the illegal techniques could be used?

a. At question Q193 of his uncorrected evidence to the Joint Committee, Lord Goldsmith states: “I do not believe, so far as the substantive standards of treatment are concerned, there is any difference between what the Geneva Convention, the Convention against Torture require in relation to detention and the ECHR.”³⁰⁷ Lord Goldsmith has made no mention of the procedural standards applicable to the above-mentioned treaties (including, for example the nature and extent of the obligation to investigate alleged breaches of the treaties).

b. As for whether that advice led to the advice that the illegal techniques could be used, the positive application of all of the substantive and procedural rights in the ECHR would have supported the argument that the techniques were illegal for use by the UK in Iraq. The advice that seems to have been given, that the ECHR does not apply in terms of status review for internees, could easily have been interpreted in such a way to imply that the ECHR as a whole did not apply, if that advice was not passed on in a full written document to those concerned. It would be easy for somebody to think that if the Law of War acts as *lex specialis* to the ECHR for the purpose of status review, then it would do the same for articles 2 and 3 - if the full advice was not understood. Clarity in the advice on status review on the continued application of articles 2 and 3 may have prevented this misunderstanding, but Lord Goldsmith thought this unnecessary.³⁰⁸

5. Following up the UNCAT Report, does the Government remain of the view that it is not necessary expressly to accept the application of all of the rights and duties in the Convention Against Torture to territory under the control of UK troops abroad?

1. The Joint Committee did raise the extent to which the UK’s obligations under Articles 2 and 16 of the Convention against Torture and other Cruel, Inhuman or degrading treatment or punishment applied to Iraq.³⁰⁹ The Government had previously told the UN Committee Against Torture (CAT) that it did not consider that the UK exercised jurisdiction in Iraq, a sovereign State, and therefore neither the UN Convention against Torture nor Article 3 of the European Convention on Human Rights (ECHR) applied to the transfer of prisoners to Iraqi or US physical custody within Iraq, since prisoners taken into custody in Iraq had at all times been subject to Iraqi jurisdiction. Similar principles applied

³⁰⁴ Letter to Redress Trust from the British Army HQ Lang Command in response to Freedom of Information request, 24/07/2007

³⁰⁵ Transcript, 13/12/06, pg 130

³⁰⁶ Transcript, 13/12/06, pp 128-130

³⁰⁷ <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/uc394-iii/uc39402.htm>, Q193

³⁰⁸ <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/uc394-iii/uc39402.htm>, Q211

³⁰⁹ House of Lords House of Commons Joint Committee on Human Rights: The UN Convention Against Torture (UNCAT): Nineteenth Report of Session 2005-2006, Volume I – Report and Formal Minutes (26 May 2006) available at <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/185/185-i.pdf>

to transfer of prisoners within Afghanistan, the Government said. However, under questioning the Minister for the Armed Forces, Adam Ingram MP, said that “we accept that UNCAT does apply to our troops overseas because it has been enshrined in British law in section 134 of the Criminal Justice Act 1988 and therefore British soldiers carry it with them.”³¹⁰ The Joint Committee responded and reported on this aspect as follows:

*“We are not fully reassured by Mr Ingram’s answers and the Government’s response to CAT. Whilst the application of the Criminal Justice Act 1988 to UK forces in Iraq ...satisfy the requirement of the Convention for the criminalisation of acts of torture, the Government has not expressly accepted the application of other rights and duties under UNCAT to territory controlled by UK forces abroad, in particular the duty to prevent torture, the duty not to return detainees to face torture, and the duty to investigate allegations of torture. **We recommend that the Government should expressly accept the application of all of the rights and duties in the Convention Against Torture to territory under the control of UK troops abroad.**”³¹¹*

2. Although this issue arose before the Committee against Torture in the context of the transfer of prisoners, the recommendation *a fortiori* also applied to the treatment of persons while still in UK military custody. At the time the *Al Skeini* case, the judicial review of the Government’s refusal to hold an independent inquiry into a number of civilian deaths in Iraq including the death of Baha Mousa, was pending in the Divisional Court, and it is now settled law that the Human Rights Act and ECHR *do* apply to persons in detention facilities in Iraq. While *Al Skeini* did not deal directly with the applicability of UNCAT, the rights and duties under UNCAT and the ECHR are very similar when it comes to the prohibition of torture and/or ill-treatment. The Government has repeatedly referred to its recognition of the obligation to penalise torture [which it did with s. 134 of the Criminal Justice Act], though it has resisted acknowledging its obligations in respect of the range of other obligations (both positive and negative) contained in the UN Convention against Torture, in particular Article 2 of the Convention.

3. The Government’s response to the Joint Committee recommendation referred to above was as follows:

“The Government does not accept the Committee’s recommendation. In giving effect to UNCAT, the UK made torture a criminal offence under section 134 of the Criminal Justice Act 1988, irrespective of where and by whom it is committed. Members of UK armed forces are therefore subject to this provision whilst on operations abroad, including in Iraq and Afghanistan; they, like any other public official, could be prosecuted for the offence of torture in the English courts in respect of their conduct abroad.

The Government is not however obliged, or indeed able, to implement the provisions of Article 2 of UNCAT in Iraq or Afghanistan in relation to the public officials or citizens of those countries; that is a matter for their own governments. For example, there is no UNCAT obligation on the United Kingdom to take effective legislative measures to prevent acts of torture in Iraq or Afghanistan because these are not territories under UK jurisdiction; indeed, the UK has no ability to do this.”³¹²

³¹⁰ Ibid, paragraph 72.

³¹¹ Ibid paragraph 73, [emphasis in the original]

³¹² House of Lords House of Commons Joint Committee on Human Rights: “Government Response to the Committee’s Nineteenth Report of this Session: The UN Convention Against Torture (UNCAT),” Thirtieth Report of Session 2005–06,

4. The above response of the Government was made before the final *Al Skeini* decision of the Appellate Committee of the House of Lords. It is now clear, and accepted by the Government, that as far as the prohibition of torture of persons in the custody of UK forces in Iraq is concerned, there is little if any difference whether the ECHR, Geneva Conventions or UNCAT is the basis for the prohibition [criminalisation of the offence of torture]. What is unclear is the extent to which *other* provisions of UNCAT are not accepted by the Government to be applicable to Iraq. The Joint Committee sought to clarify this very point with Lord Goldsmith:

“Q208 Chairman: *Is it the Government's position that other obligations under UNCAT, such as to prevent acts of torture, or of cruel, inhuman or degrading treatment and investigating allegations of torture, do not apply to territory under the control of UK troops abroad?”*

His answer failed to deal with the point:

*“Lord Goldsmith: There is no doubt at all that we have an obligation to criminalise torture, irrespective of where and by whom it is committed”*³¹³

5. From all of the above it appears that the Government position on the applicability of UNCAT to territory under the control of UK troops abroad is at best ambiguous, and that its spokespersons have restricted the Government's acceptance to the criminalisation aspect, refusing to acknowledge the preventative and investigative obligations flowing from UNCAT. These obligations may be wider, for example, than ECHR obligations when it comes to prevention.

6. What further improvements can be made to the training of troops on the ground, interrogators and legal advisers?

a. In this REDRESS Report it is suggested that the Government needs to initiate another Parker-style review of all interrogation techniques, and to decide what is permissible and then ensure that training reflects this.

b. It is also suggested that given the link between intelligence operations, such as interrogation and tactical questioning of detainees involving conditioning, and those guarding them who seem to be expected to carry out much of the conditioning, such guards must be similarly trained and should operate under a unified chain of command.

c. During the court martial some guards said that they had been told to use conditioning techniques over a length of time, presumably by the tactical questioners, showing that some tactical questioners pass their techniques on to others; on the other hand the tactical questioners said that the guarding operation was not part of their function and they were not responsible for the abuse.

d. In future, policy on detention should be fully drawn up before conflicts to prevent the “chaotic situation there was with policy.”³¹⁴ This policy must include a central detention

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<http://www.publications.parliament.uk/pa/it200506/jtselect/jtrights/276/276.pdf><http://www.publications.parliament.uk/pa/it200506/jtselect/jtrights/276/276.pdf>

³¹³ Uncorrected oral evidence from Lord Goldsmith to Joint Select Committee on Human Rights, 26-07-07, <http://www.publications.parliament.uk/pa/it200607/jtselect/jtrights/uc394-iii/uc39402.htm>. The transcript is not yet an approved formal record of these proceedings, and neither witnesses nor members have had an opportunity to correct the record.

³¹⁴ Transcript, 19/12/06, pg 121

facility and the requirement that Battle Groups transfer detainees there in a matter of hours.

e. In FRAGO 029 there was a shift of responsibility for guarding detainees from Provost Branch, who had experience as military police, to J2, normally responsible for intelligence, who would not have had as much experience running detention facilities. This was necessary because Provost did not have the resources to cope with the large number of detainees.³¹⁵ If flexibility means that units and personnel with little training and experience in an area are expected to carry such functions then written policy and doctrine become even more important. With regard to detention, this means policies ensuring accountability is ensured such as strict guard rotas, a single officer accountable for treatment and present at all times, strictly kept visitors logs so loyalty between soldiers does not prevent finding those responsible for any abuse, and other safeguards.

³¹⁵ Transcript, 19/12/06, pg 130

APPENDIX B: COURT MARTIAL CHARGES ARISING FROM OPERATION SALERNO (*R V. PAYNE AND OTHERS*)

Corporal Payne

First charge: Committing a civil offence contrary to section 70 of the Army Act 1955 that is to say manslaughter. The particulars of the offence allege that you, Donald Payne, at Basrah Iraq on 15th day of September 2003, unlawfully killed Bahar Da'oud Salim Musa. To the first charge, do you Donald Payne plead guilty or not guilty? **A. Not guilty.**

Second charge: Committing a civil offence contrary to section 70 of the Army Act 1955 that is to say a war crime contrary to section 51(1) of the International Criminal Court Act 2001 namely inhuman treatment of a person protected under the provisions of the Fourth Geneva Convention 1949 as defined by article 8(2)(a)(ii) of Schedule 8 of the said International Criminal Court Act 2001 and the International Criminal Court Act 2001 (Elements of Crimes) Regulations 2001. The particulars of the offence allege that you, Donald Payne, between the 13th day of September 2003 and the 16th day of September 2003, in Basrah Iraq inhumanly treated Iraqi civilians arrested as a result of Operation Salerno. To the second charge, do you Donald Payne plead guilty or not guilty? **A. Guilty.**

Third charge: Committing a civil offence contrary to section 70 of the Army Act 1955 that is to say doing acts tending and intended to pervert the course of public justice contrary to common law. The particulars of offence allege that you, Donald Payne, on 15th day of September 2003, with intent to pervert the course of public justice did a series of acts which had a tendency to pervert the course of public justice namely told persons, namely Thomas Lee Appleby, Gareth Aspinall and Aaron Paul Anthony Cooper to tell anyone in authority investigating the death of Bahar Da'oud Salim Musa to say that the said Bahar Da'oud Salim Musa had died because he banged his own head, thereby indicated that he died accidentally, being an account you, Donald Payne, knew to be untrue. To the third charge do you, Donald Payne, plead guilty or not guilty? **A. Not guilty.**

Lance Corporal Crowcroft and Kingsman Fallon

Fourth charge: Committing a civil offence contrary to section 70 of the Army Act 1955 that is to say a war crime contrary to section 51(1) of the International Criminal Court Act 2001 namely inhuman treatment of a person protected under the provisions of the Fourth Geneva Convention 1949 as defined by article 8(2)(a)(ii) of schedule 8 of the said International Criminal Court Act 2001 and the International Criminal Court Act 2001 (Elements of Crimes) Regulations 2001. The particulars of the offence allege that you, Wayne Ashley Crowcroft and Darren Trevor Fallon, on 13th day of September 2003 inhumanly treated Iraqi civilians arrested as a result of Operation Salerno. To the fourth charge do you, Wayne Ashley Crowcroft, plead guilty or not guilty? **A. Not guilty.** To the fourth charge do you, Darren Trevor Fallon, plead guilty or not guilty? **A. Not guilty.**

Sergeant Stacey

Fifth charge: Committing a civil offence contrary to section 70 of the Army Act 1955 that is to say assault occasioning actual bodily harm contrary to section 47 of the Offences against the Person Act 1861. The particulars of the offence allege that you, Kelvin Lee Stacey, between 13th day of September 2003 and 16th day of September 2003, assaulted an Iraqi civilian, thereby occasioning him actual bodily harm. To the fifth charge do you, Kelvin Lee Stacey, plead guilty or not guilty? **A. Not guilty.**

Sixth charge, which is an alternative to the fifth charge: Committing a civil offence contrary to section 39 of the Criminal Justice Act 1988. The particulars of offence allege that you, Kelvin Lee Stacey, between 13th day of September 2003 and 16th day of September 2003, assaulted an Iraqi civilian by beating him. To the sixth charge do you, Kelvin Lee Stacey, plead guilty or not guilty? **A. Not guilty.**

Major Peebles

Seventh charge: Negligently performing a duty contrary to section 29A(b) of the Army Act 1955. The particulars of offence allege that you, Michael Edwin Peebles, at Basrah Iraq, between 13th day of September 2003 and 16th day of September 2003, negligently performed your duty by failing to take such steps as were reasonable in all the circumstances to ensure that military personnel under your effective control did not ill-treat Iraqi civilians being detained for tactical questioning as your duty as Battle Group Internment Review Officer required. To the seventh charge do you, Michael Edwin Peebles, plead guilty or not guilty? **A. Not guilty.**

Warrant Officer Class 2 Davies

Eight charge: Negligently performing a duty contrary to section 29(A)(b) of the Army Act 1955. The particulars of offence allege that you, Mark Lester Davies, at Basrah Iraq, between 13th day of September 2003 and 16th day of September 2003, negligently performed your duty by failing to take such steps as were reasonable in all the circumstances to ensure that military personnel under your effective control did not ill-treat Iraqi civilians detained for tactical questioning as your duty required. To the eight charge do you, Mark Lester Davies, plead guilty or not guilty? **A. Not guilty.**

Colonel Mendonca

Ninth charge: Negligently performing a duty contrary to section 29A(b) of the Army Act 1955. The particulars of the offence allege that you, Jorge Emanuel Mendonca, at Basrah Iraq, between 13th day of September 2003 and 16th day of September 2003, when Commanding Officer 1 QLR negligently performed your duty by failing to take such steps as were reasonable in all the circumstances to ensure that Iraqi civilians being held at the temporary holding centre under your command were not ill-treated as your duty required. To the ninth charge do you, Jorge Emanuel Mendonca, plead guilty or not guilty? **A. Not guilty.**

APPENDIX C: SUMMARY OF EVIDENCE ON BANNED CONDITIONING TECHNIQUES AS INTELLIGENCE CORPS DOCTRINE EMERGING FROM *R v PAYNE AND OTHERS*

Lieutenant Colonel Mercer, Commander Legal Telic 1, 08/12/06 pages 25- 27

Q. Then in paragraph 6 you record your visit: "Finally, I visited the JFIT and witnessed a number of PW who were hooded and in various stress positions. I am informed that this is in accordance with British Army Doctrine on tactical questioning. Whereas it may be in accordance with British Army doctrine, in my opinion, it violates International Law. Prisoners of War must at all times be protected against acts of violence or intimidation and must have respect for their persons and their honour ..."

You quote the Articles: "... I accept that tactical questioning may be permitted but this behaviour clearly violates the Convention." Who told you that it was in accordance with British Army Doctrine that prisoners of war could be hooded and in various stress positions for tactical questioning?

A. This was the hooding issue. When I raised my concerns, I was shown the Int Corps doctrine which refers to hooding.

Q. It was called a doctrine, was it?

A. Yes, it was in a memorandum. Clearly this was not popular with members of the Intelligence Corps that the lawyer had interposed himself between questioning -- and then questioning the legality of that. But I was shown the doctrine to which I replied well I did not write it and I am the lawyer.

Q. You referred to it at page 5 in this extract from your diary. I apologise for referring to it. You are talking about this day: "Another exceptional day. I flew to the PWHO organisation in Umm Qasr and intervened, yet again, in the PW process. I had a massive row with CO QDG [*Queen's Dragoon Guards*] about Article 5 tribunals. You need a very thick skin for this job." who is the CO QDG?

A. A chap called Gill Baldwin.

Q. What is the post exactly?

A. He was basically the commandant of the PW camp.

Q. So you had a row with him that what he was doing by hooding and stress positions --

A. No, no, that is wrong. This was one of the difficulties. He was the commandant of a prisoner of war camp. But the interrogation process was separate from the PW camp. In other words he had no command over the interrogation process.

Lieutenant Colonel Barnett, Commander Legal Telic 2 19/12/06 pp 117-119

Q. Since you were effectively the head of the Army Legal Service when you were there, as you understand it, what was your own position? Your own position as a lawyer as to whether stress positions were acceptable or not?

A. As a lawyer, whether stress positions are acceptable or not is slightly technical. The interpretation of the relevant provision of the Geneva Convention depends upon whether you feel that they contravene public insult, intimidation or curiosity and the like, depending on whether it is a prisoner of war or an internee or a detainee, or a protected person.

....

Q. So far as you are concerned, Colonel, as I understand it, it is a question of the Geneva Convention and interpretation?

A. That is correct.

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Q. And just dealing with what the policy was, did you understand the policy was that detainees should not be subject to conditioning as an aid to tactical questioning, by which I mean the use of hoods, stress positions, sleep deprivation?

A. In general or in Iraq?

Q. In general.

A. In general I am aware that those matters are taught.

Q. Taught to who?

A. To those on specialist courses who are going to be engaged in tactical questioning or interrogation procedures.

Q. Let us leave specialists and deal with ordinary soldiers who maybe end up guarding detainees. That is not a matter which is taught to soldiers doing that kind of ordinary duties --

A. No.

Q. -- is it?

A. No.

Q. And it is not taught as part of the Op Tag pre-deployment training --

A. No.

Q. -- is it? Or as Law of Armed Conflict, general IDT generic Law of Armed Conflict training?

A. No, it is not.

Colonel Mendonca letter to Brigider Aitken 13/12/06 pg 119

"5. Late formal warning (and therefore a lack of priority for courses) prevented us from getting anyone trained in tactical questioning. This proved to be a serious shortfall as we were always beholden to brigade-provided TQ trained personnel and therefore the basic principles of the process remained something of a 'black art'. The brigade-provided [tactical questioning] officer or senior NCO would set the rules for 'conditioning' any potential internee prior to questioning and, prior to Baha Mousa, hoods, handcuffs and stress positions did feature in the conditioning process."