



House of Lords
House of Commons
Joint Committee on
Human Rights

**UN Convention Against
Torture: Discrepancies in
Evidence Given to the
Committee About the Use
of Prohibited Interrogation
Techniques in Iraq**

**Twenty–eighth Report of Session
2007–08**

*Report, together with formal minutes, and oral
and written evidence*

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Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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Publications

The Reports and evidence of the Joint Committee are published by The Stationery Office by Order of the two Houses. All publications of the Committee (including press notices) are on the internet at www.parliament.uk/commons/selcom/hrhome.htm.

Current Staff

The current staff of the Committee are: Mark Egan (Commons Clerk), Rebecca Neal (Lords Clerk), Murray Hunt (Legal Adviser), Angela Patrick and Joanne Sawyer (Committee Specialists), James Clarke (Committee Assistant), Karen Barrett (Committee Secretary) and John Porter (Chief Office Clerk).

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1 Discrepancies in evidence given to the Committee

Background

1. In June 2004 our predecessor Committee wrote to Adam Ingram MP, then Minister of State for the Armed Forces, about claims made in February 2004 in a report by the International Committee of the Red Cross that, in certain cases, methods of physical and psychological coercion had been used by British interrogators to obtain confessions and extract information.¹ One of the issues we raised concerned the possible use of five ‘conditioning techniques’ – wall standing, hooding, subjection to noise, sleep deprivation and deprivation of food and drink – in interrogation. The use of these techniques was prohibited by the Government in 1972, following allegations about their use in Northern Ireland. In the case of *Ireland v UK* in 1978, the European Court on Human Rights found that the combined use of the five techniques amounted to a practice of inhuman and degrading treatment. During court proceedings, in 1977, Sir Samuel Silkin, the then Attorney General, gave an “unqualified undertaking” that “the five techniques will not in any circumstances be reintroduced as an aid to interrogation”.²

2. Mr Ingram replied to the Committee in the following terms:

I can confirm that the directive on interrogation referred to in Para 135 of the Judgment in *Ireland v UK* prohibiting the use of the five techniques found to constitute degrading treatment (hooding, wall standing, sleep deprivation, food deprivation, and white noise) remains in force. The training given to those Service personnel in appointments which could require them to conduct interrogation of captured enemy personnel takes full account of this directive, of the Geneva Convention and of the Laws of Armed Conflict.³

3. In May 2006 we published a Report on the UK’s compliance with the UN Convention Against Torture (UNCAT).⁴ Amongst the areas covered in that Report were the applicability of UNCAT to the armed forces and the jurisdiction of UK courts and courts martial over military personnel for actions which may be in breach of prohibitions against torture and inhuman or degrading treatment under UNCAT, the European Convention on Human Rights (ECHR), and domestic and international law.⁵ UNCAT prohibits torture and inhuman and degrading treatment, in similar terms to the ECHR.⁶

¹ Nineteenth Report, Session 2004-05, *The Work of the Committee in the 2001-2005 Parliament*, HL Paper 112, HC 552, (hereafter 19th Report 2004-05), Appendix 3.

² HC Deb, 2 Mar 1972, from c743; and *Ireland v United Kingdom*, App. No. 5310/71, [1978] 2 EHRR 25, paragraph 102.

³ 19th Report 2004-05, Appendix 3.

⁴ Nineteenth Report, Session 2005-06, *The UN Convention Against Torture (UNCAT)*, HL Paper 185, HC 701 (hereafter UNCAT Report).

⁵ Chapter 4.

⁶ See Articles 1, 2 and 16.

4. In oral evidence, on 27 March 2006, we asked Lieutenant General R. V. Brims CBE DSO, Commander Field Army, about whether he was satisfied troops were fully aware of the prohibition on the use of the five conditioning techniques. Lieutenant General Brims said:

On hooding we have given very clear direction and hooding itself will not take place. It is permissible to blindfold in some other way in certain circumstances but we care not to do that at the moment ... I think if you went and asked most troops, "What are the five things that have been banned?", they would look at you and be unable to communicate to you. If you wrote down these five things, "What is your view on them?", they would say, "You should not do them", if you follow the answer.⁷

In our Report, we drew attention to Mr Ingram's letter and Lieutenant General Brims's comments without drawing any conclusions of our own.⁸

Evidence of the use of conditioning techniques in Iraq

5. In 2007, evidence came to light which appeared to contradict the clear assurances we had received from Lieutenant General Brims that conditioning techniques such as hooding and the use of stress positions were not used by the British army. During the court martial of a number of soldiers from 1 Queen's Lancashire Regiment alleged to have been responsible for the death of Baha Mousa, an Iraqi civilian, in September 2003, it emerged that such techniques had been used to maintain the 'shock of capture' in advance of tactical questioning.⁹ The court heard evidence that the use of the conditioning techniques had been authorised by Brigade headquarters and its legal officer. There was also evidence about advice given by the Attorney General on the applicability of the ECHR in detention facilities in Iraq, which appeared to some to suggest that he had advised that the ECHR did not apply.¹⁰ At the end of the proceedings, Judge Advocate McKinnon spoke of "a serious failing in the chain of command all the way up to Brigade and beyond".¹¹

6. At the conclusion of the court martial – at which only one person, Corporal Payne, was convicted, of inhumane treatment – the head of the army, General Sir Richard Dannatt, accepted that Baha Mousa and others "were subjected to a conditioning process that was unlawful". He went on to state that the duty of British military personnel to behave in accordance with the law "was forgotten or overlooked in this case".¹²

7. We wrote to the Secretary of State for Defence on 22 May 2007 to raise a number of issues arising from the *Payne* court martial, including:

- the apparent discrepancy between the evidence presented to the Committee that the use of the conditioning techniques had been prohibited and the evidence presented to the court martial, and accepted by the Crown, that the use of hooding and stress

⁷ Qq 238-39.

⁸ UNCAT Report, paragraphs 83-85.

⁹ Transcript of Court Martial proceedings p22 (Major Anthony Royce).

¹⁰ Nineteenth Report, Session 2006-07, *Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning*, HL Paper 157, HC 790, Qq185-240.

¹¹ Daily Telegraph, "Britain's first war criminal jailed for one year", 1 May 2007, <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2007/04/30/npayne130.xml>

¹² MoD press statement, 30 April 2007.

positioning was part of the standard operating practice of 1 Queen's Lancashire Regiment in 2003 and had been sanctioned by Brigade headquarters;

- whether any of the conditioning techniques had ever been sanctioned or authorised for use in Iraq, or in any other circumstances, by the Ministry of Defence or by any of the armed forces, to prolong or maintain 'shock of capture' prior to interrogation; and
- whether the Government intends to take any further steps to revise the training, guidance and procedures for the treatment of detainees and internees.¹³

8. The Secretary of State, in his reply of 15 June 2007, said he was unable to provide the information we had "rightly" sought because the legal process concerning Corporal Payne was not concluded and a review of the lessons to be learned from the death of Baha Mousa had been commissioned by the former Chief of General Staff, General Sir Mike Jackson, and was due to report "shortly".

9. The report of the review referred to by the Secretary of State, which was carried out by Brigadier Robert Aitken, was published on 25 January 2008. At the same time, the Secretary of State announced that the Army Prosecuting Authority had concluded that there were no further criminal lines of inquiry in relation to the Baha Mousa case.¹⁴ The Aitken report concluded that:

The great majority of officers and soldiers who have served in Iraq have done so to the highest standards that the Army or the Nation might expect of them, under extraordinarily testing conditions. There is no evidence of fundamental flaws in the Army's approach to preparing for or conducting operations: we remain the envy of our allies for the professionalism of our conduct.¹⁵

Aitken went on to note that "the doctrine, training and education required to deal specifically with detained civilians has been comprehensively reviewed", that "measures have been put in place to ensure that all those involved in prisoner handling or interrogation are now significantly clearer about the correct procedures" and "the procedures of the Military Criminal Justice System are fit for purpose".¹⁶

10. Aitken did not address the question of why soldiers in 1 Queen's Lancashire Regiment came to think that the proscribed conditioning techniques were, in fact, lawful, explaining that this was an issue to be considered by a subsequent, broader enquiry.¹⁷ He went on to set out a number of contextual factors, however. He concluded it was likely that the prohibition on the use of the conditioning techniques had been restricted only to Northern Ireland operations and did not extend outside of the intelligence community.¹⁸ By 2003, the doctrine in use at the Defence Intelligence and Security Centre only required prisoners to be treated in line with international law and did not make specific mention of the five

¹³ Letter from the Chair to the Secretary of State for Defence, dated 22 May 2007 (App 1).

¹⁴ Letter from the Secretary of State for Defence to the Chair, dated 24 Jan 2008 (App 18).

¹⁵ *The Aitken Report*, 25 Jan 08, paragraph 44.

¹⁶ *Ibid.*

¹⁷ *Ibid.*, paragraph 16.

¹⁸ *Ibid.*, paragraph 19.

techniques. “Determining how and when specific direction in 1972 came to be lost in 2003 would have to be a matter for separate investigation” Aitken concluded.¹⁹

11. Aitken also drew attention to deficiencies in training and guidance for troops. Training packages “described in detail the manner in which prisoners of war were to be treated, but made scant mention of the treatment of civilian detainees”.²⁰ The rules and practices relating to interrogation and tactical questioning (IT&Q) were “not as clearly articulated” in 2003 as they are now.²¹ Current policy on IT&Q specifically proscribes the use of the five conditioning techniques, but this was not spelled out in guidance on the handling of internees and detainees which has more general application. Aitken concluded that it was “understandable” that the contents of the more specific IT&Q policy were “not widely known throughout the Army”.²² Aitken also drew attention to the training of some members of the army in proscribed IT&Q techniques, in order to prepare them for the treatment they may receive from an enemy. This practice was discontinued in 2005.²³

12. The Secretary of State announced on 14 May 2008 that a further inquiry into the circumstances surrounding the death of Baha Mousa would be held under the terms of the Inquiry Act 2005.²⁴ Terms of reference have yet to be announced.

Conclusion

13. **The evidence presented to the *Payne* court martial, and accepted by the Crown, and the findings of the Aitken report would appear to show that:**

- **conditioning techniques such as hooding and the use of stress positioning were used by some British troops in Iraq, despite such techniques having been prohibited in 1972;**
- **the use of hooding and stress positioning by 1 Queen’s Lancashire Regiment in 2003 was based on legal advice received from Brigade headquarters;**
- **the prohibition on the use of conditioning techniques may have been interpreted narrowly, as only applying to interrogation personnel and to operations in Northern Ireland;**
- **at least until the Baha Mousa case came to light, the prohibition on the use of conditioning techniques was not as clearly articulated to troops in Iraq as it might, and indeed should, have been;**
- **even as late as January 2008, when the Aitken report was published, the prohibition on the use of conditioning techniques was not clearly articulated to service personnel other than those responsible for interrogation; and**

¹⁹ Ibid.

²⁰ Ibid, paragraph 20.

²¹ Ibid, paragraph 21.

²² Ibid, paragraph 24.

²³ Ibid, paragraph 22.

²⁴ Letter from the Secretary of State for Defence, dated 14 May 2008 (App 25).

- until 2005, interrogation personnel were trained in proscribed techniques, if only to demonstrate the techniques to which they might be subject if captured.

14. These conclusions call into question the evidence we received from Lieutenant General Brims and which our predecessor Committee received from the Minister for the Armed Forces. Lieutenant General Brims's assertion that ordinary troops would recognise that techniques such as hooding were prohibited is not supported by Brigadier Aitken's findings or the events surrounding the death of Baha Mousa. Nor does Mr Ingram's claim that the training of interrogation personnel took full account of the prohibition on the use of the five conditioning techniques seem consistent with the facts which have now come to light.

15. The evidence we received from Lieutenant General Brims and Mr Ingram formed the basis for the section of our Report on the UN Convention Against Torture dealing with interrogation techniques. It would appear that this evidence was incorrect and that, as a result, we were unable to give a full account to Parliament of the human rights issues relating to the use of such techniques.

16. We have yet to receive an explanation from the Ministry of Defence for the discrepancies between the evidence given to the Joint Committee in 2004 and 2006 on the use of prohibited conditioning techniques and the facts which have emerged from the *Payne* court martial and the Aitken report. The issues relating to the death of Baha Mousa are now the subject of a public inquiry. We recommend that, in response to this Report, the Secretary of State for Defence should confirm we will receive a detailed explanation of the discrepancies between the evidence to the Committee by Mr Ingram in 2004 and Lieutenant General Brims in 2006 and the facts which have subsequently emerged concerning the death of Baha Mousa, as soon as possible after the conclusion of the public inquiry.

2 Other matters

17. We issued calls for evidence concerning allegations of torture and inhuman treatment by British troops in Iraq on 8 August 2007 and on 5 February 2008, following the publication of the Aitken report. We are publishing the written evidence we received with this Report. We heard oral evidence from the then Attorney General, Lord Goldsmith, on this issue, as well as other matters, on 26 June 2007.²⁵ We also heard oral evidence from Mr Kevin Laue, REDRESS, and Mr Phil Shiner, Public Interest Lawyers, on 29 April 2008.²⁶ We are grateful to all of those who provided evidence to the Committee.

18. A number of issues were raised with us, other than those concerning the use of proscribed conditioning techniques, including:

- the inter-relationship between the UK military authorities in Iraq and other authorities, particularly the US, in relation to interrogation practices and the handling of detainees;
- the nature of the legal advice, particularly that provided by the Attorney General, about the applicability of the European Convention on Human Rights to people detained by the British military in Iraq ;
- the practical significance of the decision of the House of Lords in the *Al Skeini* case that the ECHR and Human Rights Act apply to people held in UK military detention facilities in Iraq;
- the practical significance of applying all the rights and duties in UNCAT to territory under UK control abroad; and
- whether the UK's National Preventative Mechanism under UNCAT should cover military detention facilities abroad.

19. Many of these issues are directly relevant to the public inquiry announced by the Secretary of State for Defence. Mr Laue and Mr Shiner both argued that such an inquiry must be broad in its scope.²⁷ We share their view. The army is rightly proud of its reputation for integrity and professionalism. The death of Baha Mousa, and the other allegations of torture and inhuman treatment in Iraq, have cast a shadow over that reputation which only thorough scrutiny of the full circumstances can dispel. **We recommend that the terms of reference of the public inquiry into the circumstances surrounding the death of Baha Mousa should be as broad as possible and, in particular, should cover the matters mentioned in this Report. We intend to pay close attention to the report of the public inquiry and to keep the compliance of the UK's armed forces with the UN Convention Against Torture under scrutiny.**

²⁵ Nineteenth Report, Session 2006-07, *Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning*, HL Paper 157, HC 790, Qq185-240.

²⁶ Qq 1-25 and the Annex to this Report.

²⁷ Qq 2, 8, 19. pm Apps 20 and 24.

Conclusions and recommendations

1. The evidence presented to the *Payne* court martial, and accepted by the Crown, and the findings of the Aitken report would appear to show that:
 - conditioning techniques such as hooding and the use of stress positioning were used by some British troops in Iraq, despite such techniques having been prohibited in 1972;
 - the use of hooding and stress positioning by 1 Queen's Lancashire Regiment in 2003 was based on legal advice received from Brigade headquarters;
 - the prohibition on the use of conditioning techniques may have been interpreted narrowly, as only applying to interrogation personnel and to operations in Northern Ireland;
 - at least until the Baha Mousa case came to light, the prohibition on the use of conditioning techniques was not as clearly articulated to troops in Iraq as it might, and indeed should, have been;
 - even as late as January 2008, when the Aitken report was published, the prohibition on the use of conditioning techniques was not clearly articulated to service personnel other than those responsible for interrogation; and
 - until 2005, interrogation personnel were trained in proscribed techniques, if only to demonstrate the techniques to which they might be subject if captured. (Paragraph 13)
2. These conclusions call into question the evidence we received from Lieutenant General Brims and which our predecessor Committee received from the Minister for the Armed Forces. Lieutenant General Brims's assertion that ordinary troops would recognise that techniques such as hooding were prohibited is not supported by Brigadier Aitken's findings or the events surrounding the death of Baha Mousa. Nor does Mr Ingram's claim that the training of interrogation personnel took full account of the prohibition on the use of the five conditioning techniques seem consistent with the facts which have now come to light. (Paragraph 14)
3. The evidence we received from Lieutenant General Brims and Mr Ingram formed the basis for the section of our Report on the UN Convention Against Torture dealing with interrogation techniques. It would appear that this evidence was incorrect and that, as a result, we were unable to give a full account to Parliament of the human rights issues relating to the use of such techniques. (Paragraph 15)
4. We have yet to receive an explanation from the Ministry of Defence for the discrepancies between the evidence given to the Joint Committee in 2004 and 2006 on the use of prohibited conditioning techniques and the facts which have emerged from the *Payne* court martial and the Aitken report. The issues relating to the death of Baha Mousa are now the subject of a public inquiry. We recommend that, in response to this Report, the Secretary of State for Defence should confirm we will

receive a detailed explanation of the discrepancies between the evidence to the Committee by Mr Ingram in 2004 and Lieutenant General Brims in 2006 and the facts which have subsequently emerged concerning the death of Baha Mousa, as soon as possible after the conclusion of the public inquiry (Paragraph 16)

5. We recommend that the terms of reference of the public inquiry into the circumstances surrounding the death of Baha Mousa should be as broad as possible and, in particular, should cover the matters mentioned in this Report. We intend to pay close attention to the report of the public inquiry and to keep the compliance of the UK's armed forces with the UN Convention Against Torture under scrutiny. (Paragraph 19)

Annex

Note on an Informal Meeting with REDRESS and Public Interest Lawyers

Kevin Laue, REDRESS and Phil Shiner, Public Interest Lawyers

Tuesday 29 April 2008

Conditioning Techniques

When the formal meeting was adjourned, Lord Lester had been asking about the 1972 decision in *Ireland v UK* and how the implications of that decision had failed to filter into any written policy on prisoner handling in the UK military. Phil Shiner considered that the transcript from the Court Martial in *Payne & Ors* showed that in Iraq, there were about four different candidates for the likely source of army policy on prisoner handling. Col. Baker, Lt. Col. Mercer and others all referred to different sources and some discussed a verbal policy.

Public Interest Lawyers had asked for disclosure of Lt. Col Mercer's evidence in an unredacted form, including exhibits. They have received certain bundles from the Court, subject to an undertaking not to disclose their contents. He considers that this material will be crucial to any new public inquiry. He expects a decision on a public inquiry to be taken by the Government on 6 May 2008. After that time, Public Interest Lawyers may have to go back to the Court to apply for further disclosure of a number of Court Martial and other military documents.

Phil Shiner told the Committee that it was his view that the evidence presented to the Court Martial and the conduct of the Baha Mousa case had shown that there was a frenetic attempt being made by some in the senior civil service on this issue to withhold information (he frankly called this a "cover up"). The circumstances of this case, and the difficulties faced by Public Interest Lawyers have been listed in their letter to the Committee dated July 2007. This letter also lists the potential documents which may include the basis of the prisoner handling policies for Iraq (UNCAT (06-07) 15, previously circulated).

Lord Onslow suggested that the fault lies much higher up, in that it wasn't really thought about before the invasion so there was no cohesive interrogation policy. He asked whether there was a basic "Army Manual" on "how to ask questions". Phil Shiner agreed and told the Committee that it was his view that policy on prisoner handling in Iraq really didn't exist in any coherent form. The real problem was that post invasion, policy was made up on the hoof. Tactical interrogators were and should have been treated differently to ordinary soldiers in Battle Groups. Unfortunately, policy on tactical questioning and prisoner handling was being established at Battle Group level, leading to the establishment of Battle Group Internment Review Officers (BGIRO). Chilling evidence from the Court Martial emerged that even those who were intended to be involved in tactical questioning, were only given 1.25 hours training on prisoner handling (evidence of Davis). Real concerns must be raised when these are the people at the front line being asked to strike an appropriate balance between the need to secure information crucial to the protection of national interests and our troops and the need to respect the dignity, rights and safety of an

individual prisoner. The question was whether these people were adequately equipped to answer the question “Is this torture?”

Phil Shiner went on to explain that the failures did not take place only on the ground, but that there had been a complete failure to plan adequately for occupation in Iraq. Lt. Col. Mercer thought the UK had failed to plan effectively as they thought that the field of operation in Iraq would be effectively filled by the UN. UK troops were trained and prepared for war fighting, not the minutiae of occupation. After a short time, our troops were not fighting in the traditional sense, but were essentially tasked with running a country. Troops were running on 2 hours sleep and asking “Where’s the FCO?” or “Where’s DFID?”

Phil Shiner told the Committee that senior army officers should not be allowed to blame the Government infrastructure for failure to plan and civil servants should not be allowed to get off the hook by pointing fingers at army training and implementation. A series of failures led to our troops being ill-prepared and the ultimate ill-treatment and torture of Iraqi civilians.

Neither Mr Shiner or Mr Laue had any evidence that UK armed forces were aware of the use of waterboarding, by the US.

Kevin Laue directed the Committee to the Fenton Report, a preliminary Report by a senior officer on the death of Baha Mousa. It is very short, only 3 pages, and in the public domain thanks to the Freedom of Information Act. It gives no clear answer on who was responsible for prisoner handling, brigade group staff or tactical questioners. It clarifies that battle group personnel were being encouraged to undertake tactical questioning. However, this Report was unable to identify the authority for tactical questioning or the techniques used. It is clear from that document that there was confusion over who was doing what to whom, and under what authority.

It is the opinion of Redress that this issue is central to the need for a full, independent public inquiry. During the course of the Court Martial, days were spent trying to figure out what the orders were and where they were coming from. They consider it difficult to understand how any inquiry run by the military in a military setting could be – and be seen to be – objective. The military were clearly involved in the giving of the orders, so they cannot be independent.

Training

Phil Shiner told the Committee that he could lay responsibility for many failings on a lack of training, not only on prisoner handling but training on how senior officers ensure that their troops understand when and how legal standards apply to their work. He considered that the failings on the part of legal and medical army professionals were particularly stark. These lawyers and doctors were subject to professional obligations and seemed to have failed utterly to meet them: they did not draw attention to applicable legal or medical standards. Medics were certifying people as fit for conditioning. For example in Baha Mousa’s case, the doctor in charge noted only one injury and a small piece of blood under his nose. Photographs of his body have since emerged which are horrific. The post mortem shows he had 93 separate injuries. It is very unlikely that in the course of his detention, the

relevant medical staff couldn't have noticed what was going on. A complaint has been lodged with the GMC by Public Interest Lawyers, on behalf of Baha Mousa's family.

Mr Shiner had doubts whether military training would now be adequate to ensure compatibility with the UK's international human rights obligations. He explained that the behaviour and training which had been publicised had been so inadequate and the military was so closed to scrutiny that he was unsure whether the system would be open to significant voluntary change. The Aitkin Report was not sufficient to prompt more effective change; independent scrutiny by a public inquiry was required.

Kevin Laue told the Committee that there was clear evidence on the Court Martial transcripts that the use of hooding and stressing at least was widespread. There was a strong suggestion that, prior to 2003, the use of these techniques had been included in training for tactical questioners. However, the real problem was, that no-one knows about the policy or the training. It is clear from the Aitken Report, that the official policy remains to keep these matters confidential (see Page 13). We don't know what was happening prior to 2003 and we don't know what is happening now.

When looking at the treatment of internees or detainees, it is important to draw a distinction between two groups: (a) ordinary troops, staff of the battle groups, who were not intelligence personnel, but who were "roped into" conditioning, and whose job it was to "soften up" the detainees (note that Baha Mousa was never questioned – he died first); and (b) Tactical Questioners, who were intelligence personnel. The evidence before the Court Martial showed that it was very difficult to ascertain what training, if any, either group had had in prisoner handling. Two facts on training are clear: (a) all troops had some very basic training on the requirements of the Geneva Convention and (b) at some point, the Heath ban of the five techniques was "lost".

Legality: Application of ECHR and UNCAT

Lord Onslow asked if they agreed with the Government that mistreatment of detainees by British troops abroad was already illegal under the Geneva Convention and domestic law, so that the ECHR and HRA provided no new protection to detainees.

Phil Shiner said mistreatment would also be in clear breach of other laws. While the Geneva Convention lacked an enforcement mechanism, the requirements of the ECHR called for an inquiry. He agreed that breaches of the Geneva Convention were against military law. But it too was ineffective whereas the ECHR added the requirement for prompt, effective inquiry into mistreatment as well as death and gave the prospect of accountability. So the applicability of the ECHR/UNCAT is all about an enforcement mechanism, which the Geneva Convention lacks.

Lord Onslow observed that military law was always subservient to civil law. Andrew Dismore said that if the ECHR had not been held to apply in Iraq there would have been no inquest. Phil Shiner said that when Lt. Col. Mercer started to complain and demand the highest standards he was rebuked by Rachel Quick. Lord Goldsmith later said that he was only dealing with the applicability of procedural standards because that was all that Mercer was raising, but in fact Mercer was complaining about substantive as well as procedural breaches. It is a matter of public record that the Attorney General was advising on the legality of detention standards from 26 March 2003. On 29 March 2003, Lt Col. Mercer

began raising substantive breaches such as the hooding of detainees in full sun. At this stage the question is, did the Permanent General HQ go back to the Attorney General and ask for further advice? If not, was this failure negligent? If they did, what was his advice? Only an independent inquiry can establish if conditioning techniques of that kind had been condoned.

Kevin Laue said that if the ECHR applied in Iraq so must UNCAT. The Government said there was no need for it to apply in detention centres in Iraq, because it has implemented its obligations under UNCAT through the prohibition on torture in the Criminal Justice Act 1998. This was disingenuous because UNCAT gives rise to more obligations than the simple prohibition in Article 4, and wider obligations than the requirements of the ECHR, e.g. the obligation to take preventative measures and to ensure that victims get proper reparation. It was important to keep trying to find out why the Government kept saying that UNCAT was not needed. Phil Shiner agreed that UNCAT made a big difference. For example, in *Al-Skeini*, the Court held that Convention rights under the HRA would apply only when an individual was in detention, so not on the streets of Basra or in the back of a van.. Its reasoning was based principally on the regional nature of the ECHR. By contrast, UNCAT is an international agreement which requires systematic review of interrogation under any form of arrest (Article 11). It is difficult to see how UNCAT couldn't add significantly. The Government's position that it did not apply in Afghanistan or Iraq was extraordinary.

The Chair asked about evidence of detainees being transferred from UK control to other countries, for torture or inhumane treatment. Phil Shiner said there were examples in Afghanistan and Iraq. In the *Al-Sweady*, case five survivors detained in May 2004 were handed over to the Iraqis in October. In Afghanistan the British Government appeared to think that the ECHR obligation not to transfer where there was a real risk of torture did not apply if no international boundaries were crossed. Lord Bowness asked what the British could do if they captured Saddam Hussein: could they have handed him over to either the Iraqis or the US? Phil Shiner explained that under the ECHR, the UK would have been obliged not to hand him over if it knew he would be subject to the death penalty.

The Chair asked if the UK's National Preventive Mechanism under the Optional Protocol to UNCAT covered military detention facilities. Phil Shiner said yes. It certainly would if the jurisdiction of UNCAT were coterminous with that of the ECHR, as he was sure a court would rule. Andrew Dismore asked if UNCAT, by contrast with ECHR, also applied in the back of a van as well as in military detention facilities. Phil Shiner said that it did, as he would argue in a new case.

Formal Minutes

Tuesday 15 July 2008

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Dubs

John Austin MP

Lord Lester of Herne Hill

Dr Evan Harris MP

The Earl of Onslow

Mr Virendra Sharma MP

Baroness Stern

Draft Report (*UN Convention Against Torture: Discrepancies in Evidence Given to the Committee About the Use of Prohibited Interrogation Techniques in Iraq*), proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 19 read and agreed to.

Annex read and agreed to.

Several Papers were ordered to be appended to the Report.

Resolved, That the Report be the Twenty-eighth Report of the Committee to each House.

Ordered, That the Chairman make the Report to the House of Commons and that Baroness Stern make the Report to the House of Lords.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till Monday 21 July at 3.30pm.]

List of Witnesses

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Tuesday 29 April 2008

Mr Kevin Laue, Redress, and **Mr Phil Shiner**, Public Interest Lawyers

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List of Written Evidence

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Note:

Evidence received by the Committee but not printed can be inspected at the Parliamentary Archives, email: archives@parliament.uk

Written Evidence

1. Letter from the Chairman of the Committee to the Rt Hon Des Browne MP, Secretary of State for Defence, dated 22 May 2007

Recent Court Martial: Payne & Ors

The UN Convention Against Torture: Nineteenth Report of Session 2006-05

The facts in this case and the incidents surrounding the death of Baha Mousa, an Iraqi civilian who died in the custody of the Queen's Lancashire Regiment, have been widely reported.

The Joint Committee on Human Rights has recently had the opportunity to consider the evidence presented to the Court Martial and the observations of Judge Advocate McKinnon. The Committee considers that the evidence heard during the Court Martial raises several issues about the United Kingdom's compliance with the UN Convention against Torture ("UNCAT") and calls into question some of the evidence we received from the Government in the course of recent UNCAT inquiry. We would be grateful if you could further explain the Government's views on a number of matters.

(a) Sanctioning the "conditioning" of detainees

Sentencing Corporal Payne, Judge Advocate McKinnon said that he would not have committed the offence of inhuman treatment "but for the exceptional position in which he was placed, being required to condition the prisoners under his supervision." The situation in Basra in 2003, in which conditioning was standard practice for the Queen's Lancashire Regiment, was evidence of "a serious failing in the chain of command all the way up to Brigade and beyond."²⁸

We are deeply concerned that it became common ground in this case that the use of hooding and stress positioning of detainees by the Queen's Lancashire Regiment had been sanctioned by Brigade Headquarters, including by the Legal Officer, Major Clifton. In the course of our inquiry on the UN Convention Against Torture ("UNCAT"), we were told by Lieutenant General Brims that troops on the ground would understand that the use of the "five techniques", including the use of hooding and stress positioning, was prohibited. We were told that following allegations made in respect of operations in Iraq, a "very clear direction" had been given that hooding should not take place, either in interrogation or elsewhere.²⁹

The evidence of Major Anthony Royce in this case that he understood that the use of "conditioning", including the use of hooding and stress positioning, had been approved by his brigade headquarters, and specifically by the Legal Officer, suggests that there is some need for a clear direction about the humane treatment of detainees to be given at a senior level and throughout the ranks. We note that the Judge Advocate accepted that Major Royce's evidence was "remarkably credible".

²⁸ Daily Telegraph, 'Britain's first war criminal jailed for one year; 1 May 2007

²⁹ Nineteenth Report of Session 2005-06, The UN Convention against Torture, paras. 83-85

[SECTION REDACTED]

1. I would be grateful if you could explain the apparent discrepancy between the evidence presented to our recent inquiry that the use of hooding, stress positions and sleep deprivation has been prohibited by an Army Directive since 1972 and the evidence presented to the Court Martial, and accepted by the Crown, that the use of hooding and stress positions was part of standard operating practice by the Queen's Lancashire Regiment in 2003 and that that practice had been sanctioned by their Brigade Headquarters and specifically, by the Legal Officer attached to the Brigade.

2. [SECTION REDACTED]

3. [SECTION REDACTED]

If so, in what circumstances?

Whether the Government intends to take any further steps to revise the training, guidance and procedures for the treatment of detainees and internees in light of the evidence in this case that army personnel across the ranks, and at different levels of seniority, proceeded on the understanding that the unlawful treatment of detainees had been authorised by their superiors?

If so, what steps do the Government intend to take?

In particular:

Does the Government intend to take any particular steps to revise the training issues to Legal Officers; and if not, why not?

[SECTION REDACTED]

(b) Training and guidance on human rights standards

We welcome the recognition of General Sir Richard Dannatt that the detainees in this case "were subjected to a conditioning process that was unlawful" and that all British military personnel deployed on operations must be in no doubt about their duty to behave in accordance with the law. We consider that it is entirely unacceptable that, as he explains, it appears that this duty was "forgotten or overlooked" in this case.³⁰

4. I would be grateful if you could tell us:

Whether you intend to reconsider our recommendation in our Report on the UN Convention Against Torture ("UNCAT"), that the Government should expressly accept the application of all the rights and duties in the Convention Against Torture to territory under the control of UK troops abroad?

To what extent the current training, guidance and procedures referred to in the Government's response to our Report on UNCAT are adequate to meet the risk that detainees and internees may be subject to torture or inhumane treatment?

³⁰ Press Statement, Defence News, 30 April 2007; <http://www.mod.uk/DefenceInternet/DefenceNews/DefencePolicyAndBusiness/GeneralDannattSpeaksAfterCloseOfCplPayneCourtMartial.htm>

Having reviewed the Judge Advocate's observations in summing up in this case, we are concerned about the uncertainty exhibited by the troops in this case as to who, precisely, had responsibility for ensuring that the detainees in this case were treated humanely during their detention and during "tactical questioning".

5. I would be grateful if you could explain the Government's view that the current training, guidance and procedures applicable to the treatment of internees and detainees clearly identifies those individuals (or the individual) responsible for ensuring that the treatment of internees or detainees is lawful; and that that guidance and training ensures that those individuals are aware of the scope of their duty to protect their detainees from inhuman treatment.

In the Government's response to our UNCAT Report, the Lord Chancellor told us that recent changes to training will be evaluated to confirm that they remain fit for purpose, and training will be subject to ongoing regular review to ensure it remains aligned with any future lessons learned.³¹

6. What has been the result of the evaluation of the recent changes to the training offered to armed forces personnel?

7. If it is the Government's view that the current training and guidance remains "fit for purpose", please give a full explanation of your reasons for that view.

(c) Effective investigation and prosecution

In our UNCAT Report, we noted that a review by Her Majesty's Inspectorate of Constabulary was under way to assess whether sufficient resources and forensic skills were available to carry out effective investigations. The Chief of the General Staff recently noted that his predecessor had commissioned a body of work to identify lessons to be learned from this and other cases involving the deliberate abuse of Iraqi civilians. He indicated that this will report shortly and its findings will be made public.

8. I would be grateful if you could tell us:

What has been the result of each of these reviews and when will these results be published?

What further steps does the Government intend to take to ensure that the investigation of claims of abuse by Armed Forces personnel of the human rights of persons detained or interned are pursued with adequate diligence?

We welcome the recognition by the Chief of the General Staff that although this court martial has ended, this does not mean the incidents surrounding the death of Baha Mousa are closed. We note the conclusion of Judge Advocate McKinnon that some soldiers on duty while the detainees were beaten and ill-treated were "not charged with any offence simply because there is no evidence against them, as a result of more or less obvious closing of ranks"³². Despite the progress of these proceedings, over three years on, the family of Baha Mousa are no closer to knowing who was responsible for his death.

³¹ Thirtieth Report of Session 2005-06, Appendix 1

³² Transcript, Decision of Judge Advocate McKinnon, 13 February 2007, Page 22.

9. We note that the Army Prosecuting Authority is considering whether further investigation or action in this case is appropriate. I would be grateful if you could inform us of the outcome of this exercise when it is complete.

In light of their respective responsibilities in respect of the prosecutions in this case and the Government's policy on human rights, I have copied this letter to the Attorney-General, Lord Goldsmith, and Baroness Ashton at the Ministry of Justice.

I would be grateful for your response by 15 June 2007

**2. Letter from the Chairman of the Committee to the Rt Hon Lord Goldsmith QC,
Attorney General, dated 14 June 2007**

Human Rights in Iraq: Legal Advice

The Joint Committee on Human Rights recently sent you a copy of our letter to the Secretary of State for Defence on the recent Court Martial *Payne & Ors*. In that letter, we asked the Secretary of State to provide further information in respect of the evidence which emerged during that trial and to explain some inconsistencies with the evidence we received during our inquiry on the UN Convention against Torture ("UNCAT").

We would be grateful if you could provide us with some further information in light of your recent letter to the Independent, dated 30 May 2007, dealing with the human rights standards applicable to detention by our armed forces abroad.

a) The Applicable Human Rights Standards

We note that there was extensive coverage of the content of several "previously confidential e-mails" in the Independent on 29 May 2007, suggesting that your legal advice to the Permanent Joint Headquarters in Iraq had been to adopt a "pragmatic" approach when handling prisoners and that it was not necessary to follow the "higher standards" of the Human Rights Act ("HRA").

We note your response, which explains that you accept that the substantive standards of treatment laid down in Articles 2 and 3 ECHR apply to the treatment of those held in a detention facility by UK forces. You explain that you consider that the standards of the Geneva Convention and domestic law provide "no lower a standard of protection" than that guaranteed by the ECHR and the HRA. We also note the distinction you draw between the application of these standards and the application of the HRA.

We have not seen the e-mail correspondence which forms the basis of the Independent's report. However, we note that in his summing-up in *Payne & Ors*, the Judge Advocate referred to detailed e-mail correspondence between Ms Rachel Quick, Legal Adviser and Lt Col. Mercer about the correct legal position and the application of human rights standards. The Judge Advocate notes "it can be seen...that there was a problem identified even before the invasion of Iraq with the legal adviser [Ms Quick] perhaps taking a robust attitude towards it". The Judge also refers to Ms Quick suggesting that Lt Col. Mercer should consider "putting himself up to be the next Attorney General".

We would be grateful if you could provide us with copies of the transcripts of any evidence given by former-Major Clifton and by Lt Col. Mercer during the Court

Martial and any witness statements made in those proceedings by Ex-Major Clifton, Lt Col. Mercer, Ms Rachel Quick and Major Royce, along with any exhibits to those statements.

We would also be grateful if you could provide us with copies of some of the named documents referred to by the Judge Advocate in his summing up on 12 March 2007: (i) the document referred to as FRAGO 163 (Bundle Reference: Members 7 (Page 1017 on)); (ii) the document(s) at Members 7, pages 270 – 277; (iii) FRAGO 29 and (iv) “Major Royce’s Own Document” or “the IQLR Internment Procedures Document” (Bundle Reference: Peebles Bundle, Tab 2).

Although we have not yet seen this broader documentation or the evidence surrounding it, we would be grateful if you could provide further information in response to the following questions arising from your letter to the Independent and the evidence produced during the recent court martials at Bulford.

- 1. At the time of the invasion of Iraq in 2003, did you consider that the provisions of the ECHR applied to those detained by our armed forces abroad?**
- 2. Do you now accept, in light of the decision of the House of Lords in *Al-Skeini v Ministry of Defence*, that your previous view was wrong?**
- 3. Were UK troops in Iraq provided with any training or guidance about the requirements of the ECHR?**
- 4. Are the reports in the Independent that your initial advice implied that there were “higher standards” to be applied by the protection of the ECHR and HRA incorrect? If so, please explain why.**
- 5. If you are satisfied that the standards of the Geneva Conventions and domestic law are of “no lower a standard” than the protection offered by Articles 2 and 3 ECHR and the HRA, please provide reasons for your view;**
- 6. Are there any respects in which the applicable standards are in your view higher under the ECHR than under the Geneva Conventions?**
- 7. Did you advise that a mechanism for reviewing the detention of civilians was not necessary?**
- 8. Did you, or any member of the UK Government, block a proposal from within the armed forces to set up a mechanism for reviewing detention of civilians headed up by a UK judge?**

It appears from the reports we have seen and from the evidence to the Court Martial, that there has been significant confusion and misunderstanding about the application of human rights standards to the holding of prisoners, internees and detainees by our armed forces in Iraq, including about the legality of hooding and the use of stress positions.

- 9. We have asked the Secretary of State for Defence to provide us with his view on whether the training currently provided to the armed forces on the application of human rights standards is fit for purpose. We would be grateful if you could also give**

us your view on this training and on the training provided to those charged with providing and communicating legal advice on the application of human rights standards to our armed forces.

If you are satisfied that this training is adequate, we would be grateful for your reasons.

We have urged the Government to reconsider our recommendation that the Government expressly accept that the rights and duties in UNCAT should apply to territory under the control of UK troops abroad.

10. In December 2005 Condoleeza Rice made clear that the U.S. Government accepts that the UN Torture Convention applies to the actions of the US military in Iraq. In light of the position of its main coalition partner, does it remain the policy of the UK Government that the Torture Convention does not apply in Iraq?

11. Do you agree that the express application of UNCAT standards could help to avoid the confusion which has arisen in this case?

If not, why not?

b) Further Investigation

In your letter to the Independent, you confirmed your public commitment to the need to investigate why legal advice was allegedly given within the Army that certain techniques, including hooding and stress positions, were legitimate to be used in theatre. We have asked the Secretary of State for Defence to provide us with further information on the ongoing reviews within the Ministry of Defence and by the Army Prosecution Authority. Neither of these reviews focus specifically on the advice given or the processes which led, first, to the giving of legal advice so clearly incompatible with the UK's international human rights obligations and, second, to such advice being relied upon by senior members of our armed forces.

12. I would be grateful if you could explain the steps being taken by the Government, whether within your Office or otherwise, to investigate how Major Royce came to believe that the use of hooding and stress positions were authorised by his Brigade Headquarters.

13. If no investigation is ongoing, please explain why the Government does not consider one necessary.

14. If an investigation or investigations are ongoing, we would be grateful if you could tell us: a) who is conducting these investigations; b) when they are expected to be complete and c) when the results will be published.

15. If any investigation is complete, we would be grateful if you could explain its outcome and provide us with any published results or concluding reports.

In light of their respective responsibilities, I have copied this letter to the Secretary of State for Defence; Baroness Ashton at the Ministry of Justice and James Arbuthnott MP, Chairman of the House of Commons Select Committee on Defence.

I would be grateful for your response by 22 June 2007.

3. Letter from the Rt Hon Des Browne MP, Secretary of State for Defence, to the Chairman of the Committee, dated 15 June 2007

Thank you for your letter of 22 May 2007 regarding the recent court martial of Corporal Payne and others. You, rightly, have sought clarification and explanation of the Government's position on a number of matters arising from the trial, including the sanctioning of illegal conditioning practices.

I fully intend to provide you with the explanation that you seek, but I am currently unable to do so for two reasons. First, the legal process concerning Cpl Payne is not concluded. There is a statutory review process under the Army Act 1955 that is not yet complete, and thereafter he may appeal. Further consideration is also being given by the investigating authorities and the Army Prosecuting Authority to whether there should be any further investigations into the circumstances considered at the recent court-martial. So you will understand that we still need to be careful what is said at this stage. Second, as you refer to in your letter, the former Chief of the General Staff, General Sir Mike Jackson, commissioned Brigadier Aitken to conduct a review of the lessons to be learned from the death of Baha Musa and other cases involving the abuse of Iraqi civilians. This report is due to report shortly and its findings will be made public. As I am sure you will understand I would not wish to pre-judge his conclusions. I will of course send the Joint Committee of Human Rights a copy of this report when it is published and respond then to any issues contained in your letter that it does not address.

I am of course happy to discuss further should this be helpful.

4. Letter from Phil Shiner, Solicitor, Public Interest Lawyers, to the Chairman of the Committee, dated 22 June 2007

Attorney-General's Advice on Legal Standards in Iraq

I am writing to you on the subject of the legal advice given by the Attorney-General at the outset of the invasion of Iraq as to the applicable legal standards to be applied by UK forces to Iraqi prisoners of war, internees and detainees.

The points I make, and questions I pose, all arise from the transcript of the proceedings of the court martial at Camp Bulford into the death of Baha Mousa, and the abuse of ten other Iraqi civilians. I know that you are aware of the issues arising from this court martial. You may also be aware of the case of *R (on the application of Al Skeini and others) v The Secretary of State for Defence* which concluded in the House of Lords on 13 June with a judgment that the HRA/ECHR did apply in S E Iraq when UK forces had Iraqis in a detention facility. As the solicitor in that case I have been invited to make representations to the Secretary of State for Defence by 30 June. Thereafter he will decide by the parliamentary recess whether there should be an independent inquiry into issues arising from the court martial in the Mousa incident. If he does not volunteer an independent inquiry the matter will return to the Divisional Court for it to decide whether such an inquiry should be held.

Some of the most troubling aspects of the court martial proceedings is clear evidence from various witnesses that appears to establish as follows:

1. Mousa and the other ten detainees were hooded, stressed, deprived of sleep and deprived of food. One detainee was subjected to noise as a means of “breaking him”.
2. Interrogators and Tactical Questioners were trained at Chicksands to hood, stress and sleep deprive.
3. Hooding reflected verbal and written NATO policy.
4. There was a written policy on hooding apparently in at least two documents, one being an army doctrinal pamphlet and the other according to Colonel Nicholas Baker (13 December 2006 at page 80) being Joint Warfare Publication 1-10.
5. All battle groups were routinely hooding, stressing and cuffing.
6. Even after Mousa’s death there was still a debate at the “highest level” as to whether hooding was lawful.
7. As late as May 2004 civil servants at Permanent Joint Head Quarters (PJHQ) were saying they had only heard of the 1972 Heath Government ban on these five techniques two weeks ago and were endeavouring to obtain the advice.
8. Various senior military officers and civil servants had been operating on the basis that the 1972 ban was not a prohibition of these techniques being used anywhere in the world, but instead a human right not to be so treated which applied only to the territory of the UK and Northern Ireland.

Thus, it is of the utmost importance to examine closely and by reference to the evidence what was happening at a senior level within the military, civil service and government. How could the UK have gone into Iraq with an apparent policy of reintroducing these techniques?

It is important to focus on the evidence of Lieutenant Colonel Mercer on 8 December 2006 at pages 7-72 (which I attach). Mercer was in charge of Army Legal 1 Division who were the relevant division at the outset of the invasion and subsequent occupation. The following points emerge:

- He wanted a Detainee and Internee Management Unit (DIMU) to be put in place based on a model from East Timor “which had got a tick plus plus from the UN saying that it was in accordance with the highest human rights standards” (pp23-24).
- Concerning the moot point as to whether the HRA/ECHR applied he took the view that the “obvious default setting is to go for the highest standard” (p18).
- In March 2003 on his visit to the POW camp he saw approximately 40 Iraqi prisoners “kneeling in the sand, cuffed behind their backs, in the sun with bags over their heads and there was an interrogation tent next to the prisoners with a generator running outside” (p11).
- He took the view as a lawyer this violated the law of armed conflict and he took his concerns to the General Officer Command (GOC) (p11). The intelligence branch responded that hooding in particular “was part of their doctrine” (p12). Later in the

transcript he confirms again that he was told hooding and stressing “is in accordance with British Army doctrine on tactical questioning” (p26). Further he was shown a written memorandum that was the Intelligence Corps doctrine (p16).

- At the time the Red Cross formally complained to the British Government and a meeting took place with the Red Cross at the UK’s Theatre Internment Facility at Umm Qasr (Camp Bucca) (p13).
- His objective was to put the DIMU “in place in Theatre so that we had a Detainee and Internee Management Unit headed up by a UK judge to review it –“.
- In response to these concerns eventually Mercer is written to by Miss Rachel Quick OBE and the following passage sets out in detail the position:

2 "Dear All

3 "Thanks for copying me in on this. I've arranged
4 for the FCO Legal Adviser (Gavin Hood) to come up to
5 PJHQ so we can only discuss many of these issues. We
6 hope to have a completely translated version of the
7 I raqi penal code tomorrow ..."

8 She goes on:

9 "On the application of ECHR, Vivien's letter dated
10 19 March ..."

11 I think we have just heard his statement
12 (inaudible):

13 "... (copied to NCC Legal Cell) which records the
14 advice of the Attorney General (supported by Prof
15 Greenwood and Jamie Eadie) makes the following points:

16 "During Phase III(b) Phase III, *lex specialis*
17 operates to oust ECHR. At PJHQ we only intend to
18 concentrate on the impact of GC III/GC IV Hague Regs
19 ..."

20 That is the Geneva Convention:

21 "... when providing guidance to TELIC Phase IV
22 operations. I would refer to the AG's advice (Nicholas

23 if you do not have a copy, please ask Neil to send you
24 a copy). This concluded the better view was that the
25. HRA was only intended to protect rights conferred by the
1 Convention and the court must look to international law
2 to determine the scope of those rights.

3 "If international law applied, the *lex specialis* to
4 the exclusion of ECHR then those Articles could not
5 confer a right which HRA would render enforceable. For
6 your purposes, I would suggest this means no requirement
7 for you to provide guidance on the application of
8 HRA/ECHR. I hope this is clear."

9 She is telling you: "Do not worry your head about
10 it".

11 A. That is correct.

12 Q. "We have the Attorney General's advice"?

13 A. Yes, but we disagreed with that.

14 Q. In the "PS" it says:

15 "Nicholas: If the [Attorney General] and Prof
16 Greenwood are wrong on this advice, perhaps you could
17 put yourself up to be the next Attorney General!!"

18 And I think Professor Greenwood was the academic --
19 THE academic -- who supported the view of the Attorney
20 General on the legality of the war, is that right --

- In terms of pushing for the highest standards to be applied he was getting political and legal resistance from Rachel Quick, the MoD, PJHQ, etcetera (p32).

I attach my recent exchange of letters with the Attorney-General and Treasury Solicitors on his behalf³³. You will note that the Attorney-General refuses to make his position clear on any of the pressing questions raised, hiding behind the protocol of legal privilege in circumstances where I, quite properly, need to know the answers to these questions.

³³ Not printed here.

It is my teams' position that the Attorney-General should have advised that, notwithstanding, the question of statutory interpretation as to whether the HRA applied (a point now confirmed by the House of Lords), nevertheless the highest standards applied in any event to the UK's detention policy from a combination of all of the following:

1. Geneva Convention III to Prisoners of War
2. Geneva Convention IV and Additional Protocol I to Civilians
3. The Convention against Torture to all
4. The International Criminal Court Act 2001 to all
5. The Criminal Justice Act 1988 to all
6. The 1972 Ban to all

If he had so advised, hooding and the other techniques would have been prohibited in the relevant military orders to all battle groups, and many Iraqis, including Mousa who was hooded and stressed for most of the 36 hours he survived, would not have been subjected to these practices (I do have a one minute video of these practices being applied to the detainees but I am not permitted to use this video for any purpose other than the House of Lords Proceedings). I should add that Mercer reported seeing Iraqis hooded using "old plastic cement bags" and that various witnesses refer to up to three sandbags being used. All this in temperatures of up to 60°C and in conditions of exposure to the direct rays of the sun at the Theatre Internment Facility (Camp Bucca). Finally I should add that the evidence makes it patently clear that hooding was not being used for security reasons but as part of the conditioning process to maintain the shock of capture and in the Mousa incident as a blatant form of punishment as detainees were hooded after tactical questioning had finished.

Accordingly there is a most pressing question as to which of three scenarios was in play:

Scenario One

In this scenario the Attorney-General was not properly instructed when asked to advise on the applicability of the HRA/ECHR. He did not know and had no way of knowing that hooding, stressing and sleep deprivation were being trained and the policy written down and applied by all battle groups. He did not know of Mercer's specific concerns which were not communicated to him in any way. He did not know of the confusion at the highest level as to whether hooding was lawful. He did not know of the ignorance of the legal position on the 1972 ban at the highest level including at PJHQ. He did not know and could not have known that the 1972 ban was being treated as not applying extraterritorially. In this first scenario although he advised that the HRA/ECHR did not apply to the UK's detention policy nevertheless he did advise that this should make little difference to the relevant legal standards which, naturally, combined could never have allowed hooding. This first scenario causes a number of probing questions to be asked of others but would exonerate the Attorney-General of any blame.

Scenario Two

In this scenario he was not instructed about what was going on as set out in scenario one. Neither could he have known of any of the factors set out in scenario one. However in this scenario he did not advise as Mercer thought was appropriate that the highest standards applied. In this scenario he may not have advised:

- That the 1972 ban applied.
- That the Convention against Torture applied.
- That Geneva Convention IV Additional Protocol I applied.

Accordingly Vivian Rose's direction to Mercer that "at PJHQ we only intend to concentrate on the impact of GCIII/GCIV" (with no mention even of Additional Protocol I) is highly indicative of the position. It would seem in this scenario that having advised that lower standards applied it was relatively easy for those in positions of authority and military command to interpret these lower standards as not specifically prohibiting hooding. In this scenario the Attorney-General shares a high degree of blame for not putting in place the appropriate legal framework.

Scenario Three

In this scenario the Attorney-General was properly instructed (as one would expect) and did not advise on the HRA/ECHR applicability point in a vacuum. He knew when he was instructed (and certainly was told of Mercer's concerns) of the specific operational implications of his advice. I need say no more as to the implications of this.

I have serious concerns that every effort is being made by the Attorney-General's office to refuse access to his legal advice and any insight into what his position was at the time. It is simply not good enough for the Attorney-General by clever use of the present tense to lead us to believe that what his position may be now was in fact his position at the time. We need to know what his position was in March 2003 and onwards. I very much hope that your committee will take this important opportunity of pressing the Attorney-General on these issues which for my part raise the most profound constitutional issues.

I am of course available to your committee if in any way I can be of further assistance.

5. Letter from the Rt Hon Lord Goldsmith QC, Attorney General, to the Chairman of the Committee, dated 22 June 2007

HUMAN RIGHTS IN IRAQ: LEGAL ADVICE

Thank you for your letter of 14 June. I am grateful for the opportunity to explain my position, and that of the Government, on these important issues, and to correct some of the inaccurate and unfounded media reports. I enclose a note which responds to the specific questions in your letter.

I also enclose transcripts of the testimony of former Major Clifton and Lt Colonel Mercer³⁴, and IQLR Internment Procedures Document, July 2003, which were all presented as evidence during the Court Martial of Corporal Payne and others. As the Committee will be

³⁴ Not circulated - available from Committee staff.

aware the Royal Military Police (RMP) are, as is usual in such cases, undertaking a formal criminal review to assess whether there are any viable lines of enquiry which can be pursued to bring to justice those who killed Mr Baha Mousa and mistreated other Iraqis whilst they were detained by the British Army in Iraq.

The RMP and the Army Prosecuting Authority (APA) have strongly expressed the view that it would be inappropriate at this time to release witness statements, associated exhibits and other documents (not given in evidence during the trial) which are being considered as part of the police formal criminal review of the case. The police anticipate that their review will be completed by 16 July 2007, at which time the police and the APA should be in a position to know whether there are any viable criminal lines of enquiry that can be realistically pursued. In the meantime the RMP are taking steps to request the permission of individual witnesses to disclose their statements at the close of the formal review or any criminal investigation or proceedings that may follow.

I am copying this letter and enclosed note to the Defence Secretary, Baroness Ashton and Mr James Arbuthnot MP.

Note from the Attorney General

1. This note responds to questions raised in the letter from the Chair of the Committee dated 14 June 2007. This refers to reports in *The Independent* on 29 May 2007 about legal advice supposedly given about the application of human rights standards to the treatment of prisoners in Iraq. These reports in turn referred to evidence given in the trial of *Payne & Ors*.
2. Legal advice given to Government on these issues (whether by the Law Officers or any other lawyer) is of course confidential and covered by legal professional privilege, like all legal advice. Moreover, in accordance with the long-standing convention set out in the Ministerial Code, neither the fact that the Law Officers have (or have not) advised, nor the content of the advice, may be disclosed outside Government without their authority.
3. For these reasons there are, quite properly, limits on what can be said about the substance of the advice which the Government has received on these issues, and whether or not any advice was given by the Law Officers. This makes it all the more difficult to respond to speculation and supposition in the press about what advice may have been given. At worst there is a risk that any journalist can, by making false and unsubstantiated claims about legal advice the Government is said to have received, force the Government into revealing the true, privileged, legal advice in order to correct the false story. That would be a wholly unacceptable situation and a very bad precedent.
4. However, I have made it clear that much of the public comment about the legal advice supposedly given in this case, including the *Independent* story, was wildly inaccurate and without foundation. I stressed this in my letter published in *The Independent* on 30 May.
5. Again without waiving privilege, I would make the following points.
 - In my various public statements I have made clear my views on the need for humane treatment of detainees and my strong support for human rights legislation in general. I have also been an outspoken critic, both here and in the USA, of the system of

detention at Guantanamo Bay, for example. My own clear position, and that of the Government, is that our soldiers are not permitted to torture detainees, nor subject them to cruel, humiliating or degrading treatment, anywhere in the world. If they do, it will be a crime, and if proved they will be punished.

- Our soldiers are bound to act in accordance with the Geneva Conventions and the UN Convention against Torture. If they do not, they are liable to prosecution under our criminal law, which prohibits the torture of detainees or subjecting them to cruel, humiliating or degrading treatment wherever they operate. There has never been the slightest doubt about that. Our soldiers are always subject to military law and our domestic criminal law, wherever in the world they are serving.
- [Q 10 and 11] So far as UNCAT is concerned there is no doubt about our obligation to criminalise torture irrespective of where and by whom it is committed. We have done that. So it is clear that any conduct constituting torture contrary to UNCAT is prohibited under our criminal law.
- [Q 4-6] I do not believe that the standards applicable to the physical treatment of detainees are “higher” under the ECHR/HRA than under the Geneva Conventions, UNCAT and domestic law. As stated, the position is that detainees may not be subjected to any form of cruel, humiliating or degrading treatment. We do not take the view that there is any form of treatment which is permitted under the Geneva Conventions but prohibited by the ECHR.
- [Q 1 and 2] I stated in my letter to *The Independent* that I agreed that the substantive standards of treatment laid down in Articles 2 and 3 of the ECHR apply to those held in a British controlled and run detention facility in Iraq. It was perfectly proper for the Government to argue the *Al Skeini* case as it did in the Divisional Court, but you will be aware that the Government conceded and did not further contest the application of the ECHR in those specific circumstances before either the Court of Appeal or the House of Lords. I have made clear that my personal view was always in line with that concession.
- The discussion of the evidence given in the *Payne* court martial has been confused and has led to the drawing of wholly unfounded conclusions. The transcript makes clear that the emailed legal advice from Rachel Quick (then PJHQ legal adviser) on 24 March 2003 was about “structures” and “whether in setting up structures they should be ECHR compliant”. Lt Col Mercer never suggested that Ms Quick’s email of 24 March was directed to the physical treatment of prisoners of war or detainees, or the application of Articles 2 and 3 of the ECHR (as has been assumed by some). Importantly, the transcripts show her advice to assume that the 3rd and 4th Geneva Conventions, and the Hague Regulations, applied, as of course they plainly did.
- [Q7 and 8] The question of mechanisms for reviewing the detention of civilians is for the MOD. For the reasons explained, I am not able to comment on what advice (if any) I may have given. The transcript shows that a review system was put in place very early in the campaign. Those continuing procedures under Article 78 of the 4th Geneva Convention for reviewing the detention of civilian security internees have been closely considered by the English courts in the *Al Jeddah* case. The UK procedures have an

administrative board that does not include a judge. The Court of Appeal has confirmed that the procedures are compatible with our international obligations.

6. Responsibility for training and guidance given to our armed forces on these issues is a matter for the Secretary of State for Defence, who will respond on those issues. [Q 3 and 9]

7. Similarly, questions concerning any further investigation or review are for the Secretary of State for Defence. I have indicated my own view that there is a need to review the question of what advice or guidance (if any) was given within the Army about the treatment of detainees, including the use of techniques such as hooding and stress positions. As I said in my letter to *The Independent*, “I have publicly made clear the need to investigate why, as it emerged in the Baha Mousa trial, advice was allegedly given within the Army that certain techniques, including hooding and stress positions were legitimate to be used in theatre, even though apparently outlawed in 1972”. [Q 12-15]

6. Letter from Edward Adams, Human Rights Division, Ministry of Justice to Ms Silvia Casale, Chairperson, Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), OHCHR, dated 29 June 2007

I am writing to report on progress towards the establishment of the UK National Preventive Mechanism (NPM) under the Optional Protocol to the Convention Against Torture.

Arrangements are well advanced. Officials here at the Ministry of Justice today met representatives of the various inspection bodies expected to compose the UK NPM, to reach agreement on the NPM's composition and working methods. Ministers intend as soon as possible to make a formal announcement to Parliament to say which bodies have been designated to constitute the NPM, and that the NPM may be considered to have commenced operations in its own right.

As you know, the UK was unable formally to establish its NPM by 22 June 2007 – the deadline laid down at Article 17 of the Protocol: i.e. one year after the Protocol's entry into force.

However, the delay is expected to be relatively brief, and will cause no shortfall in existing protection of persons held in detention in the UK. As you know, the UK already has an extensive array of well-established independent inspection mechanisms in full operation, and their activities will continue as usual.

I very much hope that the Ministerial announcement will be made before Parliament rises for the Summer recess.

7. Letter from Gareth Buttrill for the Treasury Solicitor, to the Chairman of the Committee, dated 24 July 2007

R v Payne and Others – evidence before the Court Martial concerning legal advice on the application of the ECHR

The Treasury Solicitor is instructed by the Secretary of State for Defence.

For your information, I enclose a copy of my letter to Public Interest Lawyers of today's date.

Letter from Gareth Buttrill for the Treasury Solicitor, to Public Interest Lawyers, dated 24 July 2007

R v Payne and Others — evidence before the Court Martial concerning legal advice on the application of the ECHR

Your letter dated 22 June 2007 to the Chair of the Joint Committee on Human Rights enclosed an extract from the court-martial transcript in *R v Payne and Others*. The extract concerned the contents of an email from Ms Rachel Quick (Legal Adviser to the Permanent Joint Headquarters) about the application of the ECHR and HRA.

The Judge Advocate's summing up in the trial shows the date of Ms Quick's email to have been 24 March 2003. My client has noted that your recent representations to the Secretary of State dated 10 July 2007 do not dispute the accuracy of this date.

It follows that your letter wrongly suggested to the Joint Committee that an email sent on 24 March 2003 was in response to subsequent events that your letter specifically identified, namely -

- (1) Lt Col Mercer's visit to "the POW camp" in March 2003, a visit that according to his evidence was on 29 March 2003;
- (2) concerns Lt Col Mercer expressed to the GOC about breaches of international law following that visit that were, according to his evidence, contained in a written memorandum dated 29 March 2003;
- (3) a meeting with the ICRC that, according to Lt Col Mercer's evidence, took place not long after 29 March 2003;
- (4) Lt Col Mercer's proposal for a DIMU based on an East Timor model that, according to his evidence, was discussed in meeting in Iraq on 2 April 2003, and then set out in his paper dated 16 April 2003;
- (5) Lt Col Mercer's plans for a DIMU headed by a UK judge that according to his evidence, was raised in his minute of 16 April 2003.

Similarly inaccurate accounts of the trial evidence about the nature, context and timing of Ms Quick's email have also been repeated in various articles and press reports, including -

- (1) the *Guardian* on 14 June 2007, where you wrote that

"In March 2003 Nicholas Mercer wrote to his bosses objecting to the hooding techniques but was sharply rebuked. He was told that the Attorney General had advised that the Human Rights Act did not apply but much lower legal standards did, and that if he thought he knew better he should apply for the Attorney General's job."

- (2) the *Independent on Sunday* on 1 July 2007, where Andrew Johnson, in an article, also quoting you, supported his allegation that either Lord Goldsmith or the MOD "gave the green light to abuse detainees in Iraq" by asserting that

“Lt-Col Mercer had seen about 40 hooded prisoners kneeling in the hot sun with their hands cuffed behind their backs in March 2003, six months before Baha Mousa died. He considered what he saw to be illegal and told his superiors. He got an email from Ms Quick saying the Human Rights Act did not apply in Iraq and referred to advice given by the Attorney General.”

As indicated above, the court-martial heard evidence that Lt Cot Mercer’s concerns relating to 40 hooded prisoners arose on 29 March 2003, and that his written memorandum was the same date, while Ms Quick’s email was dated 24 March.

My client wishes urgently to know of your plans to inform the Joint Committee Chairman of the inaccuracy concerning Ms Quick’s email.

A copy of this letter goes to the Chairman of JCHR.

8. Letter from the Chairman of the Committee to Edward Adams, Human Rights Division, Ministry of Justice, dated 23 July 2008

Thank you for sending me a copy of your letter to Silvia Casale, the Chairperson of the UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, about the UK National Preventive Mechanism (NPM) under the Optional Protocol to the Convention Against Torture.

In your letter, you state that the UK was “unable formally to establish its NPM by 22 June 2007 – the deadline laid down by at Article 17 of the Protocol”. I would be grateful if you could inform the Joint Committee why this deadline was missed and what were the practical implications of failing to meet the deadline.

I would be grateful if you could reply by Friday 31 August.

9. Letter from Gareth Buttrill for the Treasury Solicitor, to the Chairman of the Committee, dated 6 August 2007

R v Payne and Others – evidence before the Court Martial concerning legal advice on the application of the ECHR

I am instructed by the Secretary of State for Defence and I write with reference to the letter from Public Interest Lawyers (“PIL”) to you dated 22 June.

My client has had concerns regarding inaccuracies in that letter and I therefore wrote to PIL on my client’s behalf on 24 July to correct them (copied to you). PIL responded on 26 July but did not, as far as I am aware, send a copy of their letter to you. I am now enclosing a copy of it for your information and I would ask you to note the first (substantive) paragraph of the letter. In the circumstances, please could you remove the letter from PIL dated 22 June from the website as soon as possible.

I am sending a copy to PIL for their attention.

Letter from Public Interest Lawyers to Gareth Buttrill, The Treasury Solicitors, dated 26 July 2007

R v. Payne and Others – evidence before the Court Martial concerning legal advice on the application of the ECHR

I refer to your letter of 24 July.

I made clear at the meeting with Martin Hemmings and others on 3 July 2007 that I had got the point fairly and squarely that the email from Rachel Quick of 24 March 2003 precedes Lieutenant Colonel Mercer's specific complaint to GOC, NCC, PJHQ and others about hooding and other substantive breaches. I also made clear that I would say nothing further in public about this dispute between Lieutenant Colonel Mercer and others, including Rachel Quick, until I was absolutely sure of the position. A retraction was demanded of me by Mr Hemmings. My response – which was an entirely reasonable – was that I could not go further than I had gone as I did not have the bundles or access to Lieutenant Colonel Mercer to make sure of the precise position.

The questions to be addressed in due course by an independent inquiry include the following:

1. Was Lieutenant Colonel Mercer complaining of only procedural breaches (as suggested by the Attorney-General in his evidence to the Parliamentary Joint Committee on Human Rights recently) or was Mercer complaining about substantive breaches too (i.e. hooding, stressing in the sun, noise)?
2. If he was complaining of substantial breaches who did he complain to, how, and in what terms?
3. What was the response of each body receiving that or other complaints (from Lieutenant Colonel Mercer or otherwise) of substantive breaches?
4. Specifically did PJHQ know (or ought they to have known) of these substantive breach issues?
5. What, if any, action did PJHQ take to prohibit these practices?

I have reviewed again the evidence of Lieutenant Colonel Mercer to the Bulford Court martial. It is replete with references to documents which I do not have, or with tiny extracts from key documents which are read out to the court martial but not typed into the transcript.

It is absurd for your client (and I presume that Mr Hemmings now stands in his place) to seek to litigate these issues of fundamental importance in hostile correspondence. I note also that these questions are being raised by you in the context not of any particular litigation, but as preliminary airing of issues that will have to be dealt with fully and publicly in an inquiry in due course. I have no intention whatsoever of continuing this process.

I will in due course make clear my position on all these and other matters. I will do so when I make my full representations to the Secretary of State for Defence in the light of all

relevant documentation and information (including a meeting with Lieutenant Colonel Mercer). I have no hesitation whatsoever in confirming that if I have unwittingly misled the Committee as to the culpability of members of PJHQ on these important substantive breach matters I will make that clear in a public letter to the Chair of the Parliamentary Joint Human Rights Committee.

This correspondence is now closed.

10. Letter from Edward Adams, Human Rights Division, Ministry of Justice, to the Chairman of the Committee, dated 30 July 2007

Thank you for your letter of 23 July about the establishment of the United Kingdom's National Preventive Mechanism (NPM) under the Optional Protocol to the United Nations Convention Against Torture (OPCAT).

You ask why the Government was unable to meet the deadline of 22 June set out in the Protocol, and what the practical implications are of failing to meet the deadline.

The Government is keen that the NPM should be established at the earliest opportunity. However, it is determined that the UK NPM should be fully compliant with OPCAT, and should be an example of best practice.

As you may know, OPCAT provides that a domestic NPM may consist of one body or several. The Government has always been of the view that in the UK the domestic requirements of OPCAT will be fulfilled by the collective action of the existing statutory bodies (e.g. Her Majesty's Inspectorate for Prisons, the Mental Health Act Commission etc). It does not believe, at the outset, that in order to establish the NPM, there is a need to create any new bodies, or that the bodies who will form the NPM will need to change what they do.

Therefore we have asked bodies being considered for membership of the NPM to confirm that they are compliant with the requirements of the OPCAT in terms of independence, capability, and professional knowledge (in accordance with OPCAT Article 18). In addition we have asked them to confirm that the statutory basis on which they operate either gives them unrestricted access to places of detention and to people deprived of their liberty—including the power to make unannounced visits (and unrestricted access to information about such persons and their conditions of detention); or, at least, contains nothing to prevent such access and such visits (in accordance with OPCAT Articles 19 and 20).

That process has taken longer than we originally hoped, because of the range and variety of the bodies concerned in England, Scotland and Northern Ireland. But the process is well advanced, and Ministers hope to announce the establishment of the NPM, and its composition, to Parliament as soon as possible after the Summer recess.

There are no practical implications arising from the delay in formally establishing the NPM. As I said in my letter to Silvia Casale, the delay in formally establishing the NPM will cause no shortfall in protection of persons held in detention in the UK, since the activities of the existing bodies will continue as usual.

11. Letter from the Rt Hon Des Browne MP, Secretary of State for Defence, to the Chairman of the Committee, dated 25 August 2007

It is now two months since the conclusion of the trial into the death of Mr Baha Musa and I am writing to update you on the work that has been conducted by the Ministry of Defence since then.

I should first like to stress that we place an enormous trust and confidence in our servicemen and women and demand a great deal from them in very difficult operational environments. The Armed Forces are in no doubt that everything they do, wherever they do it, must be lawful. Credible allegations of serious wrong-doing have to be, and are, investigated. Where evidence is assessed independently as justifying a prosecution, the application of a robust, fair system of military justice must follow. We have never argued that the treatment of Mr Baha Musa was acceptable nor that his death should not have been investigated.

Following the court-martial, the Royal Military Police and the Army Prosecuting Authority are reviewing the evidence that emerged during the trial. They do this entirely independently of the chain of command, the Ministry of Defence and Ministers. They alone will determine whether any further criminal charges should be brought. The outcome of this review will be made public by them in due course. Consequently, I am not in a position to provide any further details, nor would it be appropriate for me to speculate on its outcome. I can, however, advise you that this review is not expected to be completed for several weeks yet.

As regards the representations being made by PIL, the Ministry of Defence is reviewing the court martial proceedings, both to ensure that any relevant lessons to be learnt in the light of the evidence given are picked up and acted upon and to check whether any further inquiry might be required to ensure compliance with articles 2 and 3 of the ECHA in relation to Mr Mousa. The question of whether there has been a breach of Articles 2 and 3 of the ECHR remains an issue in the ongoing court proceedings, so we are unable to offer substantive comment at this time.

The House of Lords decided in *Al-Skeini* that the ECHR does not apply from the point of arrest but from the time an individual is detained in a military detention centre within the exclusive jurisdiction of the UK (as indeed we had conceded before the hearing of the appeal in the Court of Appeal). The relevant standards of conduct and physical treatment of prisoners required of UK forces are contained in the relevant Geneva Conventions and the domestic criminal law that applies to UK forces at all times, wherever in the world they are serving. Those standards are not affected in any way by whether or not the ECHR applies.

The UK, in giving effect to the UNCAT, made torture a criminal offence under section 134 of the Criminal Justice Act, 1988, irrespective of where or by whom it is committed. Members of UK Armed Forces are therefore subject to this provision whilst on operations abroad and they, like any other public official, could be prosecuted for the offence of torture in the English courts in respect of their conduct abroad, including in Iraq and Afghanistan. In fact, British Forces overseas can be prosecuted for all criminal offences

they commit in respect of their conduct on these operations under the law of England and Wales, including murder, manslaughter, assault and other offences against the person.

I am aware of the calls for an inquiry into the circumstances that allowed Mr Musa to meet his death. I have mentioned above that the MOD is reviewing the court martial proceedings with a view to deciding what further action it may be appropriate to take. However, no decision has been taken and it will not be possible for any further inquiry to be conducted while there remains the possibility of outstanding criminal action.

I would also like to draw your attention a matter of considerable concern regarding the evidence before the court martial concerning legal advice on the application of the ECHR and the inaccuracies presented by Mr Shiner of PIL in his letter to the JCHR of 22 June. The Treasury Solicitor wrote to Mr Shiner by letter dated 24 July, correcting the inaccuracies. This letter was copied to you and my office has sent you a copy of the letter from PIL in response dated 26 July.

I would like to reaffirm that the MOD and Army are committed to taking forward whatever further action is needed, in order to ensure that all the necessary lessons from this tragic episode are learned for the future.

I have copied this letter to Shami Chakrabarti of Liberty, to keep her informed of the position as it now stands.

12. Memorandum from Kevin Laue, Legal Adviser, The Redress Trust, dated 1 October 2007

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 corps³⁵ and other courses.³⁶ 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,³⁷ though much of these sessions were held in camera.³⁸ There are a number of possibilities:

³⁵ Transcript, 19/12/06, pp 117, 125

³⁶ Transcript, 18/09/03, pg 83

³⁷ Transcript, 12/12/06, pp 85-87, 18/12/06 pp 52-53, 56

³⁸ Transcript, 18/12/06, pg 57

- 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.³⁹
- 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 oversight⁴⁰, led to abuse outside what was taught to be permissible during conditioning.
- 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”⁴¹ 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 TIF⁴², 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 bands⁴³.
 - 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 transport⁴⁴.
- 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

³⁹ See Parker Report 1972, Cmnd 4901, pg 7-9 for a full list of safeguards

⁴⁰ Transcript, 22/11/06, pg 18 indicates a lack of strict, planned guard rota

⁴¹ Transcript, 08/12/06, pg 60

⁴² Transcript, 19/12/06, pp 139-140

⁴³ Transcript, 19/12/06, pg 146-147

⁴⁴ Transcript, 19/12/06, pg 123

electronic filing 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.⁴⁵

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.⁴⁶ 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 which seemingly still has not been finished.⁴⁷ During his evidence in the court martial he mentions “significant gaps in doctrine with regard to POW’s and detainee handling;”⁴⁸ 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.⁴⁹

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.”⁵⁰ 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

⁴⁵ Transcript, 19/12/06, pp 142-143

⁴⁶ 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.

⁴⁷ Letter to Redress Trust and from British Army HQ Lang Command in response to Freedom of Information request, 24/07/2007

⁴⁸ Transcript, 13/12/06, pg 130

⁴⁹ Transcript, 13/12/06, pp 128-130

⁵⁰ <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/uc39402.htm>, Q193

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.⁵¹

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.⁵² 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 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."⁵³ 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."*⁵⁴

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

⁵¹ <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/uc394-iii/uc39402.htm> Q211

⁵² House of Lords House of Commons Joint Committee on Human Rights: The 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/jt200607/jtselect/jtrights/185/185-i.pdf>

⁵³ *Ibid*, paragraph 72.

⁵⁴ *Ibid*, paragraph 73, [*Emphasis the original*]

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."⁵⁵

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*"⁵⁶

⁵⁵ 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)," Thirteenth Report of Session 2005-06, page 10 <http://www.publications.parliament.uk/pa/it200506/jtselect/jtrights/276/276.htm>

⁵⁶ Uncorrected oral evidence from Lord Goldsmith to Joint Select Committee on Human Rights, 26-07-07, <http://www.publications.parliament.uk/pa/jt200607/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.

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."⁵⁷ This policy must include a central detention 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.⁵⁸ 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.

13. Memorandum from Liberty, dated October 2007

1. Liberty is delighted that the Joint Committee on Human Rights has decided to conduct an inquiry into allegations of torture and inhuman treatment by British troops in Iraq. We hope the inquiry manages to probe the existing evidence of past abuse; to ensure political accountability for senior officials and/or political figures implicated in past abuse; and to

⁵⁷ Transcript, 19/12/06, pg 121

⁵⁸ Transcript, 19/12/06, pg 130

push for appropriate training and operational safeguards to be put in place so that abuse does not occur in the future.

2. When British army personnel leave the UK they should not be able to leave behind their obligation to respect basic rights and freedoms. It is clear, for example, that a state's control over people and places can extend well beyond its own borders. This is certainly the case where agents of the state operating overseas are concerned or where a state's armed forces have taken control of all or part of another country. In Liberty's view where the state has such control, it has moral, legal and political responsibility for the way that control is used or abused.

3. Liberty is delighted that the House of Lords has now decided that the protection of the Human Rights Act 1998 (the "HRA") extends to individuals detained by agents of the British state anywhere in the world.⁵⁹ It is important that the HRA applies in such circumstances for a number of reasons:

- It sends a clear and unequivocal message that it is unacceptable for British soldiers to violate the rights or freedoms of those within their control;
- Knowledge of legal accountability should ensure that appropriate training and control mechanisms are put in place, making future abuses less likely;
- The positive procedural (i.e. investigative) and substantive (i.e. protective) obligations under Articles 2 and 3 are only guaranteed by the HRA and not, for example, by the laws of war;
- British armed forces in Iraq have immunity from Iraqi laws.⁶⁰ This is on the basis that UK law already provides appropriate accountability if abuses occur as well as appropriate remedies and protection for victims of such abuse. Without the protection of the HRA, we do not consider that this is, in fact, the case.

4. Sadly, despite the House of Lords' decision that the HRA applies to British military prisons in Iraq, the vital protection the HRA offers was recognised too late to prevent the abuse and ultimate death of Baha Mousa in the custody of British forces in Basrah City. We hope that the effective investigation into the circumstances surrounding Baha Mousa's death, required by Article 2 HRA, will provide greater clarity about: what happened during his 36 hours' detention; who was responsible, directly and indirectly; why the abuse was not prevented; and what safeguards could ensure that it never happens again. We also hope that the investigation will bring some sense of justice to Baha Mousa's bereaved relatives.

5. As we discuss below, the Court Martial *Payne & Ors* has already revealed evidence of serious physical and mental abuse of detainees and of the use of banned techniques. Sadly, despite hearing evidence that a number of soldiers were involved in the abuse of Baha Mousa, the judge stated: "[N]one 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.*" We hope the JCHR inquiry and the Article 2 investigation will not be subject to

⁵⁹ *Al-Skeini and others v. Secretary of State for Defence*, [2007] UKHL 26

⁶⁰ Coalition Provisional Authority Order No.17

these same difficulties and that it manages to gain a clearer understanding of how British soldiers in Iraq have treated Iraqis under their control and who was responsible.

6. Liberty believes that the important protection and accountability promised by the HRA should extend beyond those held in British detention overseas. Abuse by British soldiers on the streets of Iraq could, for example, be just as damaging to the UK's moral standing in the UK and abroad as abuse in military prisons. British soldiers also have just as much control of their actions inside and outside of detention facilities (albeit that the environment they are operating within and challenges they face may differ). We sincerely hope that the JCHR's inquiry will not be restricted by the disappointing limitations of the House of Lords' decision regarding the legal limits on the jurisdiction of the HRA. We believe that, whatever the legal limits of accountability under the HRA, political accountability must extend to abuse by agents of the British state overseas, wherever it occurs.

7. Liberty is not in a position to provide answers to a number of the factual questions raised in the call for evidence. We were not directly involved in the recent Court Martial *Payne & Ors* and did not, therefore, play a role in the collection and presentation of evidence in that case. We would, however, draw the Committee's attention to the evidence which we understand is to be submitted by Mr Phil Shiner, the solicitor acting for Baha Mousa's family. We would also draw the Committee's attention to the harrowing photographs of Baha Mousa's corpse, showing the severe injuries he sustained before his death.

8. We have also examined the transcripts of the Court Martial proceedings and consider them to reveal compelling evidence of serious physical and mental abuse of detainees as well as evidence of the approval and use of banned techniques. We would urge the Committee to consider in particular:

- Evidence provided to Court Martial by Muhanned Al Mansouri of inter alia shouting, multiple beatings, burning, humiliation involving being urinated upon and forced to drink urine and a threat to kill (transcript of 23 October 2006 proceedings, pages 43-67);
- Evidence provided to Court Martial by Baha Hashim Mohamed Fathi Malki of being photographed whilst being beaten (transcript of 10 October 2007, pages 50 & 54 and 11 October 2006, page 27), being forced to dance (transcript of 10 October 2006, page 50) and being beaten and abused even after the death of Baha Mousa (transcript 11 October 2006, pages 25-26); and
- Evidence of Senior Aircraftsman Scott James Hughes referring to kicking & hitting, eye-gouging, taunting with drinking water and forcing painful cries from detainees in mimicry of a 'choir' (transcript 26 October 2006, pages 70-107).

9. As regards evidence of banned techniques, we would refer the Committee to the following:

- Hooding
 - Evidence of hoods being used – see, for example, evidence of Taher Abdullah Ali Al Mansouri (transcript 26 October 2006, page 24) and evidence of Lieutenant Colonel Nicholas Anthony Baker (transcript of 13 December 2006, page 29);

- Evidence that hooding was allowed by Joint Welfare Publication 1-10 – see evidence of Lieutenant Colonel Baker (transcript of 13 December 2006, page 80); and
- Evidence that hooding was ‘Army Doctrine’ – see evidence of Colonel Nicholas Justin Mercer (transcript of 8 December 2006, pages 26, 47 & 48).
- Stressing
 - Evidence of stressing of detainees – see, for example, the evidence of Muhanned Al Mansouri (transcript of 23 October 2006, page 39); and
 - Evidence that ‘stressing’ techniques were discussed in Joint Welfare Publication 1-10 - see evidence of Lieutenant Colonel Baker (transcript of 13 December 2006, page 79).
- Sleep deprivation
 - See evidence of Senior Aircraftsman Scott James Hughes (transcript of 26 October 2006, page 65) and evidence of Lieutenant Colonel Baker (transcript of 13 December 2006, page 57 & 62).
- Food deprivation
 - See evidence of Muhanned Al Mansouri (transcript of 25 October 2006, page 22), Baha Hashim Mohamed Fathi Malki (transcript of 10 October 2006, page 35) and Ahmed Taha Al-Mataira (transcript of 26 September 2006, page 79).
- Noise
 - Potential use of generator noise – see evidence of Lance Corporal Craig Leslie Slicker (transcript of 23 November 2006, page 25).

10. The application of the HRA and the public condemnation of past abuse may, in themselves, deter future cases. This is not, however, enough in itself. We hope the Committee will also consider and recommend safeguards that might prevent such abuses occurring in the future. We would suggest that PACE could, for example, provide a useful starting point in terms of practical steps that could protect against abuse in military detention (with any necessary changes to reflect the context of armed conflict). Consideration should be given to independent human rights monitoring of British military detention centres overseas and mechanisms for detainees to complain about cases of abuse. Clear lines of accountability and oversight structures should be put in place to ensure that a senior member of the armed forces has responsibility for ensuring that abuses do not occur. We would also stress the importance of human rights training for members of the British armed forces, ensuring an awareness of what human rights law prohibits as well as what it requires in terms of protection.

14. Letter and Memorandum from the Rt Hon Des Browne MP, Secretary of State for Defence, to the Chairman of the Committee, dated 10 October 2007

On 8th August your Committee announced its intention of examining allegations of “torture and inhuman treatment carried out by British Troops in Iraq”. I understand this followed on from the report into the applicability of the UNCAT in Iraq. To assist the Committee please find attached a memorandum from the MOD in response to the questions that the Committee has raised.

I do not accept the notion that British forces have carried out systemic torture, inhuman or ill treatment in Iraq or elsewhere. Around 120,000 servicemen and women have served on Op TELIC in what has been and continues to be, difficult operational circumstances. Allegations of ill treatment in Iraq have been made against only a few personnel and of these, the majority have already been cleared of any wrongdoing. I fully accept that the Armed Forces must uphold the rule of law wherever they operate in the World and they well understand this. Where service personnel are accused of wrongdoing the allegations are investigated and as necessary face charges at a court-martial. Allegations are investigated by the Royal Military Police (Special Investigations Branch) who operate entirely independently of the chain of command, of the MOD and of Ministers for that purpose. Police reports are referred to the Army Prosecuting Authority which, again, is entirely independent of the chain of command, MOD or Ministers. Indeed the Army prosecuting Authority is under the general superintendence of the Attorney-General.

In my response to the Committee’s Questions, I lay out in some detail the considerations that are currently underway concerning the individual case of Mr Baha Mousa. I note that your terms of reference prohibit consideration of individual cases. It seems to me that the questions that the Committee proposes to address will inevitably, or at the very least in part, run the risk of straying into the details of the individual case of Baha Mousa. Current circumstances, and in particular the ongoing criminal review being undertaken by the Royal Military Police (Special Investigation Branch) and the Army Prosecuting Authority, who operate independently of Ministers and the chain of command for these purposes, will in any event make it inappropriate for the MOD and Army to comment in the near future. The Committee may also be aware that on 29th March I invited Public Interest Lawyers, who represent the Baha Mousa family to make representations to me concerning what further steps or enquiries may be necessary in the light of the recent court-martial. You may be aware that at a hearing on Wednesday we agreed with PIL what further documents would be made available to them to complete their representations. I am therefore not yet in a position to make a final decision in this regard.

The Committee has also asked that Lt Gen Brims and Lt Col Mercer give oral evidence on 15 October. It is not clear whether this is in a personal or an official capacity.

I note that the questions posed so far are essentially about legal issues, and indeed about the specific case which was the subject of the recent court-martial of Payne and others. In broad terms, the legal issues raised by the Committee’s questions were addressed by the then Attorney-General, Lord Goldsmith when he gave evidence before the Committee in June. I would therefore be grateful for further advice from the Committee on the lines of enquiry they would wish to pursue before making a final decision on which witnesses would be best able to answer the Committees questions.

I look forward to seeing the Committee's response to the Departmental memorandum and stand ready to assist the Committee further.

Memorandum

On 8 August 2007 the Joint Committee on Human Rights announced its intention to conduct an inquiry that "will follow up the Committee's 2006 Report into the UN Convention against Torture and the oral evidence from Lord Goldsmith QC, the then Attorney General, on 26 June 2007". The announcement went on to state the main questions of interest to the Committee to be as follows:

- *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?*
- *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?*
- *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?*
- *Why did the Government seek to resist application of the ECHR to areas controlled by the UK in Iraq? Would it matter if Articles 2 and 3 ECHR were not regarded as applying in Iraq, given other legal prohibitions on torture and ill-treatment?*
- *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?*
- *What further improvements can be made to the training of troops on the ground, interrogators and legal advisers? The court-martial heard evidence that the then Attorney General provided legal advice to the MOD on aspects of the application of the European Convention on Human Rights (ECHR) and the Human Rights Act (HRA) in Iraq in 2003. That advice is legally privileged and has not been disclosed for reasons explained to the Committee by him. An email from Ms Rachel Quick, then PJHQ Legal Adviser, dated 24 March 2003 referred to that advice.*

2. The Committee invited submissions from interested individuals and organisations by 1 October 2007. This memorandum is a response to that invitation, and its purpose is to assist the Committee in its work by offering comment on each of the questions set out above.

Question 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?

Question 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?

3. The MOD infers that Questions 1 and 2 arise from the evidence given in the Payne court-martial. The Committee is aware that the Secretary of State is reviewing the court martial proceedings and has invited representations from Public Interest Lawyers (who act on behalf of Mr Mousa's next of kin) on what if any further enquiries are required, in light of those proceedings, into the circumstances of Mr Mousa's death. The Secretary of State received representations from Public Interest Lawyers on 10 July 2007. Mr Mousa's next of kin, however, issued judicial review proceedings seeking time to submit further representations, and disclosure of documentation from the Court Martial proceedings for that purpose. At a substantive hearing on 3 October 2007 the parties agreed what documents from the Court Martial would be disclosed and under what circumstances they might be used by Public Interest Lawyers. Given that Public Interest Lawyers are unlikely to receive the full set of documents before the end of October due to the need to make redactions and have asked for eight weeks to make their representations thereafter, the Secretary of State is unlikely to reach a final conclusion on the way ahead until early next year.

4. The Royal Military Police (RMP) and the Army Prosecuting Authority (APA) are also reviewing the investigation into Mr Mousa's death and the court martial proceedings to determine what further investigations, if any, should follow. It is expected the review will be completed in the autumn of this year. Both the RMP and APA are entirely independent of the chain of command, the Ministry of Defence and Ministers (for the purposes of investigations and prosecutions respectively). Importantly, the Army Prosecuting Authority is under the general superintendence of the Attorney General, not the Secretary of State for Defence or the Army chain of command. Similarly, the Royal Military Police (RMP), whose powers are derived from the Army Act 1955, are independent of Ministers and the chain of command for the purposes of investigations. The RMP are uniquely qualified to carry out investigations in a military context - often in the most demanding of operational environments - and at the same time their training, policy and methods are continually developed and adapted in the light of the civilian best practice.

5. The Secretary of State will decide on the precise nature of any further enquiries into the events surrounding the death of Mr Mousa after the Police and Prosecution authorities have concluded their investigations and he has considered representations from Public Interest Lawyers. It is hoped that the Secretary of State will be in a position to take that decision early in the new year.

6. In these circumstances, it would be inappropriate for the MOD or the Army at this stage to pursue answers to the question asked by the Committee.

7. The Committee will also be aware that in February 2005, following the conclusion of the "breadbasket" cases, the then Chief of the General Staff (Sir Mike Jackson), announced that there would be a process of review of the lessons learned from recent courts martial into the allegations of human rights abuse in Iraq, including the Mousa case. The review is being conducted by the Director of Army Personnel Strategy (DAPS) and the findings of the review will be made public.

Question 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?

8. By the first part of this question the Committee asks about matters its Chairman has already raised directly with the former Attorney General, Lord Goldsmith, in its letter to him dated 14 June 2006. The Government's position on the disclosure of the legal advice of Lord Goldsmith as Attorney General is as stated in his memorandum submitted to the Committee on 22 June 2007:

Legal advice given to Government on these issues (whether by the Law Officers or any other lawyer) is of course confidential and covered by legal professional privilege, like all legal advice. Moreover, in accordance with the long-standing convention set out in the Ministerial Code, neither the fact that the Law Officers have (or have not) advised, nor the content of the advice, may be disclosed outside Government without their authority.

For these reasons there are, quite properly, limits on what can be said about the substance of the advice which the Government has received on these issues, and whether or not any advice was given by the Law Officers. This makes it all the more difficult to respond to speculation and supposition in the press about what advice may have been given. At worst there is a risk that any journalist can, by making false and unsubstantiated claims about legal advice the Government is said to have received, force the Government into revealing the true, privileged, legal advice in order to correct the false story. That would be a wholly unacceptable situation and a very bad precedent.

9. In the second part of Question 3 the Committee asks whether there was any connection between advice on the application of the ECHR and 'the legal advice that the illegal techniques could be used'. Firstly, Lord Goldsmith, made clear, in a letter to *The Independent* in May, that no advice came from the Attorney General's Office that certain interrogation techniques, including hooding and stress positions, were legitimate to be used in theatre, even though apparently outlawed in 1972. Nor was there any evidence before the court-martial of any advice from Ms Quick, who referred to advice from Lord Goldsmith in her email of 24 March 2003, that such interrogation techniques were legitimate. Secondly, the MOD can see no indication in the transcript of the Payne court-martial evidence of any such connection. It is also plain that neither could have been prompted by, and provided in response to, events occurring after 24 March, as has been alleged in correspondence between Public Interest Lawyers and the Committee Chairman, and repeated in the media.

10. In his letter to Lord Goldsmith (as Attorney General) dated 14 June 2007, the Committee's Chairman said:

We note that in his summing up in Payne and Others, the Judge Advocate referred to detailed correspondence between Ms Rachel Quick, Legal Adviser and Lt Col Mercer about the correct legal position and the application on of human rights standards. The Judge Advocate notes "it can be seen that there was a problem identified even before the invasion of Iraq with the legal adviser [Ms Quick] perhaps taking a robust attitude towards it".

11. The Committee will know that the relevant part of the Judge Advocate's summing up is as follows:

In April 2003, Ms Quick, Legal Adviser at PJHQ, rejected Lieutenant Colonel Lt Col Mercer's call for the application of the Human Rights Act to the way in which prisoners were handled. See Members 10, page 96 for Ms Quick's e-mail of 24th March 2003 at numbered paragraph 1. Her postscript, you will remember, refers to the possibility of Lt Col Mercer putting himself up to be the next Attorney General. The courts have since held that the Human Rights Act, the HRA, and the ECHR, the European Court of Human Rights did apply. At Members 10, page 130, appears Lieutenant Colonel Mercers' memo 29th March 2003. At paragraph 6 he refers to his visit to the JFIT where he witnessed a number of prisoners of war who were hooded and in various stress positions. At Members 10, page 142, in a note to someone to the Foreign Office, Ms Quick had written referring to Lieutenant Colonel Lt Mercer's advice: "... [it] might be appropriate for individuals locked up following a Saturday night in Brixton [but were] not appropriate for detainees arrested by Black Watch et cetera following a bit of looting in Basra." Thus it can be seen, as Lord Thomas told you, that there was a problem identified even before the invasion of Iraq with the legal adviser at PJHQ perhaps taking a robust attitude towards it.

12. This passage in the summing up has given rise to some confusion. The evidence before the court martial, as it appears from the transcript, is that:

(1) Ms Quick's email was sent on 24 March 2003 and was about "structures" and "whether in setting up structures they should be ECHR compliant" — it was not directed to the physical treatment of prisoners of war or detainees;

(2) the quotation from Ms Quick's advice came from a minute that related to detention review procedures. In the course of that minute she expressly referred to paragraph 6 of a minute from Lt Col Mercer about detention review procedures (and according to his evidence his minute was dated 16 April 2003). Ms Quick's minute did not refer to a memorandum dated 29 March 2003 from Lt Col Mercer, and the court martial heard no evidence of any advice from her that did so.

13. Lord Goldsmith's evidence to the Committee was that the question of ECHR application did not affect the standards of conduct in the treatment of detainees that the law requires of UK forces, both under the Geneva Conventions and under the criminal law that applies to Service personnel at all times, wherever in the world they are serving. Whether or not the ECHR applied, any treatment of detainees (including using any so-called 'conditioning techniques' for interrogation) that was cruel, or inhumane, or constituted any 'physical or moral coercion', would be in breach of the 4th Geneva Convention; and if the treatment amounted to torture or inhuman treatment, it would have been a war crime under the International Criminal Court Act 2001. Such conduct has been an offence under English law since the Geneva Conventions Act 1957. Torture, which the UK is required by UNCAT to criminalise, is a crime under the Criminal Justice Act 1988. The question of ECHR application does not affect this basic legal position at all.

14. The Committee will recall the evidence of Lord Goldsmith:

“... it is also very important to recognise that the obligations which nobody has been in any doubt apply (namely, the obligations under the Geneva Convention, the obligations under the Convention Against Torture) all applied, so did domestic criminal law. That is why any soldier who mistreated, treated inhumanely, let alone tortured, a detainee in the course of a UK detention would have been liable to Court Martial, and, indeed, that is precisely what happened. 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. I do not think there is any difference at all, so I do not think it matters, and I am not aware that anyone ever thought there was something that was permitted under the Geneva Conventions that is not permitted under the ECHR”.

Lord Goldsmith therefore raised a relevant question: whether there is any mistreatment of a detainee permissible under the Geneva Conventions in a international armed conflict, and under the criminal law that applies to UK forces throughout the world at all times, that is nevertheless prohibited by the European Convention on Human Rights. The MOD can identify none.

15. The Committee may also find it useful to take account of the comments of Lord Bingham, in his dissenting judgment in the House of Lords in the *Al Skeini* case. Holding that the Human Rights Act 1998 did not apply extraterritorially, Lord Bingham observed that:

*“This does not mean that members of the British armed forces serving abroad are free to murder, rape and pillage with impunity. They are triable and punishable for any crimes they commit under the three service discipline Acts already mentioned, no matter where the crime is committed or who the victim may be. They are triable for genocide crimes against humanity and war crimes under the International Criminal Court Act 2001. The UK itself is bound, in a situation such as prevailed in Iraq, to comply with The Hague Convention of 1907 and the Regulations made under it. The Convention provides (in article 3) that a belligerent state is responsible for all acts committed by members of its armed forces, being obliged to pay compensation if it violates the provisions of the Regulations and if the case demands it. By article 1 of the Geneva IV Convention the UK is bound to ensure respect for that convention in all circumstances and (article 3) to prohibit (among other things) murder and cruel treatment of persons taking no active part in hostilities. Additional obligations are placed on contracting states by protocol 1 to Geneva IV An action in tort may, on appropriate facts, be brought in this country against the Secretary of State: see *Bici v Ministry of Defence* [2004] EWHC 786 (QB).*

16. In relation to the second half of Question 3, as with Questions 1 and 2, the MOD considers that it would be inappropriate for the MOD or Army to pursue the matters raised by the Committee’s question at the present stage, when it is hoped to take decisions early in the New Year as to any further enquiries that may be required.

Question 4: Why did the Government seek to resist the application of the ECHR to areas controlled by the UK in Iraq? Would it matter if Articles 2 and 3 ECHR were not regarded as applying in Iraq, given other legal prohibitions on torture and ill-treatment?

17. The MOD infers that this question relates to a matter raised by the Committee with Lord Goldsmith when he gave evidence on 26 June 2007: why the Government had argued in *Al Skeini* in the Divisional court that the ECHR did not apply to the circumstances of Mr Mousa's detention, when Lord Goldsmith had subsequently said his own view was always that it did. Lord Goldsmith answered the question very fully (Q229):

*This is a broader question. There are certain occasions when the Attorney General's advice is determinative of what government does if you are clearing a particular action; for example, taking military action: the Government's legal adviser's view on that clears it and that is determinative. There are questions where the Government can bring forward legislation on whether it is compatible with ECHR. We take the view that there the legal advice may be determinative too. If the Attorney General says, "This is not compatible," then it cannot be brought forward. That does happen from time to time. We do not know about it because it is kept behind the confidentiality blanket. There are occasions when the Government says, "We are involved in a legal dispute. We would like to argue x." The Attorney General may say, "I don't think x is right. I think the court will hold that y is right. But I do not think it is improper for you to argue that point because the court will then determine whether you are right or not." Often, of course, there are perfectly respectable arguments which can be put. In the *Al-Skeini* case, for example, the Government argued that the Human Rights Act itself did not apply—and that is quite separate from the ECHR—and in the House of Lords the most senior Law Lord took the view with the Government that it did not apply and the four others took a different view. It is perfectly proper to make those arguments. An Attorney General should say—and I have in a number of cases said this— that the Government should not run arguments which are improper, and that means an argument which is so bad or so unlikely to succeed that it really is not appropriate for a responsible government to be arguing that at all. That was not the case in relation to whether or not the ECHR itself applied, because of this argument that the European Convention, as the European Court seemed to say in the *Bankovic* case, does not apply outside the European space, it is a convention for Europe not the Middle East.*

18. The Committee will be familiar with the judgment of the Judicial Committee of the House of Lords in the *Al Skeini* case. They held that the ECHR did not have the very wide extraterritorial application contended for by the Appellants in those areas of Iraq that were under military occupation by British Forces in 2003. The Government accepted before the Court of Appeal and the House of Lords that the ECHR exceptionally applied to the particular situation, where persons were detained in custody by British forces in a UK run detention facility in Iraq, as had been held by the Divisional Court. But the Government successfully argued throughout the proceedings that in the five cases other than Mr Mousa's that were under consideration in the proceedings, the nature of the British occupation of southern Iraq in September 2003 was not such as to give rise to 'effective control' so as to fall within ECHR jurisdiction. The House of Lords agreed with the Defence Secretary's arguments, as the Divisional Court and the Court of Appeal had done so below. Their Lordships made very clear that as a matter of law extraterritorial ECHR jurisdiction is narrow and exceptional.

19. As regards the second part of Question 4, the MOD refers the Committee to the comments made at paragraphs 13 to 15 above.

Question 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?

20. The Committee's report on the UN Convention on Torture dated 26 May 2006 accurately represented the Government's position on this question, and that position has not changed.

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

21. All personnel, including those who train as interrogators are taught their legal obligations under domestic and international law, including the Geneva Convention, relevant additional Protocols and the European Convention of Human Rights.

Other matters

22. There has been discussion regarding the circumstances in which hooding would be lawful. The Committee should be aware that the MOD made it clear in 2004 that, lawful or otherwise, hooding will not be used by UK Forces.

23. The Committee has requested oral evidence from Lt General Brims and Lt Col Mercer. It is unclear whether the Committee wishes to hear evidence from them in a personal or a representative capacity. The MOD would be grateful for further advice from the Committee on the areas of questioning that they intend to pursue in oral hearings before offering witnesses who are best placed to represent the Secretary of State in answering those specific questions. The MOD stands ready to assist in relation to any other question the Committee may have.

15. Letter from Phil Shiner, Public Interest Lawyers, to the Chairman of the Committee, dated 18 September 2007

Disclosure of Documentation – Evidence before the Court Martial

I am writing to you in your capacity as Chair of the Joint Committee on Human Rights.

My attention has been drawn to correspondence with you from Treasury Solicitors on behalf of the Secretary of State for Defence and from the Secretary of State for Defence himself. This correspondence suggests that I have misled your committee on an important point of detail arising from the transcript of the court martial into the death of Baha Mousa and the injuries sustained by the 10 other Iraqi civilians in that incident. I am writing to put the record straight.

You may have read in the Guardian recently of the efforts I am making to secure disclosure of the court martial bundles. Despite two clear rulings from Sir Andrew Collins in the High Court to the effect that these bundles should be made available to me, the Secretary of State for Defence has refused to do so. Accordingly Sir Andrew Collins has granted permission for a substantive hearing into the question as to whether these bundles should be disclosed and if so on what terms. The hearing of this case is on 3 October. At the time of writing this letter it appears possible that the parties may be able to reach a settlement so that the bundles are disclosed to me subject to a suitable undertaking. However to date I have been

reliant on the CD containing the transcript of all the public hearings of the court martial and I have not had sight of the 50 lever-arch files containing the court martial bundles. Accordingly criticisms of what I have said in public about the correspondence between Lieutenant Colonel Nicholas Mercer and Ms Rachel Quick have to be understood in the light of a decision by the Secretary of State for Defence to deny me access to the very material that would enable me to understand fully what has taken place.

I think that at the heart of the debate from the Mercer and Quick correspondence is the question as to whether Lieutenant Colonel Mercer was raising concerns only about procedural matters or was he raising concerns also about substantive matters. An example of procedural matters would be his concern that it was doctors who were determining whether a prisoner was a prisoner of war as required by Article 5 of Geneva Convention III. An example of a substantive breach would be his serious concerns after he saw 40 or so Iraqis hooded, kneeling in the hot sun near a noisy generator in late March 2003. It is absolutely plain to me from a reading of the transcript that his concerns were about both procedural and substantive matters. I have not been able to meet with Lieutenant Colonel Mercer – although the military chain of command are happy for him to do so – as the Secretary of State for Defence has again decided to deny my access to him and that decision was itself the subject of an application for judicial review. However I have spoken about this precise question on the telephone with Lieutenant Colonel Nicholas Mercer who has assured me that I am correct in my assertion that he was complaining about both matters. Accordingly there is no doubt whatsoever in my mind that Permanent Joint Head Quarters and others within the chain of command, including senior civil servants such as Rachel Quick, were specifically on notice as to Lieutenant Colonel Nicholas Mercer's concerns about hooding, stressing et cetera. At this stage I cannot be more specific than this because as I have said above I have been denied access both to the bundles and to Lieutenant Colonel Nicholas Mercer.

It is, of course, obvious to me that the Rachel Quick email in which she suggests that if Lieutenant Colonel Nicholas Mercer thinks he knows better than the Attorney-General (who had advised that the HRA/ECHR did not apply to SE Iraq) he should apply for his job pre-dates his observations of the 40 Iraqis I refer to above. This is neither here nor there. What is important to know – and we cannot know until we all see the court martial bundles – is the entirety of the correspondence between Lieutenant Colonel Mercer and all concerned after he raised these serious concerns about substantive breaches such as hooding. If this correspondence, the section 9 CJA 1967 statement of Lieutenant Colonel Mercer (also denied to me) and a meeting with him makes clear that Ms Rachel Quick and other senior civil servants (including at PJHQ) had no idea about these concerns about substantive breaches I will not hesitate to formally withdraw these remarks and to apologise for any inconvenience caused.

I strongly refute any suggestion that I have misled the Committee and I think it noteworthy that the very material that would enable me to be more specific as to how Lieutenant Colonel Nicholas Mercer raised substantive and procedural issues with all concerned, including at the highest level, has been kept from me.

I hope this letter clarifies my position. Please do not hesitate to contact me for further clarification if required.

16. Letter from Paul Whiteman, Head of Business Development, FDA, to the Chairman of the Committee, dated 1 November 2007

Re: Rachel Quick

Ms Quick is a member of the FDA. We have been advising her in relation to matters regarding the JCHR inquiry into human rights abuses in Iraq. The FDA has argued for a long time that the advice given by civil servants should not normally bring them into the public eye. The majority of civil servants are not public figures and they should be able to give advice to the government, and on this occasion to the military, without fear of the personal consequences as long as the official has not been negligent in formulating that advice and the advice is given in good faith. On the few occasions where it is appropriate or unavoidable that the civil servant is brought into the public domain to have advice challenged we believe that it is imperative that those individuals are accorded appropriate support by their employer and that a true and honest account of their actions is presented.

As you will be aware Rachel Quick provided advice in relation to the treatment of prisoners in Iraq. The portrayal of Ms Quick's advice by Public Interest Lawyers appears to be inaccurate and the failure to make corrections has caused Ms Quick a great deal of distress.

The correspondence between the committee and Public Interest Lawyers contains a number of factual errors with regard to Ms Quick's involvement in this matter. In particular, Public Interest Lawyer's letter of the 22 June 2007 (which is posted on the JCHR website) failed to inform the committee that the transcript of Ms Quick's email was dated 24 March 2003 which means it could not possibly have been a response, as Mr Shiner invites the committee to believe, to

- (1) Lt Col Mercer's proposal in his paper dated 16 April 2003 for a DIMU based on an East Timor model (East Timor was, of course, not under belligerent occupation governed by the Geneva Conventions); or
- (2) Lt Col Mercer's visit to the POW camp on the 29 March 2003; or
- (3) concerns Lt Col Mercer expressed to the GOC, General Brims about breaches of international law and of the Geneva Conventions, reported in his memorandum dated 29 March 2003; or
- (4) a meeting with the ICRC that, according to Lt Col Mercer's evidence, took place "not long after" the 29 March 2003; or
- (5) Lt Col Mercer's plans for a DIMU headed by a UK judge that, according to Lt Col Mercer's evidence, was again raised in his minute of 16 April 2003.

This published correspondence has also generated further media coverage which in some instances has been potentially defamatory and has resulted in significant unfairness to Ms Quick.

In fact, Ms Quick's email about human rights was sent on the 24 March 2003. It expressly assumed the full application of the Geneva Conventions and the Hague Regulations. We also understand in evidence at the court-martial, it was agreed her email was about 'structures'. There was no reference to hooding, or the physical treatment of prisoners, or

to 'lower legal standards applying'. She also quite properly, referred to the legal advice that had been given by the then Attorney General, Lord Goldsmith.

We understand that Treasury Solicitors have written to Public Interest Lawyers pointing out the above but Mr Shiner declined to publish a retraction until such time when he received all relevant documentation and information from the Ministry of Defence. More recently the memorandum from the Ministry of Defence (para 12 & 23-26) has also confirmed Ms Quick's email could not have been a response to events occurring after the 24 March, as has been alleged in correspondence between Public Interest Lawyers and the Committee Chairman, and repeated in the media. However as this correspondence has remained unpublished the factual errors in the uncorrected evidence posted on the JCHR website has remained uncorrected.

In light of the above, we would invite the committee to publish a statement regarding the date of Ms Quick's email pointing out it was not a response to the concerns raised by Lt Col Mercer's memorandum of the 29 March 2003.

**17. Letter from the Chairman of the Committee to the Rt Hon Des Browne MP,
Secretary of State for Defence, dated 21 January 2008**

You may recall writing to me on 10 October 2007 about my Committee's inquiry into allegations of torture and inhuman treatment in Iraq, following the death of Baha Mousa. The main issues of interest to us are as follows:

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?

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?

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?

Why did the Government seek to resist application of the ECHR to areas controlled by the UK in Iraq? Would it matter if Articles 2 and 3 ECHR were not regarded as applying in Iraq, given other legal prohibitions on torture and ill-treatment?

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?

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

In your letter, you asked us to postpone the oral evidence session we had planned with army witnesses in October because of a number of reviews then ongoing. You mentioned your review of the *Payne* court martial proceedings and whether a further investigation

into the death of Baha Mousa was necessary, and your expectation that you would reach a decision on the way ahead “early in the new year”; the review being undertaken by the Royal Military Police and the Army Prosecuting Authority, which you thought would be completed “in the autumn”; and the review of lessons learned being undertaken by Brigadier Robert Aitken, which your Private Secretary informed our Clerk on 10 October, would be published “within the next few weeks”.

I would be grateful for an update on progress in completing and publishing the findings of the various reviews mentioned above. We remain committed to concluding our own inquiry by taking further oral evidence, initially from army witnesses, and wish to report to the House our views on the questions I have set out in this letter without undue delay.

I would be grateful if you could reply by Monday 4 February.

18. Letter from the Rt Hon Des Browne MP, Secretary of State for Defence, to the Chairman of the Committee, dated 24 January 2008

You may recall that in February 2005, General Sir Mike Jackson, the then Chief of the General Staff (CGS), commissioned a Review by a senior military officer, Brigadier Robert Aitken. He was asked to consider what measures need to be taken in order to safeguard and improve the Army’s operational effectiveness in the light of allegations of abuse in Iraq and criticism in the Defence Select Committee. CGS undertook to publish the findings of this Review.

I have decided, in conjunction with CGS, that the Report, entitled ‘The Aitken Report: An Investigation into Cases of Deliberate Abuse and Unlawful Killing of Iraqi Civilians in 2003 and 2004’ should be released in its entirety. The Report is being released today, and a copy is enclosed for your information.⁶¹

The conduct that Brigadier Aitken was asked to examine was absolutely unacceptable, but he has concluded that there are no endemic failings within the Army — quite the reverse, as the Army has, in general, behaved with extraordinary professionalism and valour in Iraq. He also emphasises that the commission of acts of deliberate abuse against defenceless individuals is inexcusable and unacceptable, and that the Army must take continuous action to ensure that such acts are not repeated.

This Report is part of continuing process of review, investigation and continuous professional development for the Army; its Annex describes the work that has already been completed or is in process. Additionally, Brigadier Aitken has made three recommendations:

- The Army needs to ensure that it learns and implements lessons from the disciplinary process in the same way that it does for wider operational issues;
- The Army needs to find better ways to inculcate its core values of selfless commitment, courage, discipline, loyalty, integrity and respect for others and its standards of behaviour and discipline.
- The Army must educate itself to ensure that administrative action is used correctly.

⁶¹ Not published here.

I ask you to read this Report in full. You will note that it is a thorough and detailed piece of work. It is rightly critical in places, but that is because only the highest standards are acceptable to the Army. The Report does, however, make clear that only a tiny handful of the many thousands of soldiers who deployed on OP TELIC have perpetrated these acts, but acknowledges that this is still too many.

We are also announcing today that, as you are aware, following the court-martial last year, the Royal Military Police (Special Investigation Branch) conducted a review of the evidence surrounding the death of Mr Baha Mousa and the ill-treatment of other Iraqi civilians. This is normal procedure. That review is now complete, and after consideration of the Police Report, and consultation with the Attorney General, the Army Prosecuting Authority has concluded that there are no further criminal lines of inquiry. Please be assured that, should further evidence be made available, it will be taken seriously and further investigated.

The next step is to consider what form any future inquiry into these appalling incidents should take. I have agreed to receive representations from the legal representatives for Mr Mousa's family, and I will make a further statement when a decision has been made.

**19. Letter from the Chairman of the Committee to the Rt Hon Des Browne MP,
Secretary of State for Defence, dated 6 February 2008**

Thank you for your letter of 24 January and for sending me the Aitken Report on cases of deliberate abuse and unlawful killing in Iraq, which I have circulated to the other Members of my Committee.

As you know, we have indicated our intention to resume our inquiry into these matters, based on the call for evidence we published in August. We released a new press notice on this issue this week which included a request for comments on the Aitken Report and which I have enclosed.⁶² We will be seeking to arrange oral evidence with army witnesses in due course.

In the meantime, I would be grateful if you could answer the following questions arising from the Aitken Report.

Firstly, paragraph 7 contains references to the possibility of further enquiries arising in relation to the Baha Mousa and Al Amarah cases. I would be grateful if you could explain, for each of the cases mentioned on page 3 of the report, whether further enquiries are being considered, at least in outline what issues are likely to be considered and by whom, and the timescales envisaged. I would also be grateful for your confirmation that no fresh criminal charges are anticipated at this stage in relation to any of the cases mentioned in the report, and for any information you may have about any appeals in relation to those cases. You will appreciate that we do not wish inadvertently to infringe the parliamentary *sub judice* rule in relation to any ongoing judicial cases.

Secondly, there are references in paragraph 31 of the report to reviews undertaken by the Adjutant General of the Nadhem Abdullah and Baha Mousa cases. In relation to the Nadhem Abdullah case, the report suggests that the Adjutant General's review covered "investigation, legal advice, discipline and court processes". Some of these issues are likely

⁶² Not published here.

to be of significance to our inquiry. I would be grateful, therefore, if you could send my Committee copies of both reviews.

I would be grateful if you could reply by Friday 22 February.

20. Letter from Carl Ferstman, Director, The Redress Trust, to the Commons Clerk of the Committee, dated 8 February 2008

Re: Aitken Report: An investigation into cases of deliberate abuse and unlawful killing in Iraq 2003 and 2004

As you are aware the Aitken Report was made public on 25 January 2008, and we have deemed it necessary to prepare a Memorandum in response thereto which we have submitted to the Ministry of Defence under cover of a letter to the Rt Hon Des Browne MP dated 31 January 2008. We enclose a copy of the Memorandum and the letter.

In our respectful submission a number of crucial issues remain outstanding arising from the abuse of Iraqi civilians at the hands of UK troops, as set out in the enclosed. We believe that these issues are also relevant to the work of the Joint Committee on Human Rights. In these regards our concerns are a continuation of those elaborated upon in our October 2007 publication *UK Army in Iraq: Time to Come Clean on Civilian Torture* which we sent to you previously.

We therefore look forward to hearing from you and are available to discuss these matters further at your convenience.

Letter from Carla Ferstman, Director, The Redress Trust, to the Rt Hon Des Browne MP, Secretary of State for Defence, dated 31 January 2008

Thank you for your circular letter dated 24 January 2008 with which you sent us a copy of the Aitken Report. We had seen the Report already and deemed it necessary to prepare a Memorandum to you in response thereto, which is attached, as we believe numerous issues remain unresolved. These are set out fully in the Memorandum, which we are also forwarding to the Foreign Affairs Committee, the Defence Committee and the Joint Committee on Human Rights.

It will be recalled that in October 2007 we drew your attention to the detailed recommendations made to the Government in our publication *UK Army in Iraq 2007: Time to Come Clean on Civilian Torture*. You said in your letter of 8 November 2007 that we will receive a full reply once your officials have had time to study the Report in detail, and we look forward to this. We trust it will include a substantive response to the said recommendations, particularly as it is now clear that these have not been dealt with in the Aitken Report.

We also again refer to the Defence Committee's December 2007 Report *UK Land Operations in Iraq in 2007*, which included a call on the MOD to respond, in its response to the Committee's Report, to the questions we raised with the Committee about the handling of detainees in Iraq. We therefore look forward to this response too, and ask when it is likely to be published, as these questions as well have not been dealt with in the Aitken Report.

Once more we would welcome an opportunity to discuss our concerns with your representatives. We therefore look forward to hearing from you.

Memorandum from The Redress Trust to the Ministry of Defence on the 'Aitken Report: An investigation into cases of deliberate abuse and unlawful killing in Iraq 2003 and 2004', dated 31 January 2008

The Aitken Report was commissioned by General Sir Mike Jackson, the then Chief of the General Staff in February 2005. He was asked to consider what measures need to be taken in order to safeguard and improve the army's operational effectiveness in the light of allegations of abuse in Iraq and criticism in the Defence Select Committee.

The Redress trust (REDRESS) is an international nongovernmental organisation with a mandate to ensure respect for the principle that survivors of torture and other cruel, inhuman or degrading treatment and punishment and their family members have access to adequate and effective remedies and reparation for their suffering. REDRESS has closely followed the conduct of UK forces in Iraq which have resulted in the abuse of Iraqi civilians, including the death of Baha Mousa and others, and is a follow up to a Report published by REDRESS in October 2007 entitled: *UK Army in Iraq: Time to Come Clean on Civilian Torture*. This Memorandum is a response to the Aitken Report made public on 25 January 2008,

General shortcomings with the Aitken Report

The Aitken Report, "*An investigation into cases of deliberate abuse and unlawful killing in Iraq 2003 and 2004*", is limited to "those instances where members of the British Army are alleged or proven to have mistreated Iraq civilians outside the context of immediate combat operations."⁶³ A number of shortcomings arising from the Report are immediately apparent.

Firstly, the Report does not explore whether and to what extent British forces were authorised to use the previously banned five techniques in conditioning prior to tactical questioning and interrogation, because the Report is limited to the conduct of British soldiers. This is a major issue of concern which remains unresolved to this day.

Secondly, the Report concentrates on six allegations of "abuses which could not be mitigated by decision made by British soldiers 'in the heat of the moment,' or in the face of an immediate threat to their own safety but rather which appeared to have been committed in a deliberate and callous manner."⁶⁴ However, the picture that emerges in virtually every case of this kind is one of a lack of accountability. In particular, where the victims were in detention one would expect it to be a priority to find out who was accountable for the events that took place, and this has still not emerged to date. REDRESS has previously noted, for example, that basic paperwork, such as logs showing an audit trail of soldiers

⁶³ The Aitken Report (available at <http://www.mod.uk/DefenceInternet/AboutDefence/CorporatePublications/DoctrineOperationsandDiplomacyPublications/OperationsInIraq/TheAitkinReport.htm>) para 2

⁶⁴ Ibid, para 3.

responsible for detainees at any one time, was not properly kept.⁶⁵ This is one of the reasons why it is still not known who was responsible for the death of Baha Mousa.

Thirdly, the explanations identified by the Report are that troops were expected to convert from a high-intensity war to peacekeeping overnight, and that they were spread too thin, but the Report fails to mention why many other mistakes occurred.⁶⁶ Further, the responsibility for many of these mistakes must lie with the Government itself, and those responsible should be brought to account.

Finally, for matters such as the timing of the invasion, to some extent the resources used, the legal advice regarding the applicability of human rights law, and the manner in which the conditioning techniques were banned in the 1970's, an internal army investigation is clearly not the appropriate forum. Nothing short of a full independent inquiry will suffice.

The need for further investigations

Some have called the Report “a whitewash.”⁶⁷ It has certainly avoided a number of the key questions and problems arising from the abuse of Iraqi civilians by UK troops, and in that sense is something of a distraction. The Report itself does not purport to address all these questions and problems, and does acknowledge that there are some areas that ought to be investigated further, referred to below. Moreover, there are other issues which extend beyond the responsibility of the Army to the Government which are not mentioned at all. It is because of all these unresolved issues that the need for a full independent inquiry remains, now more so than ever. Without these matters being fully investigated then there will indeed have been a whitewash.

Acknowledged area needing further Investigation:

1. Details which come to light through the R v Payne court martial

The Report acknowledges that there are “matters arising from the court martial in connection with the death of Baha Mousa which will need to be examined further.”⁶⁸ However, REDRESS believes it is essential that any further inquiry should be widened beyond the criminal sphere. The mistakes made over this period were not just those of a few bad apples in the military - the system itself failed in a number of ways.

These mistakes include problems with training, and not just the content of training programs which the Report suggests can and have been put right with a new training video; instead, the problem lies with the type of training itself. The 1st Queen Lancashire Regiment, deployed after the invasion, was trained for War Fighting rather than Occupation or Peace Support. If the Army was expecting a humanitarian disaster, as suggested, then why were Battlegroups deployed after the end of the War Fighting stage still being trained in the same way as the invading forces?

⁶⁵ *UK Army in Iraq: Time to Come Clean on Civilian Torture*, REDRESS, 2007, hereinafter “the REDRESS Report” (available at http://www.redress.org/publications/UK_ARMY_IN_IRAQ_-_TIME_TO_COME_CLEAN_ON_CIVILIAN_TORTURE_Oct%2007.pdf pp 41-42)

⁶⁶ Some of the main mistakes that have not been explained in the Report are listed below on p 3.

⁶⁷ See <http://news.bbc.co.uk/1/hi/uk/7208273.stm>

⁶⁸ The Aitken Report, para 7.

The Report does not even try to examine whether the proper policy on tactical questioning and interrogation was followed in Iraq. In this regard the Report offers no explanation as to why Brigade Headquarters authorised the use of the banned techniques, and how legal advisers were shown doctrine allowing the use of hooding and stress positions. The Report acknowledges, though, that these key concerns need to be examined further.

The question of why the 1972 ban on conditioning techniques was not passed down within the military remains unanswered. What is still totally unclear is why the assurance by Prime Minister Heath in the House of Commons that hooding, wall standing, sleep and food deprivation, and the use of noise, would never again be used by UK armed forces as an aid to interrogation, without a ministerial statement, was ignored by the current Government, as well as by the Army. Why did Joint Intelligence Committee (A) apparently limit Heath's statement to internal security operations when no such limitation was made to the House? Why was the MOD policy on the issue in 2003 not as clearly articulated it ought to have been? The statement that the current policy "is in line with international and domestic law"⁶⁹ needs to be independently verified. It is perhaps telling that the Report offers no such assurances that the doctrine in 2003 was in compliance with international and domestic law.

It seems that confidential policies and doctrine on questioning and interrogation were simply not fit for purpose at the time, and yet the UK public are now meant to accept, on the say-so of the Report, that everything has been put right. Clearly there is need for independent assurance that this is the case. Furthermore, those responsible for the mistakes must be identified and made accountable.

2. Planning

The problems relating to planning for the invasion and afterwards are acknowledged in the Report. It argues that planning concentrated on contingencies in the case of a humanitarian disaster rather than on dealing with criminal activity. However, what is not explained is why the Army seemed unprepared even for dealing with Prisoners of War during the invasion, and why internal calls for increased resources dedicated to detention were not heeded.⁷⁰

Unacknowledged areas needing further investigation

In addition to the above which can be said to arise explicitly or implicitly from the Report, there are numerous other questions of legitimate concern which remain unanswered:

1. Why was the detention policy decentralised to the Battlegroups when they were not adequately trained for this task? Why were policies for accountability not put in place at these Battlegroup detention facilities?
2. What legal advice was given to the Army regarding the applicability of human rights law?
3. Why were tactical questioners apparently instructing ordinary soldiers, that is those with no training in tactical questioning, to condition detainees prior to their questioning? Has

⁶⁹ The Aitken Report, para 21.

⁷⁰ See the REDRESS Report, pp. 34-35.

doctrine now been put in place to make tactical questioners responsible for the whole process, including conditioning?

4. How has the *Al Skeini* judgement of the House of Lords, that the Human Rights Act and the European Convention on Human Rights applies to overseas detention facilities affected policy on detention within the Armed Forces?

5. Has training regarding the responsibility of medical staff to document evidence of abuse within detention facilities been updated? What is the role of medical personnel regarding the use of conditioning prior to questioning?

6. Why were US soldiers apparently handling British-held detainees at the Joint Forward Intelligence Team facility within Camp Bucca? What techniques were these US soldiers using on detainees for which the UK was responsible?

7. The integration of UK forces with US forces should also be investigated as some problems were caused by incompatible systems.

In REDRESS' view, therefore, the Report has done little to indicate that those responsible for multiple failures will be brought to account and certainly nothing for the victims of past abuses.

21. Letter from the Rt Hon Des Browne MP, Secretary of State for Defence, to the Chairman of the Committee, dated 19 February 2008

Thank you for your letter of 6 February.

You asked whether, for each of the cases listed on page 3 of the Aitken Report, further inquiries are being considered. Four of the six cases are considered closed, with no additional inquiries anticipated.

However, a Royal Military Police (Special Investigation Branch) investigation is ongoing into the Breadbasket case, and two individuals were arrested earlier this month in connection with witness statements provided to Phil Shiner (of Public Interest Lawyers) by Iraqi civilians. I should point out that no Iraqi civilians made any formal complaint during the initial investigation into the Breadbasket case; rather, the investigation was instigated on the basis of the photographs that had come to light of ill-treatment of Iraqi civilians. As this is a criminal investigation, I am not in a position to state when it is likely to reach a conclusion, but will keep you informed as and when I have any further information.

As for the Baha Mousa case, you will be aware that Public Interest Lawyers are making representations as to the nature of a future inquiry. It will take some weeks to consider the representations fully. You will appreciate therefore that I am not currently in a position to state what form any future inquiry would take, nor set out its timescale. I am sorry I cannot be more specific, but I will make an announcement as soon as a decision has been reached.

You also requested copies of the reviews undertaken by the Adjutant General of the Nadhem Abdullah and Baha Mousa cases. I am happy to provide these but it is necessary for both documents to be redacted for third party and security considerations, and I will explain those redactions when I send the reviews to you shortly.

22. Memorandum from Dr B U Williams dated 27 February 2008

1. By Press Notice dated 5th February 2008 (Session 2007-08 No.16) the Joint Committee on Human Rights (JCHR) sought written evidence in response to the findings of the Aitken Report⁷¹ (which was released on 25th January 2008) and in relation to six specific questions to be addressed by its resumed inquiry with the above title. Such evidence is required to be submitted by 29th February 2008.

2. This response is divided into three main sections:

(a) the first contains brief commentary upon the Aitken report itself.

(b) The second section, which arises from the fifth question before the JCHR concerns international laws and the obligations of the United Kingdom (UK) derived from ratification of the UN Convention Against Torture (UNCAT)^{72,73} and more particularly from the ratification and implementation of the Optional Protocol to UNCAT, (OPCAT)^{74,75,76}. These obligations include a requirement to fully and promptly investigate any allegations of torture, prosecute, and provide legal remedy and compensation⁷⁷

(c) The third section, which relates to the sixth JCHR question, concerns improvements which might arise from changes in the training and better ethical standard setting, specifically of medical, psychiatric and forensic personnel (MPRMs) deployed with ground troops. These persons have a key role in the treatment, monitoring, recording, certifying and reporting of detainees and their injuries or causes of death. They should form an independent professional group with a primary responsibility for the condition of all detainees and a system of secure whistle-blowing for the expression of concerns, which must be a core responsibility for them.

SECTION ONE: The Aitken Report

3. When in February 2005 the beleaguered Chief of General Staff Sir Mike Jackson⁷⁸, faced unequivocal newspaper reports and evidence of torture, killings and other crimes⁷⁹ by the

⁷¹ Brigadier R AITKEN *An investigation into cases of deliberate abuse and unlawful killing in Iraq in 2003 and 2004* [25th Jan 2008] available 15th February 2008 as http://www.mod.uk/NR/rdonlyres/7AC894D3-1430-4AD1-911F-8210C3342CC5/0/aitken_rep.pdf

⁷² *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987.

⁷³ Signed by the UK 15th March 1985, ratified 8th December 1988.

⁷⁴ *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, (OPCAT) G.A. res. A/RES/57/199, adopted Dec. 18, 2002 [reprinted in 42 I.L.M. 26 (2003)].

⁷⁵ The OPCAT entered into force on 22nd June 2006

⁷⁶ A formal announcement made in Parliament will officially designate the individual visiting mechanisms by which the UK should meet its obligation under OPCAT to provide independent torture preventing inspections of all places of detention under its control, called the National Preventive Mechanism (NPM). The Ministry of Justice has failed to meet the deadline of 22 June 2007 by which the UK should have established its NPM

⁷⁷ UNCAT Article 2:1, Article 4, Article 5, Article 6, Article 7, Article 12, Article 13, Article 14, also *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively, Article 13 read in conjunction with Article 3

⁷⁸ Second in command and on duty in Rossville St when British soldiers from the 1st Parachute Regiment opened fire on unarmed Catholic Civil Rights marchers on 30th January 1972. ! Para was one of Britain's top elite military forces highly disciplined and used for specialised security operations. Thirteen demonstrators were killed on the spot, and 17 were wounded, one of whom died later in hospital

⁷⁹ Arguably War-Crimes, *sensu strictu*, under the norms of International Humanitarian Law

forces under his command, he decided to instigate the Aitken Review. He may have had in mind the Saville Inquiry⁸⁰ into events in January 1972. This had not reported after more than ten years (it did not complete its work in 2007) and by its very existence has reduced the possibility of any sanctions against UK troops or their commanders towards zero.

4 Similarly, when in February 2005 the Rt. Hon Geoff Hoon MP as Defence Secretary undertook to publish (in the form of a Brigadier's review) the Army's response to the public outcry, he was aware that it was limited in its remit:

(i) as to the time frame, 2003 and 2004

(ii) as to the subject ("*those instances where members of the British Army are alleged or proven to have mistreated Iraq civilians outside the context of immediate combat operations.*"⁸¹ and "*(those) which appeared to have been committed in a deliberate and callous manner*",) effectively just six episodes, when at 21 February 2005, at least 164 investigations had been launched into the death, injury or alleged abuse of Iraqi civilians.⁸²,

(iii) to an internal army review rather than an open independent inquiry,

(iv) with no brief to examine and disclose logs and records for evidence of attempts at concealment of facts, and

(v) with no instructions to assign accountability

5 When on 25th January 2008 the Rt Hon Des Browne, as Secretary of State for Defence, said he was "*pleased*" and "*satisfied*"⁸³ by the release of the Aitken Report, his remarks would have not have reassured the victims and the families of those killed recklessly, or for fun⁸⁴, or those subjected to appalling torture for sustained periods (with no suggestion that this was done to them in order to obtain essential information in a series of "ticking bomb scenarios"), or those humiliated and degraded for the amusement of our soldiers. The victims were plainly ordinary Iraqi citizens, hotel staff⁸⁵, farmers⁸⁶, children⁸⁷. He may have been pleased because the report did not address the question of Ministerial responsibility, or because he considered it gave no reason to offer any apology, or because he felt he could now label these matters "*historical*"⁸⁸

⁸⁰ *The Bloody Sunday Inquiry* Chairman Lord Saville [1998]

⁸¹ AITKEN R *An investigation into cases of deliberate abuse and unlawful killing in Iraq in 2003 and 2004* [25th Jan 2008] page 2 para 3

⁸² Rt Hon Ingram A Defence Minister House of Commons Hansard 3 Mar 2005 : Column 1335W

⁸³ Rt Hon Browne D Secretary of State for Defence *Iraq: Update on Historic Cases of Abuse including Mr Baha Musa* [25th Jan 2008] Written Ministerial Statement

⁸⁴ AMNESTY INTERNATIONAL [May 2004] "*The United Kingdom (UK) Ministry of Defence has said that UK forces have been involved in the killing of 37 civilians since 1 May 2003. It acknowledges that this figure is not comprehensive. In several cases documented by Amnesty International, UK soldiers opened fire and killed Iraqi civilians in circumstances where there was apparently no imminent threat of death or serious injury to themselves or others*" AI Index: MDE 14/007/2004. cases include Hanan Saleh Matrud, an eight-year-old girl, in Karmat 'Ali,

⁸⁵ Hotel Owner Ahmad Taha Musa Al-Matairi, Receptionist Baha Musa, and others

⁸⁶ Athar Finjan Saddam Abdullah, Nadhem Abdullah, Athar Finnijan Saddam and others

⁸⁷ 15-year-old Ahmed Jabber Kareem, a non-swimmer drowned in a Basra canal, Sa'eed Shabram and others

⁸⁸ see Browne D *Iraq: Update on Historic Cases of Abuse including Mr Baha Musa* [25th Jan 2008] title

6. The very design of the Aitken Report appears complacent. It has the format of a recruiting pamphlet: - a picture on the front cover of Iraqi women walking quietly along a peaceful road, electricity pylons in good repair on the horizon. Similar banner art-work relieves each page. The print is small. A preface by the present Chief of General Staff Sir Richard Dannatt in restful green ink on the first page begins, incredibly enough, “*I take huge pride in nearly everything we have done as an army in Iraq...*”⁸⁹ The report itself acknowledges that it has omissions⁹⁰, in fact these are gross⁹¹ and this report will not suffice.

7. Focus on the context in which these cases occurred diverts attention from eliciting facts. With an expiatory tendency to indulge the behaviour of “*the few*” on the basis of their nervous state⁹², with phrases such as “*criminal activity of one sort or another often happens on operations just as it occurs in society generally in the UK*” and “*abuse of local civilians by invading forces has been a regular feature of warfare*”⁹³ we are invited to sympathise and identify with the perpetrators, the “*insufficient troops in theatre (who had) to deal effectively with the situation in which we (sic) found ourselves*” “*ours were very thinly spread on the ground*” “*soldiers who had just fought a high intensity conventional war...expected to convert overnight*” into decent human beings. However, this is not a truthful picture. These were not one or two battle-stressed heroes over-reacting, but in various episodes large numbers stood laughing to watch groups of xenophobic louts taking turn and turn about⁹⁴ to inflict atrocity upon the defenceless, just to relieve their boredom and express their *bruderkinder-gestalt*

8. The report implies not only that the number of episodes was very small: “*we must bear in mind that the number of allegations of abuse in Iraq has been tiny*”⁹⁵ and “*all but a handful of our people conducted themselves to the highest standards of behaviour*” but also that this was the end of the matter: “*the absence of any further incidents is a consequence, at least in part, of the wide range of corrective measures the Army has taken since 2003*”.⁹⁶ But the Brigadier must have known even as he penned those words that of 31 prisoners, who surrendered to British troops in May 2004 at Majar and were taken to Abu Naji, 22 were returned in body bags; and that it was reliably alleged that at post-mortem they were shown to have been tortured and mutilated⁹⁷ before being killed. The nine survivors also allege they had been tortured.⁹⁸ The Ministry of Defence had secured a Court Order

⁸⁹ quite what the effect of these words will be on the Islamic world it is difficult to conceive

⁹⁰ AITKEN R *An investigation into cases of deliberate abuse and unlawful killing in Iraq in 2003 and 2004* [25th Jan 2008] page 5 para 7

⁹¹ *UK Army in Iraq: Time to Come Clean on Civilian Torture* [2007] REDRESS, available 15th February 2008 on http://www.redress.org/publications/UK_ARMY_IN_IRAQ_TIME_TO_COME_CLEAN_ON_CIVILIAN_TORTURE_Oct%2007.pdf pp 41-42

⁹² Mr. Christopher Clarke QC tribunal counsel to the Saville Inquiry similarly focussed on the alleged nervous tension and bravado of individual soldiers who feared attack, “*increasing[ly] feeling that forces of disorder were on the verge of victory over the forces of civilisation.*”

⁹³ AITKEN R *An investigation into cases of deliberate abuse and unlawful killing in Iraq in 2003 and 2004* [25th Jan 2008] page 5 para 5

⁹⁴ evidence at Court Martial Col Jorge Mendoca Bulford Camp [November 2006]

⁹⁵ *ibid*, page 5 para 6

⁹⁶ *ibid*

⁹⁷ according to reports of the post-mortem certificates written the day after the battle by Dr. Adel Salid Majid, the director of Majar al Kabir hospital, genitalia had been mutilated with a penis cut off here and an eyeball gouged out there...

banning the media from reporting this atrocity⁹⁹ It has to be concluded that such behaviour is endemic in the British Army¹⁰⁰ It must also be concluded that rather than investigate promptly and efficiently and prosecute under both national laws¹⁰¹ and International Law¹⁰² the UK authorities prefer to become complicit by concealing the events and by obfuscation.

9. A large part of the Aitken Report (para 16 seq) is concerned with the reintroduction of the five techniques for interrogation, and with “softening up techniques” in preparation for interrogation. The impression given is that the torture and killings were purposive, that is, though mistaken, they were for the purpose of improving intelligence gathering and hence intended to be of use to the Coalition forces. To quote: “*how soldiers... came to think certain practices that had previously been proscribed were lawful*” This is misdirection, there was no misapprehension of legality in the zeal to serve their country. There was no good intention. Quite simply these were British men who were having their fun¹⁰³ knowing they would suffer no real sanction. The men and the children tortured and killed in the episodes that have become known to the outside world were not being questioned. They were not being asked for information¹⁰⁴. Killing people, and even the survivors were close to being killed, is not a way of finding out what they know. Making them scream like a choir¹⁰⁵, rupturing their viscera¹⁰⁶, beating them unconscious¹⁰⁷, are not undertaken as a regretful necessity to obtain reliable cooperation.

10. The Aitken Review does not, despite its remit, explore whether the MOD policy doctrines on the treatment of detainees either in 2003, or those in place since the reported “improvements”, meet current national and international legal standards. There is no evidence that expert opinion has been sought to this effect outside the Army training sphere. It does not show that the Al Skeini judgement of the House of Lords¹⁰⁸, which is that the Human Rights Act 1988, the International war Crimes Act 2001 and European Convention on Human Rights all apply to overseas detention facilities, has been translated into appropriate policy changes. The only conclusion to be drawn is that for a long while

⁹⁹ It was overturned by Lord Justice Moses on 30th January 2008 in the High Court (so far unreported)

¹⁰⁰ Harding T Defence Correspondent British troops ‘tortured Iraqi detainees’ [4th February 2008] Daily Telegraph

¹⁰¹ Human Rights Act 1988 Article 3 which applies to places of detention within the control of UK forces in Iraq, see judgement in *Al-Skeini and others (Respondents) v. Secretary of State for Defence (Appellant) Al-Skeini and others (Appellants) v. Secretary of State for Defence (Respondent)* (Consolidated Appeals) SESSION 2006-07 House of Lords 26 on appeal from: [2005] EWCA Civ 1609 Lord Bingham, despite dissenting, said in that case: “*This does not mean that members of the British armed forces serving abroad are free to murder, rape and pillage with impunity. They are triable and punishable for any crimes they commit under the three service discipline Acts ... no matter where the crime is committed or who the victim may be.*”

¹⁰² see footnote 7 above for relevant treaty law

¹⁰³ evidence of Ahmad Taha Musa al-Matairi “*they enjoyed it, laughing when we fell down. They were celebrating beating us, It was like Christmas for them*” reported Guardian 27th Sept 2006 and elsewhere

¹⁰⁴ “*Not one of the prisoners taken at the hotel said he had been questioned about the alleged discovery of weapons in the building*” FISK R Who Killed Baha Mousa? [22/12/2004] Independent

¹⁰⁵ MORRIS S Prisoners’ groans and shrieks made ‘music’ [Tuesday 1st May 2007] The Guardian reporting on evidence in the Court Martial against Cpl Payne, who arranged his victims as a choir

¹⁰⁶ Abd Al Jubba Mousa, 53, a headmaster, seen being beaten with rifle butts as he was led away, died on 17 May 2004

¹⁰⁷ Fouad Awdah Al-Saadoon, 67, the former chairman of the Red Crescent in Basra gave evidence he was beaten unconscious by British soldiers after being detained by them in error. He was medevaced to hospital in Kuwait

¹⁰⁸ *Al-Skeini and others (Appellants) v. Secretary of State for Defence (Respondent)*. (Consolidated Appeals). [2007] UKHL 26. on appeal from: [2005] EWCA Civ 1609 United Nations High Commissioner for Refugees intervening [2004] LORD BINGHAM OF CORNHILL

these policies have not been fit for purpose. Resources are also inadequate and were not provided when those in the field sought them.¹⁰⁹

11. Paragraphs 20 and 21 of the Aitken Review imply that the treatment of detainees was imperfect because of lack of specific *skill* training. This is again misdirection: - drownings, kickboxing and the like are not due to lack of skills. No “*military demands*¹¹⁰” required the hooding of detainees with two layers of old soiled hessian sandbags for three days¹¹¹, in a temperature of 60 degrees centigrade¹¹². The hooding of the hotel staff who had seen looting by British troops¹¹³ was not: “*perfectly reasonable... to deprive temporarily a captured person of his sight...to protect the security of our own troops or to prevent collusion with other captured persons...and the only way of doing that was with a hood (then) that would not ..constitute an illegal act*”¹¹⁴ The hoods were not put on until after the detainees were inside the detention centre. They partially asphyxiated the victims as they were intended to do.¹¹⁵

12. It is misdirection to say as the Aitken Review does “ *The issue is therefore one of context*”. The positions these victims were obliged to maintain hour upon hour were not “*a requirement*” in order “*to search a captured person quite legitimately making him stand against a wall with his arms outstretched*” Nor was it “*necessary for (the) soldiers to order their prisoners to adopt uncomfortable positions (because) the soldiers were outnumbered...those being arrested still pose(d) a threat to them*”¹¹⁶

13. The Aitken Review comes closest to finding fault when describing the Bulford Courts Martial, but having defined extrajudicial killings and acts of torture as “*conditioning*” it shows exactly the fault evident in those proceedings and most clearly described in the Redress Report¹¹⁷ : “*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(sic). 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.*”¹¹⁸

¹⁰⁹ UK Army in Iraq: *Time to Come Clean on Civilian Torture*, [2007] REDRESS available on 16th February 2008 at http://www.redress.org/publications/UK_ARMY_IN_IRAQ_-_TIME_TO_COME_CLEAN_ON_CIVILIAN_TORTURE_Oct%2007.pdf p34 & 35 and see Memorandum from Lt Col Mercer to GOC, 6th March 2003, read into the Transcript Court Martial Cpl Payne 08/12/06, pp 15-17

¹¹⁰ AITKEN R *An investigation into cases of deliberate abuse and unlawful killing in Iraq in 2003 and 2004* [25th Jan 2008] page 12 para 20

¹¹¹ BAHA MALKI evidence to the Bulford Court Martial transcript 10th October 2006

¹¹² the consequent dehydration causing life threatening kidney failure requiring hospital treatment in the case of Kifa Taha

¹¹³ RADIF TAHIR MUSLIM evidence Bulford Court Martial and Ahmad Taha Mousa Al- Mutairi as above

¹¹⁴ AITKEN R *An investigation into cases of deliberate abuse and unlawful killing in Iraq in 2003 and 2004* [25th Jan 2008] page 14 para 23

¹¹⁵ The terminal cause of Baha Musa' s death may well have been asphyxiation, but a ligature had been applied to his neck.

¹¹⁶ *ibid*

¹¹⁷ UK Army in Iraq: *Time to Come Clean on Civilian Torture*, [2007] REDRESS which is a far more complete, balanced and considered evaluation than that of Brigadier Aitken.

¹¹⁸ *Ibid* Page 6

SECTION 2: International Legal Obligations

14. It is a War Crime for soldiers acting as an occupying force or as foreign support to a national government to kill civilians deliberately¹¹⁹ except when under imminent threat¹²⁰. The UK is obliged to apply in Iraq the provisions of the human rights treaties which it has ratified, as well as those which Iraq has ratified. In the situation that obtained between the invasion and the election of the post-war Iraq regime, and in the current “support” role, UK forces are subject to international human rights law which complements and reinforces provisions of international humanitarian law. Its content and the standards of interpretation provided by its jurisprudence govern our military conduct, for example on the use of force and firearms in non-combat situations. The Geneva Conventions were adopted into UK law by the Geneva Conventions Act (1957)¹²¹

15. It is not possible to defend killings in Iraq¹²² by reference to Iraqi laws. Both the UK and Iraq are parties to the International Covenant on Civil and Political Rights (ICCPR).⁷ The UK has also ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) which applies to the conduct of its armed forces in Iraq¹²³. Article 6 of the ICCPR and Article 2 of the ECHR guarantee the right to life. Article 4 of the ICCPR emphasizes that there can be no derogation from this right, even in time of public emergency. Article 15 of the ECHR contains a similar provision, stating that there can be no derogation from the right to life, “except in respect of deaths resulting from lawful acts of war.”

16. It is also necessary to consider the modern law of torture. The Criminal Justice Act 1988 incorporates into UK law the prohibition against torture under the UN Convention Against Torture (UNCAT) and the principle that following orders does not exonerate from guilt (a principle which has applied ever since the Nuremberg Trials) but could be a mitigating factor at the time of sentence.

17. Apart from Piracy and Slavery the idea that individuals (whether private soldiers, ordinary citizens, commanders in the field or ruling statesmen) could be personally liable in International Law and suffer punitive sanction is recent and the British do not seem aware that such liability affects them. There is the concept that International Law is between States and not supported by sanctions.¹²⁴

¹¹⁹ The Coalition Provisional Authority (the administration set up by the US to govern Iraq in 2003) “strongly discouraged casualty data collection, especially in relation to cluster submunitions” and the UK and US governments joined diplomatic forces with China and Russia to oppose measures to prevent civilian killings in the Treaty Review talks in Geneva on 7th November 2006

¹²⁰ a grave breach of the Geneva Convention No IV of 1949 “relative to the protection of Civilian Populations in time of War” 75 U.N.T.S. 287, entered into force Oct. 21, 1950. Common Article 3 and Article 15

¹²¹ Geneva Conventions Act [1957] Ch 52 as amended by Geneva Conventions (Amendment) Act 1995 (c. 27)

¹²² Those which had come to common knowledge in 2003/2004 are listed in AI Index: MDE 14/007/2004

¹²³ The European Court of Human Rights (ECtHR) has recognized the extra-territorial applicability of the ECHR in situations where a state party exercises all or some public powers normally to be exercised by the government of a territory by having effective control of the relative territory and its inhabitants. See *Öcalan v Turkey* [2003] 37 EHRR 238, 274-275, para 93; *Bankovic v Belgium* [2001] 11 BHRC 435 para. 71.

¹²⁴ The legality of the international trial of individuals at Nuremberg was clearly established by the *Affirmation of the Principles of International Law recognised by the Charter of Nuremberg Tribunal* [1946] adopted by the United Nations General Assembly on 11 December 1946 G.A. Res. 95 (I), U.N. GAOR, 1st Sess., pt. 2, at 1144, U.N. Doc. A/236

18. At the outset torture was seen as a crime of state actors linked to war or hostilities, but it has become more and more a crime of individuals¹²⁵ Such individuals, if at the same time as they committed their crimes were state actors (police, soldiers etc), might by their actions make equally criminal those under whose authority they were. Commanders and states were responsible for their agents and underlings and had a duty to know what was being done¹²⁶. Politicians and Commanders who attempt to conceal and do not apply sanctions become complicit actors, though mere failure to act is not generally criminal complicity¹²⁷

19. Torture is such an abhorrent act that all humanity is demeaned by it, and as a “crime against humanity” it has the special status of *jus cogens*. All states, and not only those who are, like the UK ratifying signatories of the UNCAT, are permitted to exercise jurisdiction over any torturer and any act of torture wherever committed, and indeed are obliged to do so¹²⁸.

20. This responsibility to bring sanction is absolute¹²⁹, and not at the discretion of State Advocates General or other political appointees. There is a duty to provide no impunity¹³⁰. There is no defence *ratio locus*, that is, because of the place where the offence happened, or because of the state where the perpetrator is found. There is no defence *ratio temporalis*, that is, because of the time when the offence occurred, either before a ratification or after the expiry of some period of limitation, or because there has since been an amnesty. There is no defence *ratio standi*, that is, that the prosecuting state or individual has no relationship to the victims or to the perpetrator. There is no defence *ratio stati*, that is, because the perpetrator held or holds a particular office¹³¹ including diplomatic personnel¹³² and heads of state.

21. In particular there is no defence of obeying orders or compulsion by circumstance.¹³³ If a perpetrator is under the control of a second person, that second person is also a party to the offence. If there is a chain of command the liability to prosecution extends up that command structure; the obligation to prosecute also extends to prosecuting those higher authorities who knew, or ought to have known, what was happening. Those who conceal

¹²⁵ see *Oppenheim's International Law* (Jennings and Watts edition) vol. 1, 996; note 6 to Article 18 of the I.L.C. Draft Code of Crimes Against Peace; *Prosecutor v. Furundzija* Tribunal for Former Yugoslavia, Case No. 17-95-17/1-T.

¹²⁶ “Crimes against Humanity” U.N. General Assembly Resolutions 3059, 3452 and 3453 passed in 1973 and 1975; Statutes of the International Criminal Tribunals for former Yugoslavia (Article 5) and Rwanda (Article 3).

¹²⁷ See MacDonald K & Swaak-Goldman O *Substantive and Procedural Aspects of International Criminal Law* [2000] Brill Page 1685 seq

¹²⁸ International law provides that offences *jus cogens* may be punished by any state because the offenders are “common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution”: *Demjanjuk v. Petrovsky* (1985) 603 F. Supp. 1468; 776 F. 2d. 571.

¹²⁹ *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, G.A. Res. 2391, U.N. GAOR, 23d Sess., Supp. No. 18, at 40, U.N. Doc. A/7218 (1968), entered into force Nov. 11, 1970.

¹³⁰ Report of the United Nations Secretary-General on the protection of civilians in armed conflict [2001] (S/2001/331) see also Report of the United Nations High Commissioner for Human Rights [2001] General Assembly Official Records Fifty-sixth Session, Supplement No. 36 (A/56/36) page 11 para 71

¹³¹ Save for the shameful United Nation's Security Council resolution 1422. This attempts to provide UN peace-keepers from states that have not ratified the Rome Statute of the International Criminal Court (ICC) immunity from the jurisdiction of the ICC for one year. This includes the USA which has also “unsigned” the UN Convention Against Torture. The resolution furthermore states that the Security Council intends to renew the resolution on an annual basis

¹³² Who may be immune from arrest within a state while accredited to that State

¹³³ UNCAT Article 2 para 3

matters, or deliberately impede investigation, or order their subordinates to say in court that they cannot remember events, or who unduly delay proceedings are accessories and guilty of conspiracy to pervert the course of justice. They also add to the dishonour of their Regiments and their country.

22. There can be no plea bargaining or avoiding prosecuting for torture by prosecuting for lesser offences

23. The punishment of perpetrators is not an end in itself: indeed it is not an effective way of preventing torture save that offenders in prison are prevented from continuing or repeating their offences. It is *failing* to sanction that is harmful, since such failure encourages the libidinous violators. For authorities in the Ministry of Defence or the police to be seen to protect and eventually reward those involved is just such encouragement¹³⁴

24. The effective areas for prevention are: -

(a) (i) education from infancy, (ii) alteration of cultural influences, and (iii) training in relation to adult occupation

(b) Monitoring intensively with (i) helmet cameras in action, - (ii) closed circuit cameras in places of detainee processing and holding, -(iii) identification of detainees and (iv) record keeping including accurate duty logs. (v) access to these monitoring records by ICRC and other NGO or international monitors. (vi) Institution and deployment of NPM actors¹³⁵

(c) (i) Medical examination of identified detainees as soon as possible after arrest and (ii) at regular intervals thereafter, (iii) with access to independent medical practitioners if the detainees so elect

(d) When a civilian death, a death of a detainee or a violation is reported (i) the site and all evidence must be secured including the names of all present, (ii) urgent investigation including ballistics where appropriate (iii) forensic medical or autopsy reports must be carried out, and (iv) independent investigation must occur. This requires the previous deployment of appropriate personnel and resources.

(e) Prosecutions must be seen to be carried out without delay, inefficiency, fear or favour

25. It is shameful that the United Kingdom continues to be afraid to sign up to Article 22 of the UN Convention Against Torture which would allow our citizens and those who are under our control as detainees to bring complaints unsatisfied by domestic proceedings to the UN Committee for review. Signing this provision would be a positive signal and a guarantee that institutional torture has been prevented in our state.

26. A good deal of legislative difficulty has been placed in the way of effective prosecution by the attempt to define boundaries between the acts in the theatre of Torture, Cruelty, Humiliation and Inhumane Treatment. Is it sexual humiliation, inhumane treatment, torture, rape or all of these when detainees are stripped naked and made to perform

¹³⁴ In the case of the offences identified by the European Court in Northern Ireland in relation to the five techniques no sanctions were applied to alleged perpetrators, Supt JTC Gilchrist, and Chief Supt K Patterson were promoted and Supt Michael Slevin was honoured with an MBE

¹³⁵ See below

“simulated” oral intercourse, an act which they believed would damn them eternally?¹³⁶ In the Al-Amarah atrocity (which came to light only by chance because it was videoed) the excuse given for not prosecuting the identifiable perpetrators was that this was “battery” and not torture, and that proceedings for such “minor” offences must be brought within six months in UK civilian criminal proceedings. The length of time and state inertia elapsing before proper investigation and trial have been sources of adverse findings against states in many cases considered by the UN Committee against Torture¹³⁷

27. In 1971 Sir Edmund Compton found eleven cases of torture involving the so-called “five techniques” and these were banned by the Heath government in 1972 at last as far as internal security activities were concerned. But they continued, being ruled to constitute torture by the European Court of Human Rights in *Ireland v UK (1979 – 1980)*¹³⁸ and unlawful under Article 3 of the European Convention on Human Rights.¹³⁹ The “techniques” are a direct breach of the Geneva conventions and the UN Convention Against Torture.¹⁴⁰ Nobody in the chain of command, including at the highest level politically and within the civil service, has since attempted to bring military policy into line with basic legal standards even when they have been told what was happening, by the Red Cross among others¹⁴¹

28. The Concluding Observations of the UN Human Rights Committee emphasised that “*the Convention protections extend to all territories under the jurisdiction of a State party and ... this principle includes all areas under the de facto effective control of the State Party's authorities.*” The Committee recommended that the UK should ensure the application of Article 2 UNCAT (the duty to take effective measures to prevent torture). It also ruled: “*The State party should ensure that all those who are involved in the detention of prisoners be made fully aware of the international obligations on the State party concerning the treatment of detainees, including the United Nations Standard Minimum Rules for the Treatment of Prisoners.*”¹⁴² It is notable that the Aitken Report makes no reference to these rules¹⁴³

29. It appears, from the government case in Al-Jedda¹⁴⁴ that no duty of care was felt by the UK authorities towards detainees in Iraq. Their status should have fallen under one or other of the categories of protected persons under the four Geneva Conventions. There is no such category, in either UK law or in International Humanitarian Law, of “unlawful enemy combatant” nor of “criminal internal detainee”, nor is there any jurisprudence to

¹³⁶ Photographs by Fusilier Gary Bartlam May 2003 Camp Breadbasket

¹³⁷ eg *Suleymane Guengueng et al v Senegal* [2006] Communication No. 181/2001, U.N. Doc. CAT/C/36/D/181/2001 and Mr. *Slobodan Nikoli and Mrs. Ljiljana Nikoli v Serbia and Montenegro* [2005], Communication No. 174/2000, U.N. Doc. CAT/C/35/D/174/2000 and *Danilo Dimitrijevic v Serbia and Montenegro*, Communication No. 172/2000, U.N. Doc. CAT/C/35/D/172/2000 (2005).

¹³⁸ *Ireland v United Kingdom* - 5310/71 [1978] ECtHR 1 [18 January 1978] available 13th February 2008 on <http://www.worldlii.org/eu/cases/ECHR/1978/1.html>

¹³⁹ In later cases it was ruled that there must also be a purposive element

¹⁴⁰ The UN Committee against Torture said that such techniques constitute torture - *Consideration of a Special Report by Israel*, (CAT/C/SR.297/Add.1) paragraph 5.

¹⁴¹ Report of the International Committee of the Red Cross (ICRC) in February 2004

¹⁴² *Concluding Observations of the Human Rights Committee, United Kingdom of Great Britain and Northern Ireland*, U.N. Doc. A/50/40, paras. 408-435 (1995) section 5

¹⁴³ *Standard Minimum Rules for the Treatment of Prisoners* Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977

¹⁴⁴ *Al Jedda v Secretary of State for Defence*, [2006] EWCA Civ 327

show that such persons are outside the general protection of the Convention Against Torture.

30. It is possible to charge a soldier with a serious offence such as torture in a forum other than in a court martial and independent from the army ‘chain of command.’ Section 133 of the Army Act 1955 gives the civilian courts the right to enter proceedings if the military have ended all proceedings in a matter. This however is not a right but an obligation where crimes against humanity or war crimes are concerned. UK authorities have not done this.

31. Finally, under the Geneva Conventions¹⁴⁵, persons detained by battle groups should be transferred without delay to safe holding points (Article 19) and an audit trail of identity and disposal maintained. This has not happened.

32. Monitoring is recognised in a number of treaty preambles as the chief weapon for the prevention of torture, and there are a number of monitoring mechanisms that have been deployed as instruments provided within International Law for ensuring compliance with the generally expressed intent of ending or reducing to a minimum the behaviours which fall within the torture spectrum. The older international systems¹⁴⁶ under the Council of Europe, the European monitors under the Convention for the Prevention of Torture (ECPT)¹⁴⁷, the rapporteurs of the UN under the International Covenant for Civil and Political Rights (ICCPR)¹⁴⁸, the UN ComCAT and the important long term influence of the monitors of the ICRC¹⁴⁹ all demonstrated the limits and possibilities of monitoring.

33. The newest and most promising forms of monitoring are those presently being rolled out across the globe with the implementation of the Optional Protocol to the UN Convention Against Torture (OPCAT)¹⁵⁰, which are the Sub-Committee for the Prevention of Torture and the National Preventive Mechanisms (NPMs). These NPMs are independent but state funded bodies with powers to make visits and interview detainees at every place where persons are held unable to depart at will, to report their findings and make criticisms.

34. It is essential that the UK finally identifies and puts in place the organisations that will compose the British NPM (and at present the suggestion is that some thirty such would be involved ranging from Police Station Visitors to HM Inspector of Prisons, Mental Health Tribunals and Regional Authorities). It is essential that they are funded adequately, that they are truly independent, that a single coordinating body assume the role of putting

¹⁴⁵ Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, *entered into force* Oct. 21, 1950. Article 4 and Article 12, similar provisions in the other Geneva Conventions

¹⁴⁶ which included also the UN Special Rapporteurs (to the UN Human Rights Commission, the ICCPR and others) the Inter-American Commission on Human Rights, the Special Rapporteur on Prisons and Conditions of Detention in Africa of the African Commission on Human and Peoples’ Rights, the EU Special Rapporteur, visitors from Embassies to their citizens detained in foreign places of detention, International NGOs such as Amnesty and Human Rights Watch, as well as national Human Rights organisations and visits by jurists.

¹⁴⁷ *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* CETS No.: 126 signed at Strasbourg 26/11/1987 entry into force 1/2/198

¹⁴⁸ *UN International Covenant on Civil and Political Rights* Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49

¹⁴⁹ International Committee of the Red Cross as monitor, educator and advocate

¹⁵⁰ *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. res. A/RES/57/199, *adopted* Dec. 18, 2002 and came into force in July 2006

together the national reports, that serious attention be paid to their findings, that faults are remedied, and wrong doing prosecuted.

35. It is also important that specific NPMs are set up which have access to military places of detention¹⁵¹, including any training camps where recruits are not allowed leave during months of training, and including overseas places of detention under UK control, even where such control is delegated to contractors.

36. Persons are quite often detained outside built facilities, in their homes, in the street and in the open country in many cases. Since violent attacks on persons who have surrendered or been taken into custody may commence at the time of arrest, and extrajudicial killings equally happen in such circumstances, it is worth considering the deployment of recording cameras. These have four advantages:

(a) There can be no question of false allegations if true automatic and sealed recordings of what actually took place are available

(b) They save time in writing logs and records, in taking statements when things appear to have gone wrong, and they speed up Military Police investigations saving manpower and wasted effort

(c) they assist commanders in debriefing and tactical planning especially when it is necessary to develop countermeasures to new problems; and

(d) most importantly, they act as a deterrent, preventing undisciplined outrages and impulsive misconduct.

Such equipment, which can be highly miniaturised, of very little weight, helmet mounted and powered by body movement energy harvesting¹⁵². They would not impede troops in any way and, in the numbers that would be useful, individual mass produced sets would cost very little.

SECTION 3: Medical and Forensic Issues

37. For similar reasons it is most desirable¹⁵³ that all detainees are identified and issued with identity bracelets at the earliest possible stage, and that a medical record is instituted linked to that bracelet. An initial examination will be carried out by the best qualified person¹⁵⁴ available. This serves several purposes:

¹⁵¹ the Secretary of State's brief response to the Redress Report " *Redress Report: UK Army in Iraq*" [undated but circulated in January 2008] includes the following statement : "All theatre detention facilities are regularly inspected by Provost Marshall(Army) to ensure that all detainees arrested and held by UK Forces are treated humanely and with respect at all times, in accordance with UK law, the Law of Armed Conflict, and other relevant international obligations." But the Provost Marshall's officers do not meet the criteria laid down in OPCAT for a satisfactory NPM. Provost Staff often have three incompatible roles (i) Guarding detainees under proper conditions, (ii)collating and assisting intelligence and (iii)investigating breaches of humanitarian law. See Sergeant Smith's testimony, Transcript Bulford Court Martial, 11/12/06, pp 78-79

¹⁵² Zhong Lin Wang & Jinhui Song *Piezoelectric Nanogenerators Based on Zinc Oxide Nanowire Arrays* April 2006: *Science* 14 Vol. 312. no. 5771, pp. 242 - 246

¹⁵³ but it is recognised that resources are often not available.

¹⁵⁴ Not necessarily a full Medically Qualified Doctor, but certainly a person adequately trained for this role. Some service doctors sent on foreign deployments have remarked that they were only trained to deal with UK service personnel and had no preparation at all for dealing with detainees

(a) persons in custody are not able to take responsibility for their own health, and once a person is deprived of liberty his or her health and well-being become the responsibility of the detainers. Therefore it is essential to detect as early as possible any conditions requiring treatment, any ongoing conditions requiring the supply and administration of regular medications, any addictions for which maintenance therapy would be needed to prevent withdrawal and any psychiatric conditions.

(b) To ensure and record that they are being fed, provided with clean drinking water, kept warm, have hygienic toilet facilities, are kept clean, with adequate sleeping space and with respect for their religious and cultural needs¹⁵⁵

(c) To detect and record any wounds (ideally by photograph), decide whether these appear to have been present for some time prior to arrest, whether they appear to have been sustained at the time of arrest, and if so, what was the likely mechanism by which they were inflicted. Any injuries that occur subsequent to this initial examination will of course be significant and require explanation.

(d) The knowledge that such a record exists and cannot be modified will act to discourage false claims of subsequent ill treatment which might be made by the detainee or his representatives/ It this protects the holding authority.

(e) Similarly the knowledge that a record exists and cannot be modified acts as a deterrent to violators and to those who might be complicit with them. This also acts to protect the holding authority from unauthorised activities by its agents.

38. The preliminary examination should be informed by a “history”, that is, a carefully collected account given by the detained person of any complaints of symptoms from which they are suffering, how long and where the symptom commenced, and any explanation of its cause, etc. The person bringing the detainee to be examined should also state what they know, but the history otherwise should be taken in confidence and without witnesses or coercive presence of custodians. Ideally the only other persons present should be an independent interpreter and/or a legal adviser appointed by the detainee.

39. These preliminary examination requirements should be clearly written instructions to all battle groups, front line holding points, temporary detention facilities and most particularly all tactical interrogation sites. When persons are held in such facilities for more than a short while, which would of itself be contrary to the Geneva Conventions, regular checks should be made to ensure that they remain fit physically and psychologically, to detain. It does appear that persons carrying out such checks, as in the case of the Medical Orderlies who saw Mr Baha Mousa after he had been kicked and beaten, had his nose broken and so on, may choose not to see what would be obvious, and that the UK authorities do not succeed in sanctioning this selective blindness. The use of closed circuit cameras and the taking of photographs will not be effective if such complicity is encouraged.

¹⁵⁵ United Nations *Standard Minimum Rules for the Treatment of Prisoners* Adopted August 30, 1955, by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977).

40. Any detainee transferred away from the danger of forward positions, which under the Geneva Conventions should take place as soon as feasible, should be the subject of a recorded hand-over, a transfer not just of the physical person, but of the responsibility for his welfare, with the receiving unit certifying the condition in which the detainee is received. This will generally entail another and more thorough history and examination and a specialist who is experienced in the application of the standards found in the Istanbul Protocol¹⁵⁶, which establishes an international norm of medical ethics to which it appears certain UK practitioners may have not adhered.¹⁵⁷

41. Indeed when enquiry was made of the GMC¹⁵⁸ in October about any disciplinary measures relating to Major Keilogh the only reply given was that a leaflet existed setting out the basic requirements for medical practitioners' education ("Tomorrows Doctors")¹⁵⁹. On checking this stated only that it was the responsibility of each doctor to be familiar with any legal requirements that might affect them. There is no specific requirement for any UK medical school to teach the modern international responsibilities of medical practitioners¹⁶⁰ and most have no provision of time or testing for such measures. This needs to be urgently addressed since medical monitoring is a most powerful measure and prompt proper investigation is a Council of Europe requirement.¹⁶¹

42. The records and logs, including the medical examination records, also must be transferred and become the responsibility of the receiving officer. There is no excuse for the routine loss of records, which has repeatedly enabled the UK military personnel guilty of atrocities to be concealed; this too is someone's responsibility, some medical officer's breach of duty.

43. Though it is understood that the JCHR cannot consider individual cases or issue judgments upon individual medical practitioners there are clear, up to date, internationally established standards for the profession¹⁶² that have not been met. In the Baha Mousa case

¹⁵⁶ Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Minnesota Protocol Submitted to the United Nations High Commissioner for Human Rights 9 August 1999 and the consequent *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* or Istanbul Protocol, Recommended by General Assembly resolution 55/89 of 4 December 2000 together with subsequent variations on the procedures including *Guidelines for Medical Doctors concerning Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in relation to Detention and Imprisonment*, or Tokyo Guidelines as adopted by the twenty-ninth World Medical Assembly, held in Tokyo in October 1975

¹⁵⁷ the role of Major Derek Keilogh (ret'd) who apparently attempted resuscitation of Baha Musa without seeing the 93 antemortem injuries on his body evident on the photographs has been reported to the General Medical Council; however enquiries about the progress of any enquiries by the GMC or any case against him are met with a refusal to comment, and there is no Freedom of Information provision to allow information to be obtained.

¹⁵⁸ "Tammie Lawrie (020 7189 5378)" TLawrie@gmc-uk.org and "Ian Howell (020 7189 5166)" IHowell@gmc-uk.org

¹⁵⁹ *Tomorrow's Doctors* [1993] UK General Medical Council

¹⁶⁰ as set out, inter alia in *UN Principles of Medical Ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture, and other cruel, inhuman or degrading treatment or punishment*, General Assembly Resolution A/RES/37/194 of 18th December 1982

¹⁶¹ The European Union in its "Guidelines to EU Policy towards Third Countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" adopted by the General Affairs Council in 2001 says that states should "conduct prompt, impartial and effective investigations of all allegations of torture in accordance with the Istanbul Rules annexed to CHR resolution 2000/43" and should "establish and operate effective domestic procedures for responding to and investigating complaints and reports of torture and ill-treatment in accordance with the Istanbul Rules.

¹⁶² Inter alia the *World Medical Association resolution on the Responsibility of Physicians in the Documentation and Denunciation of Acts of Torture or Cruel, Inhuman or Degrading Treatment (Helsinki Resolution)* Initiated: September 2002 Adopted by the WMA General Assembly, Helsinki 2003 and amended by the WMA General Assembly, Copenhagen, Denmark, October 2007

it is alleged that the Death Certificate initially said death was by asphyxia. A Coroner's Officer in the UK would not accept this, since a cause for asphyxia is always required. Without a post-mortem, which at that stage had not been carried out, and without an open examination of the contents of the lungs for drowning or inhaled vomitus etc, and an open examination of the neck (it is alleged there were ligature marks) of the thyroid and cricoid cartilages for evidence of manual strangulation, no such diagnosis could be established. Later it is alleged the cause of death appeared to have been altered to "cardio-respiratory failure", again an "incomplete" and meaningless diagnosis, which any UK medical graduate would know was not acceptable.

44. The value of forensic records and photographs has never been more clearly shown than in the matter of the Abu Naji/Majar killings, an episode which will surely prove to be as significant an event in British Army history as Bloody Sunday. What is certain is that dead or alive 31 Iraqi's were removed from the fields. If the majority were already dead the reason for removing them is unclear - unless some had been shot in the back of the head after surrendering and others had been repeatedly bayoneted or stabbed while lying on the ground. Certainly some of the bodies recovered next day had injuries consistent with this scenario, and survivors and witnesses have described such events. UK field doctors, some of whom must have been available, recorded no post-mortem examinations. Iraqi hospitals say they have never before been asked to collect dead bodies from an army camp and perform post-mortems upon them.

45. On at least two occasions Ambulances were summoned from Abu Naji to collect bodies. These were not Mehdi Army sympathisers but Iraq Government Ambulances from a normal Iraqi general hospital, Majar al-Kabir Hospital. There were 22 bodies, and the condition in which they arrived was recorded on video, which is available. The majority can be seen to be unclothed or partially clothed and have extreme injuries, being covered in blood.

46. 21 year-old farm labourer Hamid Alami has a death certificate and autopsy report (provided by an experienced Hospital Director called Adil Saleh who has many years of experience in carrying out post-mortems) noting that his genitalia had been sliced off. They were with the body, in a plastic bag.

47. Labourer Ali Jasim, 37 is certified as having several bullet holes in his neck and face, a large hole gouged in his face and an almost severed right hand. His eye had been gouged out without damage to the bony orbit, implying removal at close quarters with a knife and inconsistent with a bayonet thrust. It is alleged that the eye was in the dead man's pocket, which is not consistent with the body having been collected from a battlefield, when such a small object would probably have been overlooked. His neck bore marks consistent with partial strangulation by a metal cable prior to his execution by shooting in the head. Such forensic evidence is almost impossible to discount, particularly when consistent with the accounts of survivors.¹⁶³

¹⁶³ five of whom have given statements to senior partners in two UK solicitors firms, Phil Shiner and Martyn Day who have published details of written statements of five survivors; Hussein Jabbari Ali, Hussain Fadhil Abass, Atiyah Sayid Abdelreza, Madhi Jassim Abdullah and Ahmad Jabber Ahmood, photographs of the dead, death certificates and other witness statements

48. Hamid Suweidi, a 20 year-old labourer, had total facial mutilation and other signs of torture according to the post-mortem report. He had died of a single bullet to the head. A majority of the dead died from close quarters shots to the head. It is difficult to explain how that could be the case in a battle in which one Army spokesperson has explained the many mutilating injuries as resulting from hand to hand fighting with bayonets, and another has explained the many mutilating injuries as resulting from fragmentation shrapnel from artillery.

49. Ahmed Al Halfi, a 20 year-old labourer, suffered deep cuts to his right wrist and bore “signs of beating and torture all over his body”, according to the certificate. He had been shot several times. Labourer Abbas Al Mosani, 21, had his face mutilated. He had died from a shot. The time of death was estimated at 11pm on May 14th in both cases according to the death certificates.

50. Labourer Hussein Alumshenih, 14, was killed by several bullets in his face and body. Jasim Alumshenih, 25, died after being shot in his head and body. In both cases the time of death was put at 1pm on 15th May, the day after the battle, and between the times of the two ambulance call-outs, the first of which was late at night on the 14th. Photographs taken by doctors appear to back up the autopsy reports, showing badly mutilated bodies, fresh injuries, and fresh blood. One body appeared to have been savaged by a dog.

51. It is difficult not to conclude with the remarks of one of the families’ solicitors: “*The government’s response is pathetic. It asserts that a military investigation (held, of course, in secret) concluded in May 2005 that there was no evidence of criminal wrongdoing and that all the deceased died of injuries sustained before detention. This is consistent with the decision of the present foreign and defence secretaries to shut their eyes to evidence of systematic abuse*”.¹⁶⁴

23. Memorandum from Rachel Murray, Director of the OPCAT project team, University of Bristol, dated 3 April 2008

1. We welcome the opportunity to submit this evidence to the Joint Committee’s resumed inquiry into allegations of torture and inhuman treatment carried out by British troops in Iraq. We would like to confine our written evidence to the final two questions being posed by the Joint Committee, namely:

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?

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

2. This evidence is prompted by the work being carried out by the OPCAT project which is run out of the School of Law at the University of Bristol. This is a three year Arts and Humanities Research Council (AHRC) funded independent research project looking at the Optional Protocol to the UN Convention Against Torture (OPCAT). OPCAT came into force in 2006 as an additional Protocol to the UN Convention Against Torture. It sets up a

¹⁶⁴ Phil Shiner *Political leaders as much as military bosses need to face up to our brutal detention policy in Iraq* Friday October 19 2007 The Guardian

'system' of visits to places of detention by an international committee, the Sub-Committee Against Torture (SPT) and national preventive mechanisms (NPMs). The UK ratified the OPCAT on 10 December 2003 and thus it came into force that the country on 22 June 2006. Under the Protocol, Articles 3 and 17, the government is obliged to, 'maintain, designate or establish, at the latest one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent national preventive mechanisms for the prevention of torture at the domestic level' (Article 17). The British government's Ministry of Justice has been coordinating the discussions on this issue as to who should be the NPM for the UK and the information so far obtained indicates that the British government is considering a broad and comprehensive approach with the potential that a significant number of bodies will collectively be chosen as the NPM.¹⁶⁵

3. Although application of OPCAT to prisons, mental health institutions, secure accommodation, for example, whether they be in England, Northern Ireland, Scotland or Wales appears to be accepted, less clear is the extent to which OPCAT applies to territory outside of the UK. This written evidence would like to make further reference to the requirements of OPCAT and the applicability of this to UK forces overseas. The UK government should be considering, in its choice of NPM, which body will be responsible for visiting such places abroad as well as its obligations under OPCAT to grant the SPT access to such places if the latter so wished to do so.

Places of detention within the context of OPCAT

4. Article 1 of OPCAT sets out the objective of OPCAT as being to establish regular visits 'to places where people are deprived of their liberty'. Article 4 provides that the SPT and NPM have access to 'any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence'. Further, Article 4(2) provides 'deprivation of liberty means any form of detention or imprisonment or the placement of any person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority'. In the context of the JCHR's enquiry, the situation under consideration is whether the UK has responsibility for ensuring both a national independent visiting body and the UN SPT can visit places where individuals are deprived of their liberty by military forces in, e.g. Iraq or Afghanistan.

5. From what we understand, with respect to the activities of the UK, where individuals are detained in Iraq and Afghanistan as requested by the UK, they are held in UK military camps where they are also interrogated (sometimes in the same building). The question thus arises as to whether such places are within 'the jurisdiction and control' of the UK government, as required by Article 4 of OPCAT. It is worth noting that the French text of OPCAT refers to 'jurisdiction or control' ('...dans tout lieu placé sous sa juridiction ou sous son contrôle...') and that arguably the more broader interpretation which provides greater protection for the individual should be adopted. The application of the European Convention on Human Rights and its reference in Article 1 to 'within the jurisdiction' of the state, to detention facilities at a British military base in Iraq has now been accepted (*Al-Skeini and others v. Secretary of State for Defence, Al-Skeini and others v. Secretary of State*

¹⁶⁵ A seminar was held at the University of Bristol on 26th November 2007 which brought together all the potential relevant parts of the UK NPM to discuss implementation of OPCAT in the UK, see: <http://www.bris.ac.uk/law/research/centres-themes/opcat/index.html>.

for Defence (Consolidated Appeals), [2007] UKHL 26). In its 19th Report of the Session 2005-2006 on the UN Convention Against Torture, the JCHR looked at the territorial applicability of UNCAT and noted 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'.¹⁶⁶ In the same vein, Article 4 of OPCAT should apply to such situations. Therefore, the UK government should have an obligation under OPCAT to ensure that in its selection of the NPM, such places of detention should be covered.

6. As to other situations in which individuals may be deprived of their liberty in Iraq or Afghanistan or other states but where they are not held on British military bases, although the information we have been provided with suggests that there are no other circumstances in which individuals are held under the direction of the UK forces, it is worth examining whether OPCAT would apply if this were to happen. The legal regime in such situations will include not only international humanitarian law but also human rights law, and international jurisprudence has recognised their concurrent application.¹⁶⁷ The concept of jurisdiction in relation to human rights treaties refers to the exercise of legal authority over a territory and its inhabitants. It is premised on control over territory but with regards to national territory, such control is presumed.¹⁶⁸ It can extend beyond state borders but following mainly European Convention on Human Rights jurisprudence, different levels of control are required. In cases of occupation, the applicable level has been 'overall effective control'.¹⁶⁹ In cases of overall effective control, the state should secure the entire range of 'substantive rights'.¹⁷⁰ In situations other than occupation, control needs to be more detailed. These situations refer to personal control where agents of a state exercise power over people¹⁷¹ and state control over certain establishments abroad such as diplomatic or consular premises, prisons, military barracks. In the context of OPCAT, therefore, the extent to which it applies beyond UK military places of detention depends on the degree of effective control exercised over spaces or individuals, something that needs to be decided on a case-by-case basis. As the Parliamentary Assembly of the Council of Europe put it 'the extent to which Contracting parties must secure the rights and freedoms of individuals outside their borders, is commensurate with the extent of their control ...'.¹⁷² Such differentiated treatment has been recognised by the ICJ which required either territorial control or the exercise of sovereign rights in the territories occupied by Israel in order for

¹⁶⁶ Joint Committee on Human Rights, The UN Convention Against Torture (UNCAT), Nineteenth Report of the Session 2005-2006, HL Paper 185-I; HC 701-I, at para 73.

¹⁶⁷ *Legal Consequences of the construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion ICJ Rep (2004) para 106; *Coard v United States*, Case 10.951, Inter-Am. C.H.R., Report No.109/99; Human Rights Committee, *General Comment 31: Nature of the General Legal Obligations Imposed on States parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004); Concluding Observations of the Human Rights committee: Israel, 21 August 2003, UN Doc. CCPR/Co/78/ISR, para 11; SC Res 1265 (1999); Art 72, 75 API

¹⁶⁸ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council resolution 276 (1970)*, ICJ Rep (1971) para 118

¹⁶⁹ *Cyprus v. Turkey* (Appl. No. 25781/94) ECtHR 10 May 2001, para 77; *Loizidou v. Turkey* (Preliminary Objections) ECtHR 23 March 1995, Series A, vol. 310, paras 62-64; *Bankovic and Others v. Belgium and 16 Other Contracting States* (Appl. no. 52207/99) ECtHR 12 December 2001, para 71

¹⁷⁰ *Cyprus v. Turkey* para 77

¹⁷¹ *Ocalan v Turkey*, App. No. 46221/99, Eur. Ct. H.R (Judgment on the Merits, Mar. 12, 2003) para 93

¹⁷² Parliamentary Assembly, Area where the European Convention on Human Rights cannot be implemented, Doc 9730, 11 March 2003, para 45

the ICESCR to apply.¹⁷³ The UK NPM should have the capacity, therefore, to be able to visit such places of detention where appropriate.

The National Preventive Mechanism

7. The primary purpose of the OPCAT's system of visits, whether by the SPT or the NPM, is, as set out in Article 1, to prevent torture and other forms of abuse.¹⁷⁴ It is based on the premise that visits to places of detention can deter and prevent torture occurring.¹⁷⁵ The visits to places of detention in the context of OPCAT, therefore, must be viewed within this broader context of prevention. This has been held to impose a separate legal obligation on states¹⁷⁶ and one which is 'wide ranging' and where states should provide certain basic guarantees to all persons deprived of their liberty and prevent torture and ill-treatment 'in all contexts of custody and control'.¹⁷⁷ The UN Committee Against Torture has also stated that 'protection of certain minority or marginalized individuals or populations especially at risk of torture is part of the obligation to prevent';¹⁷⁸ and states should ensure 'continual evaluation'¹⁷⁹ and that 'law enforcement and other personnel receive education on recognising and preventing torture and ill-treatment'.¹⁸⁰ This is the consideration of various 'legislative, administrative, judicial and other measures' to which the preamble of OPCAT refers.

8. Prevention also, arguably, requires a regular and on-going relationship to be established between the NPM and those whom it visits so that any recommendations it makes can be delivered. From the army perspective, a visiting body that provides recommendations and can then follow these up with advice on implementation may be particularly welcomed.

9. If one accepts the applicability of OPCAT to detainees 'within the jurisdiction or control' of the UK forces in Iraq or Afghanistan, for example, then the UK, as part of establishing the NPM under OPCAT, must also provide an institution which fulfils the OPCAT criteria of independence, 'required capabilities an professional knowledge', and with the 'necessary resources' (Article 18 OPCAT). Any visiting body should have the minimum powers, as set out in Article 19 OPCAT:

¹⁷³ Wall para 112

¹⁷⁴ Article 1, OPCAT.

¹⁷⁵ UN Special Rapporteur on Torture, Report to the General Assembly 2006, UN Doc. A/61/259, 14 August 2006, at para. 72; Civil and Political Rights including the questions of torture and detention. Torture and other cruel, inhuman or degrading treatment, Report of the Special Rapporteur on the Question of Torture, Manfred Nowak, E/CN.4/2006/6, 23 December 2005, at para. 21.

¹⁷⁶ In its ruling on *The Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 26 February 2007 the International Court of Justice held that the obligation to 'prevent' was separate from the obligation to 'punish' (in the context of the Genocide Convention), 'In particular, the Contracting Parties have a direct obligation to prevent genocide', *ibid*, para 165. 'The obligation on each contracting State to prevent genocide is both normative and compelling. It is not merged in the duty to punish, nor can it be regarded as simply a component of that duty. It has its own scope', para 427.

¹⁷⁷ Committee Against Torture, General Comment No.2, *Implementation of Article 2 by States Parties*, CAT/C/GC/2/CRP.1/Rev.4, paras. 8, 13 and 15 respectively.

¹⁷⁸ Committee Against Torture, General Comment No.2, *Implementation of Article 2 by States Parties*, CAT/C/GC/2/CRP.1/Rev.4, para. 21.

¹⁷⁹ Committee Against Torture, General Comment No.2, *Implementation of Article 2 by States Parties*, CAT/C/GC/2/CRP.1/Rev.4, para. 23.

¹⁸⁰ Committee Against Torture, General Comment No.2, *Implementation of Article 2 by States Parties*, CAT/C/GC/2/CRP.1/Rev.4, para. 25.

- a. To regularly examine the treatment of the persons deprived of their liberty in places of detention as defined in article 4, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment;
- b. To make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations;
- c. To submit proposals and observations concerning existing or draft legislation.

10. Furthermore, the UK government must provide this body with:

- a. Access to all information concerning the number of persons deprived of their liberty in places of detention as defined in article 4, as well as the number of places and their location;
- b. Access to all information referring to the treatment of those persons as well as their conditions of detention;
- c. Access to all places of detention and their installations and facilities;
- d. The opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the national preventive mechanism believes may supply relevant information;
- e. The liberty to choose the places they want to visit and the persons they want to interview;
- f. The right to have contacts with the Subcommittee on Prevention, to send it information and to meet with it.¹⁸¹

11. There should be protections in place for those who communicate with the NPM and confidential information obtained by the NPM should be privileged.¹⁸² The UK authorities are also required to ‘examine the recommendations of the national preventive mechanism and enter into a dialogue with it on possible implementation measures’ as well as ‘publish and disseminate the annual reports’ of the NPM.¹⁸³

12. At present, although we understand the ICRC visits places of detention under UK military control, this does not satisfy the OPCAT criteria as it is not a body established, maintained or designated by the UK itself.¹⁸⁴ Any body which is designated as the NPM with responsibility for such places of detention extra-territorially should also be one that understands the specific circumstances of the military context of detention.

13. The UK has yet to designate its NPM, despite this being now past the one-year deadline required by Article 17 of OPCAT. Article 24 gives states some leeway by enabling them to ‘make a declaration postponing the implementation of their obligations’. Although the

¹⁸¹ Article 20, OPCAT.

¹⁸² Article 21, OPCAT.

¹⁸³ Articles 22 and 23 respectively, OPCAT.

¹⁸⁴ Article 17, OPCAT.

English text of OPCAT refers to this declaration being made ‘upon ratification’ versions of OPCAT in other languages refer to this being after ratification or ‘once the Protocol is ratified’ and some states have taken advantage of this. It is submitted that given the UK is already out of time with its obligation to designate an NPM, the government could use the ambiguity of Article 24 to, at the least, set out a clear timetable with the international bodies as to the process of designation. The JCHR should continue to press the government to explain its plans for designation.

14. Lastly, OPCAT also requires states to allow visits by the UN SPT, an independent body of ten members, to such places as referred to in Article 4 of the Protocol. Although the SPT has announced its visits for 2008, it is within its remit, therefore, on the same basis as above, to visit such places of detention in Iraq and Afghanistan and other extra-territorial locations as part of its own visiting scheme. States are required, in order to enable the SPT to undertake these visits, to receive the SPT ‘in their territory’ as well as to ‘grant it access to the places of detention as defined in Article 4’.¹⁸⁵ The state authorities have to provide all relevant information that the SPT may request and examine its recommendations and enter into dialogue with it on possible implementation.¹⁸⁶

15. The OPCAT therefore offers an important opportunity for the UK government to set up a visiting body which aims towards greater transparency of military detention extra-territorially, which could facilitate training of troops and others and take a concrete step towards prevention of future abuse.

24. Memorandum from Phil Shiner, Solicitor, Public Interest Lawyers, dated 29 April 2008

1. Introduction

1.1 I have already submitted a copy of a lengthy letter of 10 July 2007 to Treasury Solicitors (who are acting for the Secretary of State for Defence (SSD)) to this committee. I attach this for convenience as Annex A.¹⁸⁷ This contains over 380 evidential points under various headings including evidence of abuse, individual culpability, systematic abuse and systemic issues. This letter was prepared following my reading of approximately 8,000 pages of the 10,000 or so pages that are the transcript to the court martial into the death of Baha Mousa, and the abuse and ill treatment of his colleagues. It was submitted to the SSD as part of the ongoing process in *Al-Skeini* [2007] UKHL 26 following the decision of the House of Lords of 13 June 2007 to remit to the Divisional Court the question as to whether there should be an independent investigation into the matters raised by the Mousa Court Martial.

1.2 Since this letter of 10 July 2007 was written there has been a lengthy court battle to force the SSD to disclose the court martial bundles. The SSD refused to disclose any of these bundles to Public Interest Lawyers (PIL) despite having invited PIL to make representations to it regarding issues arising from the court martial that PIL submit the SSD should consider.¹⁸⁸ On the 1 October 2007, the High Court ordered the SSD to

¹⁸⁵ Article 12, OPCAT.

¹⁸⁶ Articles 12(b) and (d), OPCAT.

¹⁸⁷ Not printed here.

¹⁸⁸ This offer is the sole reason why in *Al-Skeini* in the House of Lords the appellants agreed that the question as to whether there had been a breach of procedural duty to hold an independent enquiry should be remitted to the Divisional Court.

disclose 27 of the 50 or so bundles. PIL made further representations to the SSD by letter of 18 February 2008. These further representations increase the number of evidential points under the same headings as set out in paragraph 1.1 above to over 600. However, as the Court's order forbade publication of material arising from the bundles - although it is highly regrettable - PIL cannot make these further representations available to this committee.

1.3 Based on a reading of all of the transcripts, the court martial bundles and material arising from other cases in which PIL is instructed,¹⁸⁹ these representations concentrate on a handful of key issues. These are as follows:

1. The reintroduction of the five techniques
2. Other issues of systematic abuse
3. Systemic issues
4. The Attorney General's advice and the relevant legal framework
5. The Aitken Report
6. A single independent inquiry into the UK's detention policy in SE Iraq.

2. The Reintroduction of the Five Techniques

2.1 The evidence in the Mousa court martial and elsewhere could not be clearer. Interrogators (and presumably Tactical Questioners) appear to have been trained at Chicksands in techniques that included hooding and stressing.¹⁹⁰ From the outset the Head of Army Legal to 1 Div in Iraq (Lieutenant Colonel Nicholas Mercer) and the ICRC noted hooding, stressing and the use of noise.¹⁹¹ Thereafter it appears that all battle groups were using at least hooding and stressing as Standard Operating Procedure.¹⁹² Despite the heat (temperatures of up to 60°C) 2 or even 3 sandbags were used or, even as Mercer noted, "old plastic cement bags".¹⁹³

2.2 It might be thought that Permanent Joint Headquarters (PJHQ) would have stopped the use of these techniques immediately once Mercer, the ICRC and at least one other senior military figure, Colonel Vernon,¹⁹⁴ had brought it to their attention. Representatives from PJHQ will no doubt explain in public in due course why they did not. Neither did the

¹⁸⁹ These include *R (on the application of Al-Sweady & Others) v SSD* (a forthcoming judicial review arising from the incident in Major Al-Kabir in May 2004), *R (on the application of Kadhim Hassan) v SSD* (a forthcoming judicial review regarding the apparent hostage-taking of an Iraqi man taken by UK forces to Camp Bucca subsequently found dead) and cases about Camp Breadbasket in a hooding, stressing and abusing custody incident from April 2007. A summary of all relevant PIL work is contained in a letter to Treasury Solicitors 18 April 2008, which is attached as Annex B. Not printed here.

¹⁹⁰ Stressing included kneeling and other techniques including the well-known so-called 'ski techniques' where with the back against a wall a detainee is forced into a position where thighs and calves are at 90 degrees to each other. The use of this technique is vividly illustrated by the one-minute video shown to the court martial in the Mousa case of Corporal Payne forcing at least six hooded detainees into this position. I am subject to an undertaking which prohibits me making this video available to this committee.

¹⁹¹ See Annex A, letter from PIL to TSOL, 10 July 2007, p. 16

¹⁹² See Annex A, letter from PIL to TSOL, 10 July 2007, p. 16

¹⁹³ See Annex A, letter from PIL to TSOL, 10 July 2007, p. 17

¹⁹⁴ See Annex A, letter from PIL to TSOL, 10 July 2007, p. 19

same civil servants move to stop their use after Mousa died. As in May 2004 it appears civil servants at PJHQ were still anguishing about whether the 1972 ban only applied to the UK and Northern Ireland.¹⁹⁵ Indeed, as the latest case of *Kammash* shows,¹⁹⁶ there is reason to believe that hooding at least was still being practiced in April 2007.

2.3 In the Mousa incident there were systematic efforts made to deprive detainees of sleep.¹⁹⁷ These allegations of sleep deprivation emerge elsewhere (for example, in the *Kammash* case). Also in the Mousa incident one detainee was subjected to loud noise from a generator.¹⁹⁸ The use of noise from a generator was the object of the complaint from Mercer from March 2003.¹⁹⁹ In addition according to the pathologist's evidence in the Mousa court martial his small intestine contained only a small amount of gas and his bladder was empty thus indicating in clear terms food and water deprivation.²⁰⁰ The other detainees complain of water deprivation.²⁰¹ Thus, on any view, serious questions arise as to whether every one of the five techniques was being used to some extent by some battle groups during the period of belligerent occupation and beyond.

2.4 To underscore these concerns it is well known that the US (who were a Joint Occupying Power with the UK pursuant to UNSCR 1483 and the Senior Partner with the UK in the Coalition Provisional Authority) were using techniques that included hooding, stressing and noise.²⁰² Further one senior military figure claims that hooding reflected verbal and written NATO policy.²⁰³ To exacerbate matters the UK's Theatre Internment Facility (TIF) (Camp Bucca) which was where its Joint Forces Intelligence Team was based was a facility shared with the US.²⁰⁴ Finally, it seems obvious that, in an invasion that was planned for months ahead with the US, and in circumstances where the UK and US were Joint Occupying Powers, the two forces' Rules of Engagement could not be at odds on such important matters as appropriate interrogation techniques to extract (lawfully) available intelligence so as to protect the lives of members of both forces. This inescapable conclusion is reinforced by concerns expressed at the time that the ECHR "cuts no ice with the US",²⁰⁵ and that in the debate as to whether hooding should be stopped it emerges that the US were complaining that the UK's interrogation techniques were too soft.²⁰⁶

3. Other Issues of Systematic Abuse

3.1 Aside from the use of the five techniques (which on any sensible approach to Art. 3 ECHR are all clearly prohibited) there is much troubling evidence of many violations of Arts 2 & 3 ECHR.

¹⁹⁵ See Annex A, letter from PIL to TSOL, 10 July 2007, p. 16 and p. 25

¹⁹⁶ I attach PIL's letter before action of 16 April 2008 as Annex C.

¹⁹⁷ See Annex A, letter from PIL to TSOL, 10 July 2007, p. 18

¹⁹⁸ See Annex A, letter from PIL to TSOL, 10 July 2007, p. 11

¹⁹⁹ See footnote 4

²⁰⁰ See Annex A, letter from PIL to TSOL, 10 July 2007, p. 15

²⁰¹ See Annex A, letter from PIL to TSOL, 10 July 2007, p. 11

²⁰² See "The Torture Team", forthcoming publication by Professor Philippe Sands QC.

²⁰³ See Annex A, letter from PIL to TSOL, p. 16

²⁰⁴ The case of Kadhim Hassan will have to deal with issues of complicity arising from the joint running of the TIF.

²⁰⁵ See Annex A, letter from PIL to TSOL, p.20, section 14.1

²⁰⁶ See Annex A, letter from PIL to TSOL, 10 July 2007, p. 29

Other killings/deaths in custody

3.2 By as early as 20 May 2003 Mercer commenced Fragmented Order (FRAGO) 152 with the words: “There has recently been a number of deaths in custody where Iraqi civilians have died whilst held by various units in Theatre”.²⁰⁷ Whilst the MoD assert to BBC Panorama in answer to a question put in preparation for “On Whose Orders?”²⁰⁸ that Mercer had in mind only two deaths (both of which were unexplained) this is not the case. Only Mercer can explain what he did mean but it is difficult to see how “number” could mean two (“two” or “a couple” would have been appropriate if he had meant that).

3.3 The most notorious incident is, of course, the Majar Al-Kabir incident. To save space I am attaching a recent article I wrote for the comment is free section of the *Guardian* as Annex D.²⁰⁹

3.4 There are other deaths in custody cases at PIL, or in the media, which have not been the subject of judicial scrutiny. Nobody seems to know how many of these cases need to be faced up to: that is one of the things that a full public inquiry needs to look into – at the moment people seem to expect PIL to act as an unofficial NGO. I am attaching a list of all known cases that either PIL or Leigh Day are presently aware of as Annex E.²¹⁰

Other abuse/ill-treatment cases in custody

3.5 I have already mentioned Camp Breadbasket. This involved abuse and ill-treatment. It is dealt with in more detail below on humiliating treatment.

3.6 On February 2006, the *News of the World* was leaked a video showing soldiers inside a UK facility abusing youths whilst other soldiers walked past apparently unconcerned. It will be seen from Annex E²¹¹ that there are other abuse in detention cases to face up to.

3.7 In the Mousa court martial it becomes apparent that the abuse and ill treatment of the Iraqi detainees was commonplace. For example, Private Anthony Riley gave evidence to the RMP (after giving it to me personally) to this effect.²¹² The routine nature of this ill-treatment helps to explain why, despite the abuse of the soldiers and cries of the detainees being clearly audible, nobody (particularly in authority) took any notice of what was happening in the Temporary Detention Facility (TDF) before Mousa died.

Degrading treatment

3.8 In the Mousa incident various witnesses complained of humiliating and degrading treatment. At the hotel, dirty toilet water was flushed over the bodies of these male Muslims.²¹³ At the TDF the Mansouri son was put into a humiliating position by a noisy

²⁰⁷ FRAGO 152 - 1 (UK) Armd Div, Detention of Civilians, Introduction, para 1

²⁰⁸ Shown on February 28th this programme explored the issues of the five techniques, systematic abuse and the Majar Al Kabir incident.

²⁰⁹ Not published here.

²¹⁰ Not published here.

²¹¹ Not published here.

²¹² S.9 CJA Witness Statement of Anthony Malcolm Riley available at PIL.

²¹³ See Annex A, letter from PIL to TSOL, p.11, section 11.4 (4)

generator.²¹⁴ Others mentioned things that cannot be spoken of, or complained that women members of their household were to be exchanged for sex to secure their release. Others were told that their women family members would be raped. Allegations of threats of rape are made in the *Kammash* case from April 2007.

3.9 The clearest evidence that the systematic dehumanization of Iraqis led to this type of treatment emerges in the Camp Breadbasket case. In the Osnabruck court martial the APA HQ and the Attorney General persisted with the completion of the proceedings despite being on notice from me that I was instructed by three victims and that more were available to give evidence. The evidence of 9 victims who have now instructed PIL and Leigh Day²¹⁵ is at striking variance to the official version of what took place, which was in simple terms that soldiers were having a laugh and things got out of hand. This witness evidence includes allegations that women soldiers were involved in sexual taunts as well as the well-known photographs taken by soldiers of Iraqis forced into simulated poses of anal and oral sex. The resonance with the Abu Ghraib photographs is both striking and obvious. The comparison between the US and UK “techniques” towards detainees is unexplored territory. The UK media focuses mainly on US abuses.

4. Systemic Issues

The Role of the Civil Service

4.1 I submit that some of the key people responsible for allowing the re-introduction of the five techniques, failing to move to ban their use when they came to light, failing to put into place the correct legal framework, and acting now to cover up these failings are senior civil servants including those based at PJHQ, or in the chain of command that included PJHQ.

4.2 This is not an allegation made lightly. However, it beggars belief, that even if all civil servants had been completely unaware of the policy shift on hooding and stressing, they did not act immediately to remove such techniques once Mercer had complained that he had seen 40 or so Iraqis hooded kneeling in the hot sun near a noisy generator, as he did in late March 2003.²¹⁶ It seems scarcely believable that all those concerned did not realize that such techniques constituted clear violations of the prohibition on torture, leaving aside the non-issue of whether or not the 1972 ban applied only to the UK and NI. Serious probing questions of those in senior positions within the civil service need to be asked.

4.3 Civil servants and lawyers at PJHQ interpreted the Attorney General’s advice to conclude that the *lex specialis* of IHL operated to oust international human rights law including the ECHR.²¹⁷ I return to the issue of legal standards below. Leaving aside the vexed question of whether or not the Attorney General knew as he advised in March,²¹⁸ or

²¹⁴ See Annex A, letter from PIL to TSOL, p.18, section 13.5 and on p. 9

²¹⁵ Instructed to bring a private law claim for damages.

²¹⁶ See Annex A, letter from PIL to TSOL, p.16, section 13.4

²¹⁷ See Annex A, letter from PIL to TSOL, 10 July 2007, p. 20

²¹⁸ It is clear from the transcript that the AG had advised prior to 20 March 2003 that the *lex specialis* of IHL operates to oust ECHR. It is known also that he advised on 26 March 2003 that the UK “would be bound by the provisions of International Law governing belligerent occupation, notably the Fourth Geneva Convention and the 1907 Hague Regulations” in the absence of a further UNSCR authorising reform and restructuring of Iraq and its Government (Lord Goldsmith, Iraq: Authorisation for an Interim Administration (Mar. 26, 2003, in John Kampfner, Blair Was Told It Would Be Illegal to Occupy Iraq, UNS, May 26, 2003. He also wrote in the same detailed memorandum: “I am advising the Ministry of Defence separately on the extent of our ECHR obligations in Iraq”).

thereafter, that these techniques were being used, it is a matter of public record that PJHQ knew as did the National Contingent Command (NCC) and others. We now know from Al-Skeini that the ECHR did apply when UK soldiers held Iraqis in military facilities. However, even if the ECHR had not applied, the matters of which Mercer, Vernon and ICRC complained are in clear breach of Common Article 3 to Geneva Convention III/ Geneva Convention IV as well as Additional Protocol 1 (which applied whilst the UK military action in SE Iraq was properly classified as an international armed conflict). Further I submit that the UK's argument that the UN Convention Against Torture (UNCAT) does not have extraterritorial effect so as to apply in Iraq (and Afghanistan) is fundamentally flawed and will not withstand judicial scrutiny. Indeed, it is difficult to see what logical distinction the Government can make between the ECHR (which it now accepts does apply extra-territorially to detention cases such as Mousa's) and UNCAT. Accordingly, all the requirements of investigation (Articles 6 and 13), training (Article 10), review of interrogation systems (Article 11), rights to fair and adequate compensation (Article 14) apply, and the implications of complicity (Article 4) especially for the civil service must be addressed.

The Politicians

4.4 In my law practice the buck stops on my desk. Thus if I fail to institute proper systems including appropriate training of staff so that inadvertently a letter is not submitted to the Court in time, it is no defence for me to point the finger of blame at an employee. I fail to see why the same principle does not apply to all those politicians who presided over the disgraceful implications of the UK detention policy in SE Iraq. If Chicksands was training interrogators in hooding and stressing, if hooding was a written policy, if these techniques reflected our relations with the US, all of this and more should have been known to the relevant politicians.

4.5 Further, even if there were deliberate and successful efforts made at the time by senior civil servants to shield politicians from any knowledge of all of the above it is a matter of record that our present Secretary of State for Defence, Secretary of State for Foreign and Commonwealth Affairs and Attorney General do know of all of this and yet choose to close their minds to the evidence that strongly suggests that systematic abuse and worse was rife in Iraq.²¹⁹

4.6 A number of senior military figures have complained bitterly, and in public, about how the failings of politicians led directly to abuse on the ground.²²⁰ There were perceived failures to plan for the occupation as it was assumed by the Government (wrongly) that the UNSC would authorise the invasion and occupy the field. Complaints are made that the military were expected to police, train the judiciary, pay civil servants, man the infrastructure²²¹ and, in effect, administer SE Iraq whilst the Foreign Office, DFID and the Home Office had provided little or no backup.²²² If this failure to plan led to soldiers not coping with their required tasks and, thus, being stressed, hot and exhausted and more

²¹⁹ I attach by way of example, in Annex F, my recent correspondence to David Miliband as he took up his present post. I felt optimistic that he might take this approach seriously as I knew him from 1993 onwards when he was employed at the IPPR. I also draw attention to the attached letter to the Guardian from the SSD.

²²⁰ See Annex A, letter from PIL to TSOL, 10 July 2007, p. 28

²²¹ See Annex A, letter from PIL to TSOL, 10 July 2007, p. 28

²²² See Annex A, letter from PIL to TSOL, 10 July 2007, p. 24

likely to abuse, this potential connection needs to be examined. If it is a relevant factor there are lessons to be learned for the future aside from the issues of political accountability.

The Military

4.7 There is no doubt that junior soldiers should be faced with pressing issues of individual culpability. No matter how badly trained, inexperienced, stressed or badly led these junior soldiers may have been, they must face accountability for their decisions to abuse, humiliate or worse: so much was established at Nuremberg. However, a proper perspective is demanded. So far no one in any position of command or responsibility has been brought to account.

4.8 At the most basic level it is clear that those in command at Battle Group Main of 1 QLR (involved in the Mousa incident) must have known of, and heard, what was going on within the TDF. It is a disgrace that every soldier who pleaded not guilty was found so, and that the CO escaped liability because he could rely on the so called “Royce sanction”.

4.9 When one considers all the evidence as to systematic abuse and systemic failings pressing questions for the most senior military figures including the CDS (then and now) need to be answered. These include:

- Who knew or ought to have known of the change of policy on the five techniques?
- Who was responsible for ensuring officers and soldiers were properly trained on the relevant legal framework, and on lawful interrogation techniques and prisoner handling?
- Who knew or ought to have known that prisoners and detainees were being hooded and stressed?
- Who is responsible for accounting accurately for all cases of deaths, killings, torture, degrading and ill-treatment by any UK soldiers anywhere (inside or outside a military facility)?

5. The Attorney-General’s Advice and the Relevant Legal Framework

5.1 It is not accepted that the ECHR, UNCAT and other relevant international human rights instruments did not apply either because they were said not to have extraterritorial effect (ECHR or UNCAT), or had been ousted by the *lex specialis* of IHL.²²³

5.2 Neither is it accepted that even if IHL did operate to oust IHRL the relevant protection of the minimum standards of IHL (plus the protection of the ICCA 2001 and s.134 CJA 1988) was not more than sufficient to prohibit any of the matters referred to in this submission. One need look no further than Common Article 3 for that proposition. However, what is important to understand is what was the correct legal framework, why it was not applied, what difference it would have made if it had been, and what did the Attorney General actually advise at the time (not what his views may be now; or even what they were then if they were not conveyed to others who needed to know).

²²³ This question of law will have to be decided shortly in Al-Sweady as the survivors were interned (presumably under a power derived from Art 78 GC IV) in clear breach of the Art 5 ECHR right to due process.

5.3 The UK accepts it was an Occupying Power from at least 22 May 2003 (the date of UNSCR 1483) to 28 June 2004 (the date of handover to the Iraqi Transitional Government pursuant to UNSCR 1546). Thus, at least GC IV and the Hague Regs. applied. However it is not accepted that human rights law would not apply to govern the standards of treatment of detainees, or to determine the relevant procedural framework to that detention including a proper review system and, if appropriate, access to independent legal advice.²²⁴ As I say above UNCAT did apply, as did the ECHR.

5.4 It was in the context of applying high standards that Mercer's first concerns arose in the run up to the invasion. As Head of Army Legal to 1 Div he became concerned that, in respect of the procedural standards relevant to the UK's detention policy he saw being designed, there was a likelihood that the UK would breach its international obligations. In respect of those procedural concerns he wanted the UK to adopt the detention policy used in East Timor by INTERFET which, as he said, had got a tick plus plus from the UN.²²⁵ On this procedural issue he was overruled, and that appears to be the context of the first stage of the row between Mercer and Rachel Quick, and the evidence given by Lord Goldsmith to this committee in June 2007. However, what is critically important to understand is that, one, Mercer was legally correct to insist that if there was a moot point the default position should be that the higher standards should apply and two, having raised the issue of procedural standards in early March 2003 (and thereafter) he then complained bitterly about the substantive breaches he witnessed, and heard about from others including the ICRC. The questions that need to be addressed include:

- Once the issue of substantive violations had been raised did the Attorney General have any knowledge about this separate issue, and specifically did he have any knowledge that any of the five techniques were being used (put another way, was the AG's advice confined entirely to relevant procedural standards?).
- If it was not the AG's advice that the *lex specialis* of IHL operated to oust the ECHR and that, therefore, it was intended to apply just GC III/IV what did he advise were the applicable standards (e.g. did he advise at the time that UNCAT had extraterritorial effect or that AP1 also applied as he was advising that the ECHR did not apply?).
- If it was not the AG responsible for the ruling that only GC IV applied who was responsible, and which lawyers advised or knew of this advice?
- At each relevant point who reviewed which standards applied, and whether what was happening on the ground represented procedural or substantive breaches of the standards thought to apply (for example, after Mercer's complaints of March 2003, after the ICHR complaint, after the Camp Breadbasket incident in May 2003, after Mousa's death in custody in September 2003, etc.).

The Aitken Report

²²⁴ Roberts, A, "Transformative Military Occupation: Applying the Laws of War and Human Rights (2006) 100 Am.J.Int'l L.580 – 622, at 593"

²²⁵ See Annex A, letter from PIL to TSOL, 10 July 2007, p. 20

I do not accept that the Aitken report was anything like adequate. It was not a public process and did not involve the families or their representatives (for example, despite it being known that PIL were acting in 3 of the 6 incidents he examined (p.3) he made no effort to seek PIL's views), nor was it independent, or rigorous. His findings include that "the number of allegations of abuse in Iraq has been tiny" and that "it would be a mistake to make radical changes to the Army's essential organisation unless there was clear evidence that the faults we were seeking to rectify were endemic. They were not". These findings are not accepted. As these submissions are long enough I will take questions on this Report and whether it is adequate at the session.

7. A Single Independent Inquiry into the UK's Detention Policy in Iraq

The SSD now has to decide following the remitting of *Al-Skeini*, whether to volunteer an inquiry, or whether to have the matter litigated further. The temptation may be to continue to shield these most troubling issues from full public view. If there are separate inquiries with narrow remits into these various incidents it is obvious that the public is unlikely to be able to understand what went wrong, and why, and thus the appropriate lessons for the future will not be learnt. What is needed is a process to ensure that these abuses cannot happen again. This involves addressing various issues: the military culture, training, the role of the medical profession, the role of the civil service, the role of legal advisers, including the Law Officers, how relevant legal standards can be instilled into the armed forces etc. I submit that there should be a single judicial inquiry with a remit broad enough to address all the issues raised in these submissions and its various Annexes. The inquiry would have several parts to it to include the following:

1. The Mousa Incident.
2. Camp Breadbasket.
3. Majar Al-Kabir.
4. The 2007 hooding case.
5. Other deaths/killings in custody.
6. Other abuse/ill-treatment cases in custody.
7. The five techniques.
8. Complicity issues with the US.

Others will have other issues to add to this list. If such an inquiry were to be held it would enable all concerned to face the issues, draw out the lessons and put in place the necessary reforms.

25. Letter from the Rt Hon Des Browne MP, Secretary of State for Defence, dated 14 May 2008

You may recall that on 25 January, I made a statement announcing the publication of the *Aitken Report: An Investigation into Cases of Deliberate Abuse and Unlawful Killing in Iraq in 2003 and 2004*. In that statement, I made clear that my next step was to consider what

form any future inquiry into the death of Mr Baha Mousa should take, and that I was expecting representations from the lawyers acting for Mr Mousa's family on that subject.

Those representations were received in February, since which time I have been consulting widely, including the Chief of the Defence Staff and the Chief of the General Staff. This is a complex issue with a great many representations and points of view to be considered, so I did not want to make a precipitate decision. I have now decided, and will be announcing today, that there will be a Public Inquiry to examine this issue. This reinforces my determination, and that of the Chief of the General Staff, to do everything we possibly can to understand how it came to be that Mr Mousa lost his life. I consider that this is the best course of action and will provide the independence that I hope will reassure the public that no stone will be left unturned.

The inquiry will be established under the terms of the Inquiries Act 2005: its terms of reference will be made public once they have been established in accordance with the provisions of the Act; and the inquiry report will also be published.

The Army is fully committed to co-operating with this inquiry and to drawing on its conclusions as it works to improve its standards still further.

Reports from the Joint Committee on Human Rights in this Parliament

The following reports have been produced

Session 2007-08

First Report	Government Response to the Committee's Eighteenth Report of Session 2006-07: The Human Rights of Older People in Healthcare	HL Paper 5/HC 72
Second Report	Counter-Terrorism Policy and Human Rights: 42 days	HL Paper 23/HC 156
Third Report	Legislative Scrutiny: 1) Child Maintenance and Other Payments Bill; 2) Other Bills	HL Paper 28/ HC 198
Fourth Report	Government Response to the Committee's Twenty-First Report of Session 2006-07: Human Trafficking: Update	HL Paper 31/ HC 220
Fifth Report	Legislative Scrutiny: Criminal Justice and Immigration Bill	HL Paper 37/HC 269
Sixth Report	The Work of the Committee in 2007 and the State of Human Rights in the UK	HL Paper 38/HC 270
Seventh Report	A Life Like Any Other? Human Rights of Adults with Learning Disabilities: Volume I Report and Formal Minutes	HL Paper 40-I/HC 73-I
Seventh Report	A Life Like Any Other? Human Rights of Adults with Learning Disabilities: Volume II Oral and Written Evidence	HL Paper 40-II/HC 73-II
Eighth Report	Legislative Scrutiny: Health and Social Care Bill	HL Paper 46/HC 303
Ninth Report	Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill	HL Paper 50/HC 199
Tenth Report	Counter-Terrorism Policy and Human Rights (Ninth report): Annual Renewal of Control Orders Legislation 2008	HL Paper 57/HC 356
Eleventh Report	The Use of Restraint in Secure Training Centres	HL Paper 65/HC 378
Twelfth Report	Legislative Scrutiny: 1) Health and Social Care Bill 2) Child Maintenance and Other Payments Bill: Government Response	HL Paper 66/HC 379
Thirteenth Report	Government Response to the Committee's First Report of Session 2006-07: The Council of Europe Convention on the Prevention of Terrorism	HL Paper 67/HC 380
Fourteenth Report	Data Protection and Human Rights	HL Paper 72/HC 132
Fifteenth Report	Legislative Scrutiny	HL Paper 81/HC 440
Sixteenth Report	Scrutiny of Mental Health Legislation: Follow Up	HL Paper 86/HC 455
Seventeenth Report	Legislative Scrutiny: 1) Employment Bill; 2) Housing and Regeneration Bill; 3) Other Bills	HL Paper 95/HC 501

Eighteenth Report	Government Response to the Committee's Sixth Report of Session 2007-08: The Work of the Committee in 2007 and the State of Human Rights in the UK	HL Paper 103/HC 526
Nineteenth Report	Legislative Scrutiny: Education and Skills Bill	HL Paper 107/HC 553
Twentieth Report	Counter-Terrorism Policy and Human Rights (Tenth Report): Counter-Terrorism Bill	HL Paper 108/HC 554
Twenty-First Report	Counter-Terrorism Policy and Human Rights (Eleventh Report): 42 days and Public Emergencies	HL Paper 116/HC 635
Twenty-Second Report	Government Response to the Committee's Fourteenth Report of Session 2007-08: Data Protection and Human Rights	HL Paper 125/HC 754
Twenty-Third Report	Legislative Scrutiny: Government Replies	HL Paper 126/HC755
Twenty-Fourth Report	Counter-Terrorism Policy and Human Rights: Government Responses to the Committee's Twentieth and Twenty-first Reports of Session 2007-08 and other correspondence	HL Paper 127/HC756
Twenty-fifth Report	Counter-Terrorism Policy and Human Rights (Twelfth Report): Annual Renewal of 28 Days 2008	HL Paper 132/HC 825
Twenty-sixth Report	Legislative Scrutiny: Criminal Evidence (Witness Anonymity) Bill	HL Paper 153/HC 950
Twenty-seventh Report	The Use of Restraint in Secure Training Centres: Government Response to the Committee's Eleventh Report	HL Paper 154/HC 979
Twenty-eighth Report	UN Convention Against Torture: Discrepancies in Evidence Given to the Committee About the Use of Prohibited Interrogation Techniques in Iraq	HL Paper 157/HC 527

Session 2006–07

First Report	The Council of Europe Convention on the Prevention of Terrorism	HL Paper 26/HC 247
Second Report	Legislative Scrutiny: First Progress Report	HL Paper 34/HC 263
Third Report	Legislative Scrutiny: Second Progress Report	HL Paper 39/HC 287
Fourth Report	Legislative Scrutiny: Mental Health Bill	HL Paper 40/HC 288
Fifth Report	Legislative Scrutiny: Third Progress Report	HL Paper 46/HC 303
Sixth Report	Legislative Scrutiny: Sexual Orientation Regulations	HL Paper 58/HC 350
Seventh Report	Deaths in Custody: Further Developments	HL Paper 59/HC 364
Eighth Report	Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005	HL Paper 60/HC 365
Ninth Report	The Meaning of Public Authority Under the Human Rights Act	HL Paper 77/HC 410
Tenth Report	The Treatment of Asylum Seekers: Volume I Report and Formal Minutes	HL Paper 81-I/HC 60-I
Tenth Report	The Treatment of Asylum Seekers: Volume II Oral and Written Evidence	HL Paper 81-II/HC 60-II
Eleventh Report	Legislative Scrutiny: Fourth Progress Report	HL Paper 83/HC 424

Twelfth Report	Legislative Scrutiny: Fifth Progress Report	HL Paper 91/HC 490
Thirteenth Report	Legislative Scrutiny: Sixth Progress Report	HL Paper 105/HC 538
Fourteenth Report	Government Response to the Committee's Eighth Report of this Session: Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9 order 2007)	HL Paper 106/HC 539
Fifteenth Report	Legislative Scrutiny: Seventh Progress Report	HL Paper 112/HC 555
Sixteenth Report	Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights	HL Paper 128/HC 728
Seventeenth Report	Government Response to the Committee's Tenth Report of this Session: The Treatment of Asylum Seekers	HL Paper 134/HC 790
Eighteenth Report	The Human Rights of Older People in Healthcare: Volume I- Report and Formal Minutes	HL Paper 156-I/HC 378-I
Eighteenth Report	The Human Rights of Older People in Healthcare: Volume II- Oral and Written Evidence	HL Paper 156-II/HC 378-II
Nineteenth Report	Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning	HL Paper 157/HC 394
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First Report	Legislative Scrutiny: First Progress Report	HL Paper 48/HC 560
Second Report	Deaths in Custody: Further Government Response to the Third Report from the Committee, Session 2004–05	HL Paper 60/HC 651
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume I Report and Formal Minutes	HL Paper 75-I/HC 561-I
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume II Oral and Written Evidence	HL Paper 75-II/HC 561-II
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Eighth Report	Government Responses to Reports from the Committee in the last Parliament	HL Paper 104/HC 850
Ninth Report	Schools White Paper	HL Paper 113/HC 887
Tenth Report	Government Response to the Committee's Third Report of this Session: Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters	HL Paper 114/HC 888
Eleventh Report	Legislative Scrutiny: Fifth Progress Report	HL Paper 115/HC 899
Twelfth Report	Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006	HL Paper 122/HC 915

Thirteenth Report	Implementation of Strasbourg Judgments: First Progress Report	HL Paper 133/HC 954
Fourteenth Report	Legislative Scrutiny: Sixth Progress Report	HL Paper 134/HC 955
Fifteenth Report	Legislative Scrutiny: Seventh Progress Report	HL Paper 144/HC 989
Sixteenth Report	Proposal for a Draft Marriage Act 1949 (Remedial) Order 2006	HL Paper 154/HC 1022
Seventeenth Report	Legislative Scrutiny: Eighth Progress Report	HL Paper 164/HC 1062
Eighteenth Report	Legislative Scrutiny: Ninth Progress Report	HL Paper 177/ HC 1098
Nineteenth Report	The UN Convention Against Torture (UNCAT) Volume I Report and Formal Minutes	HL Paper 185-I/ HC 701-I
Twentieth Report	Legislative Scrutiny: Tenth Progress Report	HL Paper 186/HC 1138
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Twenty-fifth Report	Legislative Scrutiny: Thirteenth Progress Report	HL Paper 241/HC 1577
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Twenty-seventh Report	Legislative Scrutiny: Corporate Manslaughter and Corporate Homicide Bill	HL Paper 246/HC 1625
Twenty-eighth Report	Legislative Scrutiny: Fourteenth Progress Report	HL Paper 247/HC 1626
Twenty-ninth Report	Draft Marriage Act 1949 (Remedial) Order 2006	HL Paper 248/HC 1627
Thirtieth Report	Government Response to the Committee's Nineteenth Report of this Session: The UN Convention Against Torture (UNCAT)	HL Paper 276/HC 1714
Thirty-first Report	Legislative Scrutiny: Final Progress Report	HL Paper 277/HC 1715
Thirty-second Report	The Human Rights Act: the DCA and Home Office Reviews	HL Paper 278/HC 1716

Oral evidence

Taken before the Joint Committee on Human Rights

on Tuesday 29 April 2008

Members present:

Mr Andrew Dismore, in the Chair

Bowness, L
Lester of Herne Hill, L
Morris of Handsworth, L
Onslow, E of
Stern, B

Mr Richard Shepherd

Witnesses: Mr Kevin Laue, Redress, and Mr Phil Shiner, Public Interest Lawyers, gave evidence.

Q1 Chairman: Good afternoon, everybody, this is the resumption of our inquiry started last year into allegations of torture and inhumane treatment in Iraq. We are joined by Kevin Laue of Redress and Phil Shiner of Public Interest Lawyers; welcome to you both. Does either of you want to make a short opening statement?

Mr Laue: No, thank you, Chairman.

Q2 Chairman: Perhaps I could start with you, Kevin. To what extent do you think there has been deliberate abuse and unlawful killing by British troops in Iraq? To what extent do you think that has been a widespread problem or is the Aitken Report right when it refers to just a “tiny” number? Obviously it refers to a whole series of other problems but the deliberate one first.

Mr Laue: Chairman, from our point of view, from Redress’s knowledge, we are not aware of what has happened in Iraq other than what has appeared in the public domain, so it would be wrong to suggest that there are other cases. Our submission, which we have suggested in our report, is that unless there is a full inquiry which looks into the possibility of other incidents then this will not be known, but we do not have any evidence to suggest that there are other cases.

Mr Shiner: I do have evidence of other cases and I have summarised those in my submission to you. I have other cases on my books at Public Interest Lawyers, for example the case of Al Sweady, which is now in court which concerns these allegations, which are very troubling, of the Maja incident when the allegations are that 20 Iraqis were in effect executed in custody and nine others who survived complain of being tortured, and myself and my colleague at Leigh Day have seen five of those. There is a new case on which I have just sent a letter about last week concerning very troubling allegations from April 2007: five men complain of being hooded and stressed and deprived of sleep and subject to sexual taunts. There are other cases; therefore my view is that the word “tiny” in the Aitken Report is just not justified on the evidence.

Q3 Chairman: To what extent was what was going on just gratuitous abuse of civilians or to what extent do you think it was conditioning as part of interrogation going too far—if you see the distinctions?

Mr Shiner: Yes. There are various theses put forward as to why stress and hood and cuff behind et cetera, and at first you are led to believe that it was about safety, but that falls away when you realise, for example, in the Mousa incident that all of the men were introduced into Battle Group Main without a hood and it falls away when you think for a moment as to how simple it was eventually to introduce a policy now which says if you must deprive of sight for security reasons you do it with blacked-out goggles. It seems clear from the senior military figures, of which there were many in the Mousa court martial in the transcript, that it was all about conditioning and maintaining the shock of capture, but that becomes a lot worse when you realise that it was not about softening up these men prior to being tactically questioned—that is bad enough because that could be 36 hours away and was often at the Theatre Internment Facility at Camp Bucca that long away, but in the Mousa incident the evidence is absolutely clear that once the tactical questioning process had finished they were still kept hooded, so that seems to me to raise questions about whether it is simply punishment because it does not seem to have any logical, military purpose to it.

Mr Laue: I would just draw the Committee’s attention to Colonel Mercer’s document where he did refer to a number of other cases where civilians had died and it has been pointed out that what he meant here is not entirely clear. This document was published in about May or June 2003 and there had been two cases before that which had reached the public domain of civilians who had died, but is that all that he is speaking of? Perhaps I am going back to the first question and to some extent the question of the way civilians were being treated wrongly, may be wider than appears from the Mousa case and the cases that Brigadier Aitken has referred to.

Mr Shiner: Can I just help the Committee with the precise details of the point there that Kevin is making? It is Fragmented Order 152 issued on 20

May 2003. The relevant words are at paragraph 3.2 of my submission and they are: "There has recently been a number of deaths in custody where Iraqi civilians have died whilst held by various units in theatre." I make the point that the reference to the words "number" and "various" cannot mean two, and that is the MoD's answer to the *Panorama* question on that point.

Q4 Chairman: Why do you think it took so long for the Army to investigate the events of 2003–04, covered by the Aitken Report and why do you think there have been so few convictions of military personnel in relation to abuse and unlawful killing?
Mr Shiner: Do you want me to answer that?

Q5 Chairman: Yes.

Mr Shiner: My view is that the military system of investigation and prosecution of itself has manifestly failed and is seen to have failed in Iraq. Taking the Mousa incident, I do not believe that anything would have happened if the judicial review that was started in May 2004 had not acted as a lever. Every error that could be made was made: they did not secure the scene of the crime, they did not take away anyone's clothes, and all of that came out in the *Al Skeini* proceedings with this correspondence between Lord Goldsmith and the Secretary of State for Defence. Lord Goldsmith was very unhappy about these things, so there was huge delay and, therefore, so many witnesses were able to hide behind that delay in the court martial. What is needed on the military system of investigation, leaving aside prosecution, is an overhaul and a fundamental review. I have had to balance on the one hand if it is a time of conflict—and the occupation at the beginning was obviously a difficult time—then you cannot send civilian policemen and judges in, but on the other hand if you allow soldiers to sit in their own rooms and make a decision in private that there has been no breach of the rules of engagement, and of course those rules are kept secret, then that is wrong as well, there needs to be something much more balanced, I think.

Q6 Chairman: That decision is apparently geared towards the police side of it rather than the prosecution side of it.

Mr Shiner: I fear that when you look at the hand that the prosecution were given, it was already too late. For example, there was a multiple of 14 that McKinnon J referred to and it was clear that when they were on duty at night the abuse got much worse. None of them were charged; there was a sergeant who spent the night beating a metal bar on the floor of the toilets to keep them awake. He was not called, he was not charged. I fear that if you analyse what had happened during the investigation the prosecution were left with just not enough to go on. They themselves made some fairly fundamental errors in my view, but that is probably another matter.

Mr Laue: It is interesting, Chairman, in our submission that Brigadier Aitken also was critical of the delay but he did not seem to elaborate on how it

had come about, he simply says that it was unacceptable, and then it appears that steps were now in hand to avoid that sort of thing in the future, but it might have been interesting to have some examination of the very point you have raised, why did it take four years for Mousa to reach the court martial?

Q7 Chairman: It was part of the problem that it was some time before the allegations came to light, or was it that some people were anti at the time?

Mr Shiner: The allegations came to light immediately, so the log records that the commanding officer was told immediately and SIB knew straightaway. They appear to have allowed the Rogers multiple, the multiple I am talking about—and that is all in the court martial, so I am not saying anything improper—for some reason they seem to have allowed that multiple enough time to have got together and a lot of them have stitched together a story where they all support one another and leave Corporal Donald Payne carrying the can for the lot because he happens to be holding the dead body at the time. Why they did that only an independent investigation can really establish what those errors were, why they were made and how we can learn the lessons for the future.

Q8 Chairman: The last issue I want to deal with before bringing in colleagues is to do with the transfer of UK prisoners to US teams and the use of joint facilities, and you have probably seen some of the claims of Philippe Sands published in a book about this. What questions does that raise as to how the UK acted compatibly with our human rights obligations, particularly bearing in mind that the US is obviously not a signatory to the Convention and it is now settled law that the Convention does apply to detainees in Iraq?

Mr Shiner: It is obviously the subject of the House of Lords judgment that it did. The issue of our relationship with the US is pretty much unexplored. Colonel Baker, a senior military figure, says that the policy on hooding reflected, as he put it, verbal and written NATO policy. There were clear issues where we had planned this invasion with the US, we assumed that they would build us a prisoner-of-war compound which they turn out not to do but we end up having our Theatre Internment Facility at Camp Bucca which we are sharing with them; they have got six compounds, we have got two. But they are our detainees, we are responsible for them, we have jurisdiction over them, and it seems to me that there is a problem if you have got two forces who are the joint occupying forces and they are running the same Theatre Internment Facility which is for prisoners-of-war and internees together. How can you have the US with one set of rules of engagement and the UK with another? If, for example, we had gone in on the basis that the ECHR did apply then huge alarm bells would have rung, surely, as soon as Mercer blew the whistle and said "I have just seen 40 Iraqis, hooded, kneeling in the hot sun by a noisy generator." The problem would be that he saw that at Camp Bucca, so on the other side of the fence you could have had

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the US doing that, and there are some very difficult issues that we need to face up to. The US were complaining, certainly in the early part of the occupation, that the intelligence that we were getting was not good enough because we were too soft, so when there was this debate about whether we should stop hooding when Mousa died it was said “The ECHR will cut no ice with the US” so on any view that is another area that an independent inquiry should be looking into if we want to learn the lessons from what happened.

Q9 Chairman: Have you got any evidence that any prisoners transferred from UK to US custody or whilst in UK custody interrogated by US interrogators were subject to either the five techniques or anything worse like “water-boarding”?

Mr Shiner: I do not have direct evidence on that, no.

Q10 Chairman: I just want to put to you the last point that General Brims, when he gave evidence to us in March 2006, told us that when he visited a prisoner-of-war handling facility he saw eight prisoners being hooded but he thought that was unnecessary and he said he gave orders for that to be stopped. Can you throw any light on that?

Mr Shiner: Many of our own senior military saw for themselves that our detainees or internees were hooded by us. Nicholas Mercer of course was in charge of Army Legal for the First Division, there was a Colonel Vernon who made his own complaints; both of those senior military officers were told that this was fine and it reflected UK doctrine, so leaving aside what people might have witnessed the US were up to at Camp Bucca, there is plenty of evidence as to what our senior military witnessed we were up to at that facility.

Q11 Earl of Onslow: Can I ask for clarification on that one question? Did I understand you to say that when these two officers you named complained about the procedure they were told that it was all right—who by?

Mr Shiner: Nicholas Mercer complained to everyone. Mercer was the First Division Army Legal, he was in charge of the legal team for First Division who were in theatre at the time of the invasion and for the first few weeks of the occupation. His evidence is absolutely crystal clear. He complained to the Permanent Joint Headquarters, to the National Contingent Command and anyone else who would listen, and he was overruled. He was told that hooding was lawful—he says he was shown a memorandum but when questioned at the court martial could not remember what it was. The evidence from Colonel Vernon was that he was told that these people who were responsible for it were answerable to Chicksands and were not answerable to the chain of command out in Iraq. I am not sure quite what that all means, but I am saying quite clearly that it was known and Permanent Joint Headquarters certainly were told “Our soldiers are hooding” and as late as May 2004—virtually at the end of the occupation—

they were still anguishing about whether the five techniques ban only applied to Northern Ireland and UK and they were saying “We have just heard of this ban, we are trying to get hold of a copy of it but we think it is just the Irish question.”

Q12 Chairman: When Lieutenant General Brims told us in 2006 this: “I think if you went and asked most troops what are the five things that have been banned they would look at you and be unable to communicate with you. If you wrote down these five things and asked ‘What is your view on them?’, they would say you should not do them.” If you follow the answer, the answer is “Yes”—that is going on to the question I put to him, so he is saying if you wrote down the five techniques and showed them to basically any squaddie they would say you are not supposed to do it.

Mr Shiner: I would not accept that because it was standard operating procedure to hood and stress and, it seems, certainly at the beginning, to cuff to the rear, so I would not accept that the average squaddie would say “I do not know what you are talking about”. Nobody seemed to have said “Hang on, it is going to be very, very hot.” The Red Cross, by the way, also witnessed this early on and they went mad, and there was a massive row and a political representative out in Iraq was at a meeting with the Red Cross. It seems to me that it was standard operating procedure to do it. It would have been easy to have secured a prisoner so that he could not see around a military facility through other means. No one seems to have thought about that. No one seems to have thought about how hot it would have been and even when the Red Cross pointed this out, as they did, no one seems to have thought to say actually forget about the five techniques which were banned in 1972, just as a matter of plain commonsense, does hooding and stressing in these conditions of heat represent at least cruel and degrading treatment and therefore are covered by whatever provisions you can think of? No one seems to have thought it does.

Q13 Chairman: But Brims was absolutely clear to us in saying the squaddie knows these are five things you should not do, that was the point of it, and that is something we will have to refer to when we get Army witnesses and MoD witnesses in due course. The other thing he told us—this was in the context not of interrogation but of handing-over of the people who were prisoners-of-war and this is when he said he observed people being hooded—is that he took legal advice and he was told that they were at liberty to do this under law but he decided as a matter of policy to stop doing it. This is General Brims who was at the top and effectively what you are saying is that you did not have that instruction or order filtered down.

Mr Laue: Chairman, if I could just add to what Phil Shiner was saying on your question as to whether ordinary troops would have known effectively that the five techniques were banned, I find it rather ironic if it is being suggested that an ordinary soldier would be aware but PJHQ—and I quote from a

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military document—"was unaware of the Heath ruling until it was raised in the last two weeks". This is dated 17 May 2004 and Mr Shiner has made that point already, so it would be extraordinary if the men on the ground knew more than what was at the top; it just does not make sense with all due respect to General Brims. I just wanted to touch briefly on the question of the US and their role, again to supplement what Phil Shiner has said. There was evidence in the court martial—it is in the transcript—that the UK interrogators were under pressure from the US and there is a quotation which I could read, because it was felt 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." This was because by what was known as the Joint Forward Intelligence Team the US were in fact interrogating civilians that had been brought there by the UK. As to where responsibility lay and what actually happened it is not clear, but there is a strong suggestion which came out of the court martial that something along the lines of what you are suggesting did take place, that civilians who were initially detained by UK forces and taken to what is called the TIF were then put in the custody of US interrogators. It is speculative to ask what happened but there is enough other evidence as to the sorts of things that have happened to raise serious questions.

Q14 Chairman: You have got no direct evidence about water-boarding or anything like that, it is just suspicion at the moment.

Mr Shiner: Nobody has ever looked at it.

Q15 Earl of Onslow: May I ask one factual follow-up question? I, before this life, was actually a soldier so I understand something about the chain of command. Surely if a colonel of a battalion knows that you should not use the five techniques it is his duty to tell his company commanders, troop commanders, his senior NCOs and they should in turn be told by their seniors as well. Are you saying this was not happening, because if the senior officers knew it is not the junior soldiers' fault that they did not know?

Mr Laue: What appears to have emerged from the court martial, if I can answer it that way, was that not only did the soldiers on the ground not know what was and what was not legal but the more senior officers, including Colonel Mendonca, did not know either—in fact the converse was true, he told the court martial—and he was quite open about this in the evidence which he gave to Brigadier Aitken—he believed that hooding and certainly stress positions were permissible as part of what is called conditioning. Therefore, it was apparently at all levels that the Heath ruling had got lost.

Q16 Earl of Onslow: The follow-up on that is was this applicable only to the Queen's Lancashire Regiment or did it apply to other battalions as well?

Mr Laue: I am not aware of the details relating to the other battalions. There was some evidence given at the court martial but Mr Shiner can probably help.

Mr Shiner: The evidence of the court martial is that all battle groups were using these techniques and by "these techniques" I do not have evidence that all battle groups were using noise or sleep deprivation but all battle groups according to witness after witness were hooding and stressing and cuffing to the rear. What happened in terms of the early debate about what General Brims did and did not do I think is best explained by looking at what Nicholas Mercer did because when he felt himself to be blocked at every level he decided that as he was in charge of Army Legal and as it was a moot point he had the discretion to say "Stop" and it stopped because he made sure it stopped. The problem was First Division were not there for that much longer so when Third Division came into theatre Colonel Barnett, who was head of Legal for them, took a different view and the default position of hooding and stressing came back on. That appears to have been what happened.

Q17 Baroness Stern: I would like to ask you a few questions about the Aitken Report and some of it is ground that has been covered already so you do not need to cover it again, but some may be new. Could I ask you first of all if you would like to give us your reaction generally to the Aitken Report?

Mr Laue: Thank you, Lady Stern. What Redress would say is that one has to look at what the terms of reference were for the Aitken Report and, as I understand it, they were to examine how the Army's operational capabilities could be improved in the light of the abuse that had taken place, or words to that effect. It was not meant to be—and it is quite clear from the report—an inquiry which was going to look into things like the Heath banning and other issues; that is important, it was a very limited review. Even having said that, we do have some criticisms of some of the weaknesses in the report, even in that context, and we put this in our written submission. There are things which he raised, that there was a lack of planning and so forth, that the UK had gone there prepared for war fighting and they were expecting at the most to deal with humanitarian issues, but that really does not explain some of the difficulties that followed. For example, when it became clear that humanitarian issues were not going to be the problem, the problem was going to be dealing with civilians and civilian detainees there does not seem to have been, at that stage, a coherent change in direction. At the risk of repetition as late as May 2004—this is now just before the end of the official occupation, a year after Colonel Mercer's realisation that there were difficulties with hooding, PJHQ are still unclear as to what its position is. We accept that the Brigadier, I am sure, covered his brief to some extent but we think he did not really deal with important issues, in any event to the extent that I have indicated the problems with his report.

Mr Shiner: I would say that it was woefully inadequate. Firstly, it was not independent at all; secondly, he only looked at six cases and although I

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was on the record with my law practice on three of those—I am now on the record in four—he made no effort whatsoever, no one made any effort to ask Public Interest Lawyers as to what we thought of anything. Its remit, as Kevin says, specifically accepted that it cannot answer “how soldiers on the ground in Iraq in 2003 apparently came to think that certain practices which had previously been proscribed were lawful” so it accepted that it had no remit to do anything about the five techniques. In my view it tends to draw a veil over the whole thing. “Allegations of abuse in Iraq have been tiny . . . faults we are seeking to rectify were not endemic . . . We cannot excuse the commission of a small number of acts of deliberate abuse against defenceless individuals.” No doubt the Government will be tempted to look at this report and say that in some way this fulfils the requirement for an independent inquiry into what went wrong in the UK’s detention policy. I hope they do not. I hope that now that the House of Lords has sent the question back to the Divisional Court as to whether there should be an independent inquiry that that will now be volunteered, but in my view this report really adds very little. I read it again this morning in preparation for this Committee and I am none the wiser as to what happened in 2003 and what the policy now provides for. We are told that it meets our international obligations: that is merely an unsubstantiated assertion and I think we as a nation need to know that we have a policy on training of interrogators and tactical questioners and ensuring that officers know that they could never do the things that were done and that we have in place a rigorous system to ensure that that ban is now written in stone and could never be reintroduced.

Q18 Baroness Stern: Thank you. If I can stay on this subject, the main messages from the Aitken Report, as you have said, are that the instances of abuse which came to light were not endemic and that the Army has now put its house in order. I am assuming from what you have said that you disagree with both those conclusions.

Mr Shiner: I do.

Mr Laue: Yes.

Q19 Baroness Stern: Could I go on to say the Aitken Report contains nine pages listing action taken by the Army since 2003 to deal with instances of abuse and one paragraph on future action. Do you agree that with those nine pages and that one paragraph (number 45) the problems have mostly been dealt with and the future will be different from the past?

Mr Laue: One has to acknowledge that as listed by the Brigadier a large number of documents and doctrines and so on have been produced. I would hesitate to put myself forward as an expert on the implications, I am not a military lawyer, but it does seem clear that efforts have genuinely been made to avoid these sorts of things happening in the future. It is not entirely clear, and even the Brigadier says it at the top of page 26 of his report: “Finally and notwithstanding any findings from further inquiries in the Baha Mousa case military doctrine should be

amended to provide all members of the Army [I am emphasising all] with a clearer understanding of interrogation and tactical questioning procedures and formally to proscribe the five techniques on all military operations.” As I understand the measures taken, it is now clearly part of military doctrine on the training of interrogators that the Heath ban applies and so on, but if I have understood the point I have just read it does not necessarily follow that ordinary soldiers are aware of these issues. That is just one example that the Brigadier himself was suggesting that more has to be done.

Mr Shiner: My fundamental concern is what is the starting point of the Aitken review, which is these six cases only. I said at the beginning that I am aware just from my own law practice of a great number of other instances so it is not just about understanding how it is that the techniques which were banned in 1972 could never be returned. If, for instance, the terrible allegations that have been made from Maja al-Kabir from May 2004 turn out to be true—and only an independent inquiry could establish that—then that would suggest, putting that incident with other incidents, for example Camp Breadbasket, that there is a range of problems which have simply not been faced up to at all. I have put those in my submissions and I have talked about issues of sexual and religious humiliation and some other issues, so for my part the remit of an inquiry should be much, much broader than the Aitken Report. It has got to be independent and it has got to be in public.

Q20 Lord Lester of Herne Hill: I ought to declare some interests: first of all I am a patron of REDRESS; secondly, 35 years ago, with the Attorney-General Sam Silkin, I helped to give the assurances to the European Court of Human Rights in the Irish State case that we would never again use the five techniques, and that led the Court to decide that they were inhumane treatment but not torture in the context of that case; thirdly, on the eve of the invasion but also before that in the debates on the International Criminal Court I raised issues about the training and guidance for armed forces so far as torture and inhumane treatment was concerned, including the five techniques; lastly, there was a series of questions to which written answers were given about hooding and other aspects. I say all of that before I put my first question because I am concerned about not hindsight but foresight. Is it right that there can be no doubt in the light of the judgment of the European Court of Human Rights in the Irish State case that the usage of the five techniques violated the prohibition against inhumane and degrading treatment, whether under that Convention or the Torture Convention?

Mr Shiner: In my view and in the view of all of my team—because we have discussed this obviously—we have absolutely no doubt whatsoever, given the conditions of heat in Iraq, that any of those five techniques and one of them on their own let alone two or three of them together is a clear violation of the prohibitions on torture and inhumane treatment within the Geneva Convention, within the United Nations Convention Against Torture, within any

body of law that one chose to look at. I do not think any sensible person actually could get up in a court and try and argue that what was happening in Iraq was somehow permissible under any body of law even minimum humanitarian legal standards.

Q21 Lord Lester of Herne Hill: Do you or Redress have any knowledge of the training and instructions that were given at the time after the invasion of Iraq on the use of the five techniques to Armed Forces serving in Iraq?

Mr Shiner: The information I have is evidence in the court martial where you get the finger pointed at Chicksands where we train our interrogators. A Colonel Baker says that he was told that what was going on, hooding and stressing was, “100% Chicksands”. It seems that Chicksands had been training people, interrogators, to hood and stress at least for some considerable time and it was written down in possibly three or even four different documents. It seems to me that the use of hooding and stressing did not just magically come on board when the invasion started and then became an occupation shortly afterwards, the fact that people were routinely getting out old sandbags—because that is what we are talking about—which were routinely available and using them, I think reflects that it was now policy, it was standard operating procedure. No one raised an eyebrow. One of the problems is that the Government had gone in on the basis that the European Convention on Human Rights did not apply so minimum standards from international humanitarian law did apply and those minimum standards in people’s minds did not raise the alarm bells which should have gone off when all this came to light.

Q22 Lord Lester of Herne Hill: When Lord Onslow and I had the privilege of being in the Armed Forces as he will remember we had a manual on military law, a chapter of which was written by Sir Hersh Lauterpatch and Colonel Draper giving guidance on humanitarian and human rights standards—this was a very long time ago in the 1950s. To your knowledge has there been similar guidance of that kind given since the invasion of Iraq of the kind that I understood ministers to say would be given?

Mr Shiner: From my understanding of the evidence of the foot soldiers they had had a very minimal amount of training on the law of armed conflict. None of them seemed to have more than a very shaky understanding that Geneva Convention provisions applied, no one had been trained in prisoner handling, so when we went into Iraq we were sending far too many prisoners—some of them were criminal detainees and some of them were internees—to end up at Camp Bucca so they made up a new system which involved this new post, the battle group internment review officer, which meant that ordinary soldiers who had had no training at all in prisoner handling were now engaged in prisoner handling and they had not got a clue what they were doing, from what I can understand.

Q23 Lord Lester of Herne Hill: Can you help the Committee with evidence as opposed to suspicion about the extent to which the undertaking we gave to the court in 1972 has been breached in practice by the use of the five techniques, whether in combination or otherwise?

Mr Shiner: If you go to my letter of 10 July which analyses, at some considerable length, over 30 pages, my reading of the court martial transcript it is littered with references to the evidence of senior military figures that all battle groups were using hooding and stressing *et cetera*. I cannot do better than summarise what is in my submissions and what is supporting those submissions which is the evidence from the court martial. So I emphasise that what I say is not my opinion, it is evidence from senior military which is before your Committee.

Mr Laue: Lord Lester, if I could just emphasise that the court martial made it clear beyond any doubt whatsoever that certainly hooding and stress positions were regarded as legitimate for purposes of interrogation. I can quote from Colonel Mendoca’s letter to Brigadier Aitken on 13 December—this was evidence given on 13 December 2006 and he quoted it in the court martial. “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.” It was never in dispute that not only was there a complete confusion or ignorance about the five techniques but that some of them at least were used. That is common cause.

Q24 Lord Lester of Herne Hill: To be devil’s advocate one could point out that the assurance that we gave was about the combined use of the five techniques, not about the individual use of any one technique. If you take, for example, hooding, as you will know as well as I do the Government’s answer to my question was that the hooding was done not at all for conditioning purposes.

Mr Laue: Sure.

Q25 Lord Lester of Herne Hill: Leaving aside whether that was true or not is there any decision of any court which decides that hooding on its own would violate Article 3 of the European Convention on Human Rights if used to condition? I do not know the answer to that.

Mr Laue: I do not think there is. In fact, if I may, I just wanted also to go back to your very first question about the impact of the 1978 European decision and to remind with respect the Committee of the point that Lord Bingham made in what he called the *Case of A* the torture evidence case in 2004, where he said—this was obiter of course but it is very important—that he was of the view that the five techniques, which the European Court ruled did not constitute torture but inhumane and degrading treatment might well “now be held to fall within the definition of torture under Article 1 of the Torture Convention”. I just wanted to emphasise that, but your question with respect of course is a valid one, if

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just one is used or if two are used, what is the significance? Phil Shiner has elsewhere argued that more than hooding and stressing was used.

Mr Shiner: I would like to make two or three points just to clarify this. Firstly, the Crown's submissions at the beginning of the court martial were that all battle groups were using hooding; secondly, many of the senior military make it clear that it was not just one hood, it was two or even three hoods or, as Nicholas Mercer said, old plastic cement bags. The evidence in the Mousa case is that it certainly was not just hooding anyway, even if there is a moot point as to whether hooding on its own in normal climate conditions in Britain for a few minutes might be okay; this was going on for a long time, there was more than one hood often and there was more than one technique. So the evidence from Mousa is that actually all five came into play because Mousa died without any urine in his bladder, without anything

but gas in his small intestine, so the pathologist clearly said that was not consistent with being fed or watered. We know that he was hooded probably for about 23 hours and 40 minutes of the 36 hours he was in captivity, we know he was stressed and I have mentioned in my submissions the video I have got which shows the men being stressed whilst hooded and one of the detainees at least was deliberately put by a noisy generator. I remind you also that Mercer complained early on that he had seen 40 Iraqis kneeling in the hot sun near a noisy generator, so there is a prima facie case that at least all of the five came back in some instances and I have seen nothing to suggest that what we are looking at are some isolated instances of hooding only.

Chairman: I am sorry; we are going to have to suspend the hearing because we are no longer quorate.

[A note of the ensuing private meeting is published as an Annex to the Committee's Report]