



SUBMISSION TO THE BAHA MOUSA INQUIRY



SEPTEMBER 2010



## 1 Introduction

- 1.1 British Irish RIGHTS WATCH (BIRW) is an independent non-governmental organisation that has been monitoring the human rights dimension of the conflict, and the peace process, in Northern Ireland since 1990. Our vision is of a Northern Ireland in which respect for human rights is integral to all its institutions and experienced by all who live there. Our mission is to secure respect for human rights in Northern Ireland and to disseminate the human rights lessons learned from the Northern Ireland conflict in order to promote peace, reconciliation and the prevention of conflict. BIRW's services are available, free of charge, to anyone whose human rights have been violated because of the conflict, regardless of religious, political or community affiliations. BIRW take no position on the eventual constitutional outcome of the conflict. Our charitable objects include the abolition of torture, extrajudicial execution, arbitrary arrest, detention and exile.
- 1.2 BIRW are responding to the invitation made by Sir William Gage to make submissions to the Baha Mousa Inquiry, which was instigated, as the Secretary of State for Defence has acknowledged<sup>1</sup> not just because a man died in the custody of British soldiers but because an investigation by the Royal Military Police and a subsequent Court Martial highlighted further important questions that needed to be answered.
- 1.3 We are making submissions to the Baha Mousa Inquiry on the basis of our extensive experience of monitoring the human rights situation in Northern Ireland. We believe that we are in a position to offer valuable insights regarding the circumstances leading to the death of Baha Mousa and the aftermath of this tragedy given our extensive understanding of the historically analogous lessons from the conflict in Northern Ireland. We have attended sessions of the Iraq Inquiry, attended the opening of the Al-Sweady Inquiry and have been one of the few human rights non-governmental organisations to have a presence at and to have monitored the Baha Mousa Inquiry, producing summary transcripts of the proceedings. In addition, we have made extensive submissions to the British Government on many aspects of its counter-terrorism legislative programme. We have also raised these matters with the United Nations, the Council of Ministers, Committees of both the US Houses of Congress and organisations such as the International Commission of Jurists. We were co-interveners in the House of Lords' judgment in *Al-Skeini and Others v Secretary of State for*

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<sup>1</sup> In a written statement given in Parliament on 14 May 2008

*Defence* [2007] UKHL 26 and in the successful application to the European Court of Human Rights (ECtHR) in the case of *Al-Saadoon & Mufdhi v UK* (61498/08). We monitor and report on the cases brought by Iraqi nationals against the British Government in addition to those UK citizens who have been subject to extraordinary rendition and who allege to have been tortured.

- 1.4 Our experience of the inquiry system in the UK provides us with the knowledge and understanding to comment upon the scope and conduct of the Baha Mousa Inquiry. BIRW has been responsible for securing or influencing inquiries into the murders of civilian Robert Hamill, the solicitor Rosemary Nelson and the loyalist prisoner Billy Wright. We have monitored these inquiries and have provided evidence to the Rosemary Nelson Inquiry and submissions to the Robert Hamill Inquiry. In addition, our work with the families of the victims of Bloody Sunday helped to bring about the Bloody Sunday Inquiry. BIRW has monitored the Northern Ireland inquiries and made interventions concerning procedural matters as appropriate. We have consistently advocated an independent Article 2 compliant inquiry into the murder of Belfast solicitor Patrick Finucane in 1989. We acted as a third party intervener in David's Wright's challenge by way of judicial review of the conversion of his son's inquiry to an inquiry under the Inquiries Act 2005 and we continue to lobby for the reform of this legislation and its substitution with an Article 2 compliant model of investigation. As we have noted above this has led us to monitor the current Iraqi inquiries and to follow the litigation bought by the relatives of British serviceman killed because of human rights infringements whilst on active service.
- 1.5 Our work has been nationally and internationally recognised, most recently with the award of the Parliamentary Assembly Council of Europe Human Rights Prize in 2009.
- 1.6 We note if they are to be of assistance to the Inquiry, written submissions must principally address one or more of the 32 Module 4 topics identified by the Inquiry.

## **2 BIRW engagement with the 32 Module 4 topics**

- 2.1 BIRW engages substantially with the following four questions of the 32 Module 4 topics sent to the Ministry of Defence:

(3) To what extent is a prohibition on the use of these five techniques now entrenched in military doctrine?

(6) Should the use of the five techniques be specifically criminalised, or is legislation otherwise required?

(14) Is there a need for time limits for detention at company and battlegroup level on operations? If so, what should the time limits be or is it impracticable to specify a standard time limit in the military context?

(18) Is adequate provision made for the inspection of detention facilities on operations?

2.2 BIRW will also address the following questions among others:

(4) Does the prohibition on the use of the 5 techniques extend adequately to all those under the control of the MOD?

(13) Is there a need, with suitable adaptations for the military context, for a role similar to Custody Sergeants in police custody facilities?

(20) Where deaths, serious injury or injuries suggestive of abuse occur in military custody on operations, is adequate provision made to ensure the retention of evidence and prompt investigation in theatre?

(22) – (26) Defence Intelligence: Tactical questioning and interrogation.

### **3 Preliminary Matters: The Inquiries Act 2005**

3.1 BIRW welcomed two important decisions taken by Sir William Gage. First, he waived his government exemption from Freedom of Information requests and said his inquiry will operate as though it is subject to the Freedom of Information legislation allowing members of the public to put in requests for information that will be answered in twenty working days. The Baha Mousa Public Inquiry website states “we will operate in as transparent and open a manner as possible in keeping with the interests of justice”. Second, he has signed a protocol with the Cabinet Office which gives him, and not Whitehall, the final say in whether documents can be published. If there is a dispute between the Inquiry and the Ministry of Defence (MoD), for example, the MoD will have to go to court to attempt to stop Sir William from releasing the information. The final decision, therefore, will rest with the independent judge and not with the civil servants of the executive.

3.2 However, BIRW has serious reservations regarding inquiries conducted under the Inquiries Act 2005. This is because we consider the legislation gives primacy to political office holders over independent judges in the establishment, conduct and conclusions of public investigation mechanisms. We maintain that an independent, inquisitorial model of investigation is superior to any other form of investigation. We remain convinced that an investigation headed by a chair who is an independent member of the judiciary (not fettered by the constraints of the Inquiries Act

2005) is a far better model of truth-finding than an inquiry under the Inquiries Act 2005.

3.3 Our critique of the failings of the Inquiries Act 2005 can be summarised as follows:

The Inquiries Act brought about a fundamental shift in the manner in which the actions of government and public bodies can be subjected to scrutiny in the United Kingdom. The powers of independent chairs to control inquiries has been usurped and those powers have been placed in the hands of government Ministers.

The Minister:

- decides whether there should be an inquiry
- sets its terms of reference
- can amend its terms of reference
- appoints its members
- can restrict public access to inquiries
- can prevent the publication of evidence placed before an inquiry
- can prevent the publication of the inquiry's report
- can suspend or terminate an inquiry
- can withhold the costs of any part of an inquiry which strays beyond the terms of reference set by the Minister.

Parliament's role has been reduced to that of the passive recipient of information about inquiries. Under the Tribunals of Inquiry (Evidence) Act 1921 reports of public inquiries were made to Parliament. Now, not only is there no guarantee that any inquiry will be public, but inquiry reports go to the Minister prior to being seen by the legislature.

The Minister's role is particularly troubling where the actions of that Minister or those of his or her department, or those of the government, are in question. In effect, the state will be investigating itself. This goes against the letter and spirit of the UK's obligations under the European Convention on Human Rights (the Convention) in relation to investigation of deaths under Article 2.

In addition, it is our view that the Inquiries Act 2005 is at odds with the United Nations' updated set of principles for the protection and promotion of human rights through action to combat impunity.<sup>2</sup>

Where Article 2 of the European Convention on Human Rights (which protects the right to life) is engaged, the Inquiries Act 2005 is at variance with the United Nations' Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.<sup>3</sup> Indeed, we doubt that the Inquiries Act 2005 can ever deliver an effective investigation in compliance with Article 2. The Minister's powers to interfere in every important aspect of an inquiry robs it of any independence. Even if a Minister were to refrain from exercising those powers that are discretionary, s/he still has absolute power over whether there should be an inquiry at all and over its terms of reference. There is no scope for victims to be involved in or even consulted about the process and therefore no prospect of justice, fairness, accountability or adequate redress.

Lord Saville, who chaired one of the most complex public inquiries in UK legal history, the Bloody Sunday Inquiry, expressed grave reservations about the 2005 Act. In a letter to Baroness Ashton at the Department of Constitutional Affairs, dated 26<sup>th</sup> January 2005, he voiced particular concern about restriction notices and orders, saying, "I take the view that this provision makes a very serious inroad into the independence of any inquiry and is likely to damage or destroy public confidence in the inquiry and its findings, especially in cases where the conduct of the authorities may be in question." He added that such ministerial interference with a judge's ability to act impartially and independently of government would be unjustifiable. He further stated that neither he nor his fellow judges on the Bloody Sunday Inquiry would be prepared to be appointed as a member of an inquiry that was subject to a provision of that kind.<sup>4</sup>

Despite the best efforts of Sir William Gage and the legal teams representing the 'core participants' (although we would differentiate between the core participants as perpetrators and those as victims), BIRW fear that the recommendations of the Inquiry will not deliver truth and justice to the relatives of Baha Mousa or the other abused detainees and that those responsible will not be brought to account. Section 2 of the 2005 Act states there will be no determination of liability. This robs the victims of

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<sup>2</sup> Available at <http://www.derechos.org/nizkor/impu/principles.html>

<sup>3</sup> Available at <http://www2.ohchr.org/english/law/executions.htm>

<sup>4</sup> See:

<http://www.birw.org/inquiries/InquiriesBillSavilleAshtonCorrespondence.pdf>

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truth and justice, that which is foremost where a state violation of the right to life is concerned.

#### **4 Context: The Iraq Invasion, Jurisdiction and Human Rights**

- 4.1 The Iraq invasion and its violent aftermath has been a testing ground of the UK's commitment to human rights norms. The death of Baha Mousa in British military custody is a flashpoint tragedy engaging this test. We point to the demonstrable reluctance of the government to extend its human rights commitments to the actions of its occupying forces overseas on the questionable basis of the jurisprudence of jurisdiction, argued as a point of sophistry (indeed casuistry) to evade such responsibility. This has been demonstrable in much of the evidence given to the Inquiry<sup>5</sup>. Further, we argue that there have been serious breaches of both Article 2 (the right to life) and Article 3 (the prohibition of torture, and cruel and inhuman and degrading treatment) of the European Convention perpetrated by (and against) British forces. We also argue breaches by the UK of its other international human rights and humanitarian law commitments.
- 4.2 BIRW requests the Baha Mousa Inquiry consider the extent to which the UK has attempted to avoid application of human rights and other domestic and international standards, norms and law to its forces in Iraq and that the death of Baha Mousa was not merely an isolated incident but representative of a cultural ethos prevalent within the military when in the theatre of war. Central to this analysis must be the concept of jurisdiction. Proceedings under way in the UK are seeking to enforce the Government's obligations under the European Convention, the UN Convention Against Torture (UNCAT)<sup>6</sup>, the UN Convention on the Rights of the Child<sup>7</sup>, the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation<sup>8</sup>, the UN Basic Principles on the Prevention and Investigation of Extra-Judicial Executions<sup>9</sup> and non-derogable principles of international law that apply worldwide in any court, in any jurisdiction including militarily-occupied Iraq. These international instruments are underpinned by the concept of the responsibility of states, now enshrined in the International Law Commission's Articles of State Responsibility, adopted by the UN

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<sup>5</sup> Particularly at senior political and military level including the evidence of politicians Geoff Hoon and Adam Ingram and military leaders such as Robin Brims.

<sup>6</sup> Available at <http://www2.ohchr.org/english/law/cat.htm>

<sup>7</sup> Available at <http://www2.ohchr.org/english/law/crc.htm>

<sup>8</sup> Available at <http://www2.ohchr.org/english/law/remedy.htm>

<sup>9</sup> Available at <http://www2.ohchr.org/english/law/executions.htm>

General Assembly.<sup>10</sup> These concepts of international law are growing in their capacity to protect the vulnerable against state abuses of power, particularly in the context of domestic judicial review claims against the British government for extra-territorial breaches of fundamental human rights. These instruments and principles of international law impose onerous duties on states, enforceable in the courts, to investigate human rights abuses.<sup>11</sup> The content of this investigative duty was summarised by Lord Bingham in the House of Lords case of *Amin*:

“To ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost a relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.”<sup>12</sup>

- 4.3 These are the human rights obligations the British military should have implemented and to which they should be held to account. However, it is clear that after the “success” of the invasion, and during the period of occupation, there was a deliberate attempt to evade these obligations, highlighted in the manner of the death of Baha Mousa and the treatment meted out to his co-internees. This avoidance of responsibility, which amounts to an assertion of impunity, was sanctioned at the highest level on the basis of the non-applicability of the European Convention, in particular because of the jurisprudence on jurisdiction.<sup>13</sup> It is clear from the

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<sup>10</sup> Available at <http://assets.cambridge.org/97805218/13532/sample/9780521813532ws.pdf>

<sup>11</sup> See the report by *British Forces in Iraq: The Emerging Picture of Human Rights Violation and the Role of Judicial Review*, by Public Interest Lawyers 30 June 2009

<sup>12</sup> *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653

<sup>13</sup> See for example the email exchange between military lawyers cited in Sir William Gage’s decision in relation to the Attorney General’s controversial legal advice 2003 on the application of the Convention to British Army’s operations in Iraq. “At the moment, as per the A-G’s advice, ECHR has no application ... Rachel Quick, referring to the Attorney-General’s Advice, stated: ‘This concluded the better view was that the HRA was only intended to protect rights conferred by the Convention ...’ This was a reference to the ‘A/G’s Advice.’” See The Baha Mousa Public Inquiry: Attorney-General’s Advice Ruling, 1 April 2010, p 9 [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/key\\_documents/rulings/bmpi-agruling310310v1.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/key_documents/rulings/bmpi-agruling310310v1.pdf) What was being interpreted on the front line was different to the account given by the then Attorney-General to this Inquiry on 27 January 2010 at pages 227-229.



litigation in cases such as *Al-Skeini and Others v Secretary of State for Defence* [2007] UKHL 26<sup>14</sup>, *R (Al-Saadoon and another) v Secretary of State for Defence* [2009] WLR 17<sup>15</sup> and *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58<sup>16</sup>, that the British government, its administration and its military did not consider the Convention to have jurisdictional effect in occupied Iraq.<sup>17</sup> This was a position accepted by the domestic judiciary. For example, Lord Justice Laws in *Al-Saadoon* expressed the argument in the following terms:

“The scope of the ECHR is essentially territorial... It was not easy to identify precisely the scope of the Article 1 jurisdiction where it was said to be exercised outside the territory of the impugned state party; it had to be ascertained from a combination of key ideas which were strategic rather than lexical. Drawing on *Banković v Belgium* (2001) 11 BHRC 435 and *R (Al-Skeini) v Secretary of State for Defence* [2008] 1 AC 153 there were four core propositions: (1) it was an exceptional jurisdiction; (2) to be ascertained in harmony with other applicable norms of international law; (3) reflecting the regional and (4) indivisible nature of the Convention rights. (1) and (2) implied an exercise of sovereign legal authority, not merely *de facto* power, by one state on the territory of another. That was of itself exceptional, though well recognised in some instances such as that of an embassy. The power must be given by law, since if given only by chance or strength its exercise would not be harmonious with, but offensive to, material norms of international law, and there would be no principled basis on which the power could be said to be limited, and thus exceptional. It was impossible to reconcile a test of mere factual control with the limiting effect of the four

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14 *Al-Skeini* is the case against the British army arguing that the Convention applied to the actions of British forces whilst in *de facto* control of occupied territory in Iraq and that members of the occupying forces breached Article 2 and 3 of the Convention in the course of the detention of Iraqi nationals. The case is pending before the ECtHR but lead directly to the Baha Mousa Public Inquiry.

15 *Al-Saadoon* was also concerned the question of the jurisdiction of Convention obligations specifically in relation to Articles 3 and 2 in the case of two detained Iraqi nationals being returned to the custody of the Iraqi High Tribunal in breach of an interim measure of the ECtHR creating a *de facto* injunction preventing such action.

16 *Al-Jeddah* was an application to the House of Lords by an Iraq-UK citizen who argued that he had been unlawfully detained by British forces in Iraq in contravention of Article 5 of the Convention (right to liberty). The application was dismissed.

17 Or that it was somehow suspended through the fog of war.

propositions. Propositions (1) and (2), thus understood, conditioned the others. If a state party was to exercise Article 1 jurisdiction outside its own territory, the regional and indivisible nature of the Convention rights required the existence of a regime in which that state enjoyed legal powers wide enough to allow its vindication, consistently with its obligations under international law, of the panoply of Convention rights – rights which might, in the territory in question, represent an alien political philosophy. The Convention's natural setting was the espace juridique of the states parties; if, exceptionally, its writ was to run elsewhere, that espace juridique must in considerable measure be replicated. The state party must have the legal power to fulfil substantial governmental functions as a sovereign state. It might do so within a narrow scope, as in an embassy, consulate, military base or prison; it might, in order to do so, depend on the host state's consent or the UN's mandate. However precisely exemplified, that was the kind of legal power the state must possess: it must enjoy the discretion to decide questions of a kind which ordinarily fell to a state's executive government. If the Article 1 jurisdiction was held to run in other circumstances, the limiting conditions imposed by the four propositions would be undermined. The UK was not before 31 December 2008 exercising any power or jurisdiction in relation to the applicants other than as agent for the Iraqi court. After that date British forces enjoyed no legal power to detain any Iraqi. Had they done so, the Iraqi authorities could have entered the premises they occupied and recovered any such person so detained.”<sup>18</sup>

- 4.4 This approach was rejected by the European Court of Human Rights (ECtHR) in *Al-Saadoon and Mufdhi v United Kingdom*:

“126. The Government contended that they were under an obligation under international law to surrender the applicants to the Iraqi authorities. In this connection, the Court recalls that the Convention must be interpreted in the light of the rules set out in the Vienna Convention on the Law of Treaties, 1969, of which Article 31 § 3(c) indicates that account is to be taken of “any relevant rules of international law applicable in the relations between the parties”. More generally, the Court recalls that the principles underlying the Convention cannot be interpreted and applied in a vacuum. The Convention should be interpreted as far as possible in harmony with other principles of international law

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18 See, *The Weekly Law Reports Daily R (Al-Saadoon and another) v Secretary of State for Defence* [2009] WLR (D) 17

of which it forms part (see *Al-Adsani v the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI; *Banković*, cited above, §§ 55-57). The Court has also long recognised the importance of international co-operation (see *Al-Adsani*, § 54 and *Bosphorus*, § 150, both cited above).

127. The Court must in addition have regard to the special character of the Convention as a treaty for the collective enforcement of human rights and fundamental freedoms. Its approach must be guided by the fact that the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective (see, inter alia, *Soering*, cited above, § 87; *Loizidou v Turkey* (preliminary objections), cited above, § 72; *McCann and Others*, cited above, § 146).

128. It has been accepted that a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of a Contracting Party's "jurisdiction" from scrutiny under the Convention (*Bosphorus*, cited above, § 153). The State is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention (see *Bosphorus*, cited above, § 154 and the cases cited therein). For example, in *Soering*, cited above, the obligation under Article 3 of the Convention not to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture or inhuman or degrading treatment or punishment was held to override the United Kingdom's obligations under the Extradition Treaty it had concluded with the United States in 1972."<sup>19</sup>

- 4.5 The ECtHR found that the Convention extended to British occupying forces therefore undermining the claims made by the government and its military and upheld in domestic litigation. Regarding the allegations relating to breaches of other international instruments binding upon the UK, in particular the UN Convention Against Torture and the UN Convention on the Rights of the Child, the government sought to avoid liability for these breaches by arguing that such conventions' territorial application

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<sup>19</sup> (No. 61498/08)

extended only to UK territory and that, whilst ratified, they have not been incorporated into UK law.<sup>20</sup> The UK again sought to limit the application of internationally recognised and accepted human rights instruments. The first contention, of geographic applicability, is well met by the statements of the UN Committee Against Torture, which is charged with policing the Convention and has expressly made it clear to the UK and the US that UNCAT has direct application in Iraq whilst those two states are in *de facto control*. Baha Mousa and his co-detained would certainly have perceived that the British military had *de facto control* over them even though they were not prisoners of war, and in our submission their perception would have been correct. There was no domestic authority with the power to come to their aid. The second contention, of non-incorporation, does not adequately meet the argument that these conventions can be relied upon by domestic litigants since they constitute customary international law. In any event, the Convention should be interpreted consistently with the UK's obligations in treaties such as UNCAT, given that their ratification preceded the passage of the Human Rights Act 1998 (under the principle in *Garland* referenced by Lord Bingham in *A (No.2)* [2004] UKHL 56)). If UNCAT is not said to apply, then the duty under Article 12 requiring states to investigate possible cases of torture as soon as they are aware of them becomes relevant.<sup>21</sup> We note again the failings of both the internal military investigation and the flawed court martial, both of which failed to meet the requirements of Article 12, bringing about the necessity of an inquiry.

- 4.6 BIRW urges the Baha Mousa Inquiry to consider the government's attitude to its human rights obligations during the invasion and occupation of Iraq and to ensure that it recommends complete human rights compliance in the future. This would be a strong message to the forthcoming statutory inquiries including that into the death of Al-Sweady and others and domestic litigation and the proposed non-statutory inquiry into complicity in torture. Further,

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20 While it was widely believed that the Human Rights Act 1998 incorporated the ECHR into domestic law, the House of Lords ruled in *Re McKerr* [2004] UKHL 12 that the Act only gave effect to certain provisions of the ECHR from October 2000, when the Act came into force, but did not incorporate them. However, one of the provisions of the ECHR, Article 3, to which the Act gave domestic effect, specifically prohibits torture and cruel and inhuman or degrading treatment, so the non-incorporation of UNCAT is something of a red herring.

21 Article 12 of UNCAT states "Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction." See further Public Interest Lawyers *op cit* 28 at 4.5.

BIRW requests the Baha Mousa Inquiry considers the testimony of Lieutenant Colonel Nicholas Mercer taken by the Inquiry on 15 March 2010. Colonel Mercer was clear in his evidence that senior figures in the British military intentionally ignored their legal obligations under both the Geneva and European Conventions. This occurred during meetings with the International Committee of the Red Cross, who were concerned with the conditions of detention. Further, in relation to the detention of Iraqi civilians, which we examine below, Colonel Mercer claimed that the abuse of Iraqi prisoners might have been prevented if a British judge had been appointed to oversee the handling of detainees. This proposal was blocked by the then Attorney-General, Lord Goldsmith.<sup>22</sup> In response to Colonel Mercer's request for a Detainee and Internee Management Unit, a member of Permanent Joint Headquarters noted, "The standards to which Nick refers are based on UK law. Whilst his advice might be appropriate for individuals locked up on a Saturday night in Brixton, they are not appropriate for detainees arrested by the Black Watch following a bit of looting in Basra."<sup>23</sup> In further evidence to the Baha Mousa Inquiry on 30 March 2010, Ewan Duncan (deployed as Staff Officer with responsibility for human intelligence operations) confirmed that he was told by Colonel Vernon that visitors from the Red Cross must not witness prisoners being hooded.<sup>24</sup> Ewan Duncan further confirmed that UK defence doctrine on interrogation was

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22 See *Baha Mousa inquiry: Eight or civilians died in British custody*, by Richard Norton-Taylor, *The Guardian*, 16 March 2010 and *Baha Mousa inquiry: Attorney general 'blocked' system to stop prisoner abuse*, Press Association, *The Guardian*, 16 March 2010 and [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/hearings/transcripts/2010-16-03day68fullday-redacted.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/transcripts/2010-16-03day68fullday-redacted.pdf)

23 See *Baha Mousa inquiry: Eight or civilians died in British custody*, by Richard Norton-Taylor, *The Guardian*, 16 March 2010 and *Baha Mousa inquiry: Attorney general 'blocked' system to stop prisoner abuse*, Press Association *The Guardian*, 16 March 2010 and [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/hearings/transcripts/2010-16-03day68fullday-redacted.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/transcripts/2010-16-03day68fullday-redacted.pdf)

We need hardly remind the Inquiry that Baha Mousa was not involved in looting or any other criminal activity when he was detained, but was a wholly innocent man.

24 "From my recollection is very clear. S009 and Colonel Vernon's position was that: the ICRC and the media were visiting. They must not witness prisoners being hooded."  
[http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/hearings/transcripts/2010-30-03-day76fulldaywithwitnessstatements.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/transcripts/2010-30-03-day76fulldaywithwitnessstatements.pdf). Colonel Mercer was deliberately excluded from meeting the Red Cross (as confirmed in the evidence of military lawyer Lieutenant Colonel Davies)  
[http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/hearings/transcripts/2010-29-03-day75fullday.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/transcripts/2010-29-03-day75fullday.pdf)

“somewhat thin and lacking in detail and could be strengthened.”<sup>25</sup>

- 4.7 Before moving on to consider our detailed submissions on the Module 4 topics we have identified as being within our remit, BIRW considers it important to draw the Inquiry’s attention to the view of the military (and others) on human rights obligations, illustrated through the extensive evidence and documentation submitted. Importantly, as Colonel Mercer makes clear, these views were held at senior military and political levels. For example, in a loose minute dated 21 January 2003 under the heading Article 5 and *Banković*, it states, “The meeting agreed that guidance was needed on whether the ECHR would apply in Iraq in accordance with the decision in *Banković*.”<sup>26</sup> In a further loose minute of 25 November 1999 it is noted that, “Therefore the conduct that would breach the ECHR is relatively extreme,” and, “You intimated to me that the value of interrogations may be such that from a political viewpoint it outweighs the legal consideration.”<sup>27</sup> In an e-mail from the Permanent Joint Headquarters, dated 14 May 2004, it is noted by the unidentified author, “Without going into any detail I had in mind the direction of the AG that ECHR did not apply (and UK case law in this area was as I understood it ECHR-related) and GC3 [the third Geneva Convention] was *lex specialis*.”<sup>28</sup> In his evidence to the Inquiry, Major Royce, as Battle Group Internment Review Officer, made the following comment in his statement, “At the time there was no law and order system at all, it was completely lawless and trying to impose principles such as the Human Rights Act at this stage was idealistic and totally unrealistic.”<sup>29</sup>
- 4.8 On 19 March 2010, in *The Times*, Colonel Richard Kemp wrote, “A commander has more than enough on his mind already without having to worry about whether he might be in breach of the

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25 See:  
[http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/hearings/transcripts/2010-30-03-day76fulldaywithwitnessstatements.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/transcripts/2010-30-03-day76fulldaywithwitnessstatements.pdf)

26 See:  
[http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_160310/mod053714.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_160310/mod053714.pdf)

27 See:  
[http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_160310/mod028352.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_160310/mod028352.pdf)

28 See:  
[http://www.bahamousainquiry.org/linkedfiles/Baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_160310/mod020218.pdf](http://www.bahamousainquiry.org/linkedfiles/Baha_mousa/baha_mousa_inquiry_evidence/evidence_160310/mod020218.pdf)

29 See:  
[http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/hearings/transcripts/2010-10-02-day57fullday.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/transcripts/2010-10-02-day57fullday.pdf)

Human Rights Act.”<sup>30</sup> Whilst we are not unsympathetic to the demands of war on UK forces and related personnel, we cannot but deplore the attitude demonstrated in the above comment to obligations under European and international human rights covenants in addition to breaches of the Geneva Conventions (although Colonel Kemp did not specify the latter). However, Colonel Kemp’s comment is indicative of British military attitudes as evidenced in much of the testimony to the Inquiry.

- 4.9 It is interesting to note the extent of human rights obligations toward British troops serving overseas who suffer a human rights violation whilst on duty. The question of the duty of care owed to its personnel by the military has been litigated on in this circumstance. In *Secretary of State for Defence v R (ex parte Smith) and HM Assistant Deputy Coroner for Oxfordshire* [2009] EWCA Civ 441 it was held that armed forces personnel serving overseas are protected by both Article 2 of the Convention and the Human Rights Act. The case subsequently failed in the Supreme Court.<sup>31</sup>

## **5 Module 4 topic (3):**

- 5.1 ***To what extent is a prohibition on the use of these five techniques now entrenched in military doctrine?***
- 5.2 It is clear to BIRW that this question can only be answered in the negative. There is no clear entrenchment of the prohibition of the five techniques in military doctrine. This is clear from our submissions above regarding the attempt to evade (at all official levels) the obligations arising out the Convention, the Human Rights Act, the

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30 *Lawyers have no place on the battlefield*, Richard Kemp,, *The Times*, 19 March 2010

31 *Smith* concerned the death of a soldier through hyperthermia whilst on active service in Iraq. The Court of Appeal held that Article 2 of the Convention could extend to members of the Armed Forces, wherever they might be; whether it did so would depend on the circumstances of the particular case. The case has been appealed by the MoD to the Supreme Court. Contrast this decision with the House of Lords decision in *R (on the application of Gentle) v The Prime Minister* [2008] UKHL 20, [2008] 1 AC 1356 in which it was found that Article 2 could not be breached in similar circumstances per Lord Bingham. Lord Bingham was not persuaded by this argument and considered that there was an insufficient causal link. In contrast to the facts in the present case, he explained, the decision to send an individual to a foreign country in these expulsion cases would have “an immediate and direct impact on that individual”. In his view, the claimants’ contention merely highlighted the degree of remoteness of an Article 2 violation from the use of military force.

Geneva Conventions and associated international human rights instruments. It is also clear from the evidence adduced before the Inquiry and related litigation. For instance, the ignorance of the 1972 Heath Ruling at all levels is alarming.<sup>32</sup> Similarly there was ignorance of the *Ireland v UK* judgment.

- 5.3 BIRW consider that the experience of troop deployment in Northern Ireland during internment resulting in the prohibition of the five torture techniques and the 1977 inter-state litigation in *Ireland v UK* (5310/71) continues to have important consequences in the thinking of the UK military as demonstrated in the Baha Mousa and Al-Sweady Inquiries and related forthcoming litigation. BIRW suggest that the Baha Mousa Inquiry makes recommendations condemning such activities by both the British military and security services and confirming the absolute prohibition on torture including the five techniques used in custody (internment) and interrogation (tactical questioning).<sup>33</sup> It is important to note (as the detainees' representatives do in their closing submissions) that what occurred was torture: "This is a torture case."<sup>34</sup> This statement was made on the basis that it is possibly only the first time that allegations of torture have been subjected to legal proceedings in the domestic courts save in cases of asylum applications.
- 5.4 Long before the invasion of Iraq, it appears that British forces developed and used now discredited coercive questioning techniques in counterinsurgency operations and as an aid to interrogation of those held in internment. These techniques, which led to the death of Baha Mousa, were developed and used primarily by British and American forces in the years following the Second World War. In 1972 the Irish government made a complaint to the ECtHR – the first such interstate complaint – regarding British use of coercive interrogation techniques during internment in

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<sup>32</sup> Please see paragraph 5.5 below

<sup>33</sup> This demand has recently been framed in terms of the recommendation on an independent inquiry into allegations of complicity regarding the torture of terror suspects: "To the extent that the analysis in the letter of Jonathan Sumption QC draws attention to the inherent limitations of litigation as a means of inquiring into a wider systemic problem, we agree. It powerfully makes the case for an independent inquiry into these grave matters, which would not be constrained from looking at the wider issues in the way that the court adjudicating on Binyam Mohamed's claims inevitably is. In our view, the case for setting up an independent inquiry into the allegations of complicity in torture is now irresistible." Joint Committee on Human Rights *op cit.* para 12, p 41. The report follows campaigns by Public Interest Lawyers and Amnesty International.

<sup>34</sup> See the closing written submissions of counsel for the victims: [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/hearings/oral\\_submission/sub002149\\_part1.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/oral_submission/sub002149_part1.pdf) page 2.



Northern Ireland. The facts of the case were stark, with British forces employing the same techniques – hooding, sleep deprivation, wall-standing, white noise and lack of nutrition – that are now familiar from images burned into the public consciousness of blindfolded and ear-muffled Guantanamo detainees and of Baha Mousa and his colleagues<sup>35</sup>, bowed into stress positions and blasted by white noise. The “Baha Mousa” video shown to the Inquiry graphically makes the point. After a lengthy investigation by the then European Commission of Human Rights, the ECtHR gave its historic ruling in 1978, holding that use of these techniques constituted cruel and degrading treatment in breach of Article 3 of the ECHR, which absolutely prohibits state torture and inhuman or cruel and degrading treatment. The Court stated at the time:

“The five techniques were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation.”

- 5.5 Many commentators have since reflected that if the “conditioning” techniques reviewed in *Ireland v UK* were to be examined by the ECtHR today the likely result would be a finding of torture, this being also the unanimous conclusion of the European Commission of Human Rights in 1976 prior to the referral of the case to the ECtHR.<sup>36</sup> Before the ECtHR’s 1978 judgment, Prime Minister Edward Heath

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35 There is some confusion in terms of definition. A detainee has been defined as: “A non-combatant who has been detained because he has committed, (or is suspected of committing), a criminal offence against the laws of the territory in which he has been captured or against UK Forces, or an offence against the law applied in an occupied territory.” An internee has been defined as “During an international armed conflict or belligerent occupation, an internee is defined in GC IV as a civilian who is interned for imperative reasons of security or because he has committed an offence against the detaining power. During international armed conflict, a civilian interned by UK Forces for committing a criminal offence against members of UK Forces will be an internee and not a detainee. During an internal armed conflict, an internee is a civilian who is interned for security reasons. A civilian who, during an internal armed conflict commits a criminal offence is a detainee.” *Prisoners of War, Internees and Detainees*, Joint Doctrine Publication 1-10 (JDP 1-10), May 2006, 1 (MOD)

36 Lord Hope, *Torture*, 53 ICLQ 826: “It seems likely that the mixture of physical and psychological pressures that were used in the case of the IRA suspects would now be regarded as torture within the meaning of article 3 of the Convention.” The article was cited by Lord Bingham in *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) (No. 2)* [2005] UKHL 71.

unequivocally banned the use of these “five techniques”, stating to Parliament in 1972:

“[The Government], having reviewed the whole matter with great care and with reference to any future operations, have decided that the techniques ... will not be used in future as an aid to interrogation ... The statement that I have made covers all future circumstances. If a Government did decide ... that additional techniques were required for interrogation, then I think that ... they would probably have to come to the House and ask for the powers to do it.”<sup>37</sup>

- 5.6 This ban was later reaffirmed by an unqualified undertaking by the then Attorney General to the ECtHR on 8 February 1977.<sup>38</sup> The Baha Mousa Public Inquiry has closely examined government documents from the time to uncover whether or not the techniques were in fact eradicated as promised, or whether they were instead continued covertly.
- 5.7 Prior to the 1972 ban, the Government commissioned its own investigations into the use of coercive interrogation techniques, producing two reports which preferred the Government’s explanations of the mistreatment that had occurred. Nevertheless, the second of these reports, the Parker Report, does at least establish that British use of coercive interrogation techniques in 1971 was but one instance of what had in fact been a sustained development and use of the techniques over previous decades. Lord Parker stated that they “have been developed since the War to deal with a number of situations involving internal security. Some or all have played an important part in counter insurgency operations in Palestine, Malaya, Kenya and Cyprus and more recently in the British Cameroons (1960-61), Brunei (1963), British Guiana (1964), Aden (1964-67), Borneo/Malaysia (1965-66), the Persian Gulf (1970-71) and in Northern Ireland (1971)”.<sup>39</sup> Lord Gardiner elaborated further in his attached Minority Report, citing

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37 Hansard, HC Debate 2 March 1972 vol 832 cc 742-9

38 *Ireland v UK* (1978) 2 EHRR 25, para 153: “The Government of the United Kingdom have considered the question of the use of the ‘five techniques’ with very great care and with particular regard to Article 3 (art. 3) of the Convention. They now give this unqualified undertaking, that the ‘five techniques’ will not in any circumstances be reintroduced as an aid to interrogation.”

39 *Report of the inquiry into allegations against the Security Forces of physical brutality in Northern Ireland arising out of events on the 9th August, 1971 or Compton Report*, November 1971; *Report of the Committee of Privy Counsellors appointed to consider authorised procedures for the interrogation of persons suspected of terrorism or Parker Report*, 31 January 1972, para 10

the now well-documented Allied forces research into sensory deprivation and the psychological debilitation of detainees which preceded and accompanied the adoption of "conditioning" techniques in the post-war era. It is important to note when considering coercive interrogation techniques that "the absence of physical evidence should not be construed to suggest that torture did not occur, since such acts of violence against persons frequently leave no marks or permanent scars".<sup>40</sup> More recent reports, such as those of Physicians for Human Rights provide a detailed explanation of modern use of these techniques and their effects upon victims.<sup>41</sup>

- 5.8 We reiterate that it has become clear that the prohibition on the use of the five techniques has not become entrenched in military doctrine. As we have stressed, at almost every level of responsibility there was a remarkable ignorance of both the Heath ruling and the *Ireland v UK* judgment. This is clear from the evidence of Lieutenant Colonel Mercer cited above. It is also clear from the evidence of Defence Secretary Geoff Hoon and his Minister of State Adam Ingram, who admitted misinforming the House of Commons over the treatment of Baha Mousa.<sup>42</sup> The use of "tactical questioning" techniques as described to the Inquiry blurs the line between interrogation and torture and this is obviously so in the extreme conditions of occupation and counter-insurgency operations. Again, the military were being asked to undertake a civilian role, with clear reverberations from Northern Ireland experience. As revelations about internment and tactical questioning methods (torture) continue to emerge it is clear that there is wilful misunderstanding within both the military and the security services regarding what is an acceptable level of treatment of an internee or detainee in order to comply with the standards demanded by the Geneva and European Conventions.

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40 Ibid. Minority Report, paras 12-14

41 *Leave No Marks: Enhanced Interrogation Techniques and the Risk of Criminality*, by Physicians for Human Rights, August 2007, p 5: "an extensive body of medical and psychological literature and experience with victims of torture and abuse show that although "enhanced" interrogation techniques may not result in visible scars, they often cause severe and long-lasting physical and mental harm. This is directly related to the purpose of these techniques: to 'break' detainees, mentally and physically."

42 See Inquiry website:  
[http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/hearings/transcripts/20101006day103fulldayws.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/transcripts/20101006day103fulldayws.pdf) and  
[http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/hearings/transcripts/2010-02-06-day97fullday.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/transcripts/2010-02-06-day97fullday.pdf)

5.9 The Baha Mousa Inquiry has served to expose a culture of violent dehumanization within the military regime. It is hoped that in his report Sir William Gage will highlight this on behalf of the victims and call the military and political system to account in addition to alerting his brother judge Sir Peter Gibson who will be conducting a non-statutory inquiry into state complicity in torture.

## **6 Module 4 topic (6):**

6.1 ***Should the use of the five techniques be specifically criminalised, or is legislation otherwise required?***

6.2 No special legislation is required, for the reasons we explain at 6.8. below. However, the existing law needs to be applied with rigour and consistency.

6.3 So far as the Baha Mousa Inquiry is concerned, there is a need for an independent condemnation of the state sanctioning of torture by any of its agencies, in this instance the military but also by the intelligence services. There must be an absolute prohibition on torture. To make any legal precedent as an exception in an extreme case is not to control the practice of torture but to set dangerous acceptable limits. Such an exception runs the risk of normalising the practice and thus reducing the threshold associated with it which is so high as to amount to virtually a complete prohibition. It is not morally permissible to just "accept" it: by doing that "we" in fact legitimate the practice. There is also an empirical position that can be used to question any argument suggesting a moral or legitimate excuse for torture and it is an argument which we develop from the experience of Northern Ireland.

6.4 As we have noted above, and as remarked on in the words former Home Secretary James Callaghan "internment had produced more evil than the ills it sought to overcome".<sup>43</sup> That was undoubtedly so, but the British state and its forces continued to use a variety of mechanisms to defeat insurgents and terrorists including the suspension of normal law, the introduction of "emergency" laws which in fact became permanent, special courts and covert military methods (counter-insurgency) up to and including illegal collusion with paramilitaries.<sup>44</sup> The use of torture did not end the

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43 *A House Divided: The Dilemma of Northern Ireland*, by James Callaghan London: Collins, 1973, p 170

44 See, for example:  
*Stevens 3 Enquiry: Overview and Recommendations*, April 2003, paragraph 1.3  
Statement by the Police Ombudsman for Northern Ireland on her

conflict in Northern Ireland and did not aid the prosecution of that earlier conflict one bit; indeed, it worsened and prolonged it. The question of whether interrogation involving torture actually “worked” is not even debatable in the context of Northern Ireland. Interrogation and internment in Northern Ireland provoked violent reaction and massive distrust of the state by the minority population. It also produced poor evidence and false allegations against others, as the number of convictions by the Diplock courts which have been overturned on referral back to the Court of Appeal by the Criminal Cases Review Commission illustrates.<sup>45</sup> In Northern Ireland the use of torture and emergency legislation led seamlessly into a disregard not just for international law and norms but domestic law by making security policy in Northern Ireland dependent on covert means. The deployment of “Special Forces” in Northern Ireland (such as the Force Research Unit of the British army)) and the use of assassination squads can be seen against the backdrop of a belief that the ends justify the means and that in order to defeat terrorists and insurgents, the rule of law can be suspended, disregarded, distorted, manipulated or made opaque. In this context the distinction between interrogation and torture is difficult to maintain. What the death of Baha Mousa further illustrates is the military ethos while on active service toward those captured and detained, where the fog of war obliterates the presence of the rule of law.

- 6.5 The early internment system in Northern Ireland, as reflected in the Temporary Detention Facilities on British military bases in southern Iraq, was essentially a form of interrogational torture whereas the later “shoot-to-kill” policy appeared close to state-sanctioned terrorism. The UK Government’s decision to introduce a raft of emergency legislation in the 1970s looks remarkably similar to that which occurred after 9/11 principally in the USA but imitated and endorsed by the UK in its quest for intelligence linking Islamist threats to the UK (the cases of Moazzam Begg and Binyam Mohammed for example). The attempt to create a legal regime (internment, special courts) to regulate certain kinds of interrogatory practices failed to constrain them and actually may have facilitated the

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investigation into the circumstances surrounding the death of Raymond McCord Junior and related matters, January 2007  
The Cory reports into the murders of Patrick Finucane, Rosemary Nelson, Robert Hamill and Billy Wright at  
<http://www.nio.gov.uk/media-detail.htm?newsID=9220>

- 45 The following convictions in the Diplock courts have been overturned by the Court of Appeal following reference back by the Criminal Cases Review Commission: John Boyle, Billy Gorman, Thomas Green, Richard Hanna, Gerard Magee, Patrick McKinney, Paschall Mulholland, Anthony O’Doherty, and Danny Morrison.

proclivity to torture. Attempts to control a practice like torture requires an almost superhuman level of moral probity and institutional efficiency, which it is implausible to simply assume can exist in any institutional structure when those structures are under pressure.<sup>46</sup> Torture cannot be rule-bound, it has to be outlawed as being beyond law and morally impermissible in the absolute. We hope that the Baha Mousa Inquiry will recommend that steps are taken to inculcate and anti-torture culture within the military and the intelligence services, so that when individual officers are placed under pressure their instinct will be to avoid torture, rather than seeing it as a first resort. In particular, these agencies need to be disabused of the misapprehension that torture “solves” anything, or acts as a deterrence. It merely dehumanizes both victim and perpetrator, as well as making what will by definition already be a bad situation worse by alienating not just the immediate victims, but whole communities.

- 6.6 If (interrogational) torture in any form was sanctioned by the state, no matter how morally reprehensible or legally moribund the justification “bringing it out in the open”,<sup>47</sup> one way to confront it would be to focus attention less on what rules might (or might not) exist to constrain or regulate a practice like torture and focus instead on what rules we might have (and how we might enforce compliance with them) to punish those who violate such rules as there are. We are not unaware that it may be those at the lowest level of the institutions that torture who will be punished (Corporal Payne, for example). Although it is important that the immediate perpetrators of torture should be held to account for their illegal actions, those who give the orders, frame the policies, and create the climate in which torture can occur must also be made accountable, and we urge the Baha Mousa Inquiry, despite not being able to apportion guilt or liability, so to do in the strongest of terms.
- 6.7 We have already cited at 4.2 above Lord Bingham’s definition of a satisfactory model of investigation, prosecution and punishment in his judgment in *Amin*.<sup>48</sup> Since Article 13 of the Convention (the right to an effective remedy) is specifically excluded from the Human Rights Act 1998 it is not possible for anyone to obtain an effective

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46 *Torture, Rights, Rules and Wars: Ireland to Iraq*, by Caroline Kennedy-Pipe and Andrew Mumford, *International Relations* 21(1) 2007 p 119-126

47 This argument is advanced by Alan Dershowitz, that is we accept state torture exists then it should be regulated and those responsible held to account for their actions. See: *Shall we fight terror with terror?*, *The Independent*, 3 July 2006. The point is analysed by Kennedy-Pipe and Mumford op cit at note 57.

48 op cit note 29

remedy for the loss of a life under domestic law. We fear that the family of Baha Mousa, killed by British forces during his internment in Iraq, will not result in the truth, which is the remedy they desire and deserve, despite the best intentions of the Chair, because of the limitations of the law.

- 6.8 Allegations of torture and unlawful killing by the apparatus of the state demand that the state be held to account and that relatives of the victim(s) are provided with truth and justice. Only rigorous oversight and sanctions will keep in check those who are tempted to ride rough shod over the rule of law and human rights.
- 6.9 The five techniques amount to torture. Torture is prohibited by Article 3 of the European Convention as brought into domestic law by the Human Rights Act 1998. Therefore, torture is a breach of fundamental human rights. Rather than criminalise specific acts of torture or introduce particular legislation what is required is the entrenchment of the doctrine of the complete prohibition of any form of torture, rather than singling out any particular acts of torture. As we have noted, the Inquiry will be aware that the Prime Minister has announced a non-statutory inquiry into allegations that state agents were complicit in torture. Further, judicial action is now also pending regarding the alleged unlawful killings of civilians in Afghanistan. It is a terrible indictment of our liberal democracy that so many inquiries should be required into something like torture, which should not be at issue in the 21<sup>st</sup> century. As lead Counsel for the relatives of Baha Mousa stated in his opening statement: "This case is not just about beatings or a few bad apples. There is something rotten in the whole barrel."<sup>49</sup>
- 6.10 The Inquiry should note that the government's new interrogation policy for intelligence officers is facing a legal challenge as the guidelines fail to outlaw hooding.<sup>50</sup> The guidelines, which govern the military when questioning overseas, distinguish between torture and examples of cruel, inhuman and degrading treatment, and say that only a serious risk of the latter should force UK personnel to abandon an interrogation. Therefore, what this implies is that acts falling just short of torture are acceptable. Further, the new guidelines fail to make it clear that complicity in torture is prohibited under Article 14 of the UN Convention Against Torture or under Article 3 of the European Convention.<sup>51</sup>

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<sup>49</sup> A comment in the opening statement of Rabinder Singh QC at [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/hearings/transcripts/20090921day9fullday1.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/transcripts/20090921day9fullday1.pdf)

<sup>50</sup> See <http://www2.ohchr.org/english/law/executions.htm>

<sup>51</sup> See <http://www.guardian.co.uk/law/2010/jul/12/interrogation-policy-facing-legal-challenge>.

6.11 What is required are sanctions to punish the perpetrators of torture. These would include both criminal and civil proceedings. The sanctions must also include mechanisms of accountability, review and inspection by independent authorities. The balance between the maintenance of security and fundamental breaches of Convention rights must be set to preclude the unacceptable state invasion of an individual's physical and mental integrity. What we have seen at the Baha Mousa Inquiry has been direct contravention of that integrity emerging from a culture of impunity fuelled through lack of understanding, inadequate training, a culture of violence, failures in the chain of command, a collapse of discipline and the absence of independent review mechanisms. All these absences must be addressed.

## 7 Module 4 topic (14):

7.1 ***Is there a need for time limits for detention at company and battlegroup level on operations? If so, what should the time limits be or is it impracticable to specify a standard time limit in a military context?***

7.2 BIRW is strongly in favour of time limits imposed upon the length of detention in accordance with Article 5 of the European Convention. Detention must therefore be firmly understood in terms of the liberty of the person. Article 5 imposes a duty upon the state to ensure that detention occurs in accordance with a procedure proscribed by law. Therefore, detention can neither be arbitrary or open-ended. BIRW would view detention as purposive in the sense of either leading to charge within a reasonable time-scale or release at the earliest moment that it becomes apparent that detention is not required. Within this scheme detention for the sole purpose of intelligence-gathering or to temporarily remove individuals from civil society is inadmissible.

7.3 Although BIRW does not possess the expertise to comment on the laws of war in relation to prisoners-of-war taken from a battlefield and with the purpose of capture leading to some form of sanction under the Geneva Conventions or those who surrender, we are in a position to comment upon the use of internment as a counter-insurgency measure as deployed in Northern Ireland. It will be clear from the above that internment as used in Northern Ireland dramatically failed as a tactic of counter-insurgency and led to a wave of violent republican opposition.

7.4 The question must be put as to why civilians were detained during the occupation by allied forces in Iraq. It was clear that the Ba'athist regime of Saddam Hussain was systematically removed



through military intervention. It was clear there were no weapons of mass destruction to be destroyed and it was further clear that the influence of Al-Qaeda was minimal in Iraq and that Saddam Hussein did not harbour radical Islamist insurgents. We accept there was, and continues to be, a dangerous level of counter-insurgency in Iraq due to the slow process of political transformation and domestic resistance to the allied presence. However, we argue that the methods of the counter-insurgents should not be shadowed by the occupying power.

- 7.5 We reiterate our position, learnt from Northern Ireland, that to blur the line between the military as armed invaders and the military as a mechanism of civil policing in the aftermath of invasion is dangerous. The military are not a civil police force. Whilst we understand that in the immediate aftermath of the allied invasion of Iraq there was a vacuum in civil society and a long period of transition embarked upon prior to the establishment of a new stable sovereign state, it must be emphasised that the laws and norms of European and international human rights and humanitarian codes to which the UK has subscribed must have been the legal and moral bedrock for governance by allied forces in Iraq. In relation to Baha Mousa they certainly were not such a bedrock, as brutal military revenge and the evasion of accountability became the driving force. Baha Mousa was held for a comparatively short time before his untimely death; this brings into play the question of why he and his colleagues were detained in the first place. Again, this demands an answer to the question of the reasons for detention by and the investigative role of the military.
- 7.6 We are of the opinion, formulated through our experience in Northern Ireland, that there needs to be clear demarcation in roles when a national military presence is involved. When an invading force has routed its "enemy" the role of peace-keeping (which involves policing) cannot satisfactorily be left to those troops. The end of a conflict and the securing of a fragile peace necessarily involves a transition from a military to a civil society. The role of troops in civil society must be clear and they cannot assume the responsibility of civic agencies such as the police. This role would be ideally undertaken by UN peacekeeping forces. This might mean a simply change from green to blue hats, but the symbolism of this and accountability to the UN is what would be important.
- 7.7 Whilst determined time limits for detention would not have saved Baha Mousa, a system whereby there is a recognised time limit before release or a review of further periods of military custody is needed. As the Convention must apply to the *de facto* occupying forces similar considerations of compatibility in an internment situation must run. There must be a fixed period for the internment

of a civilian by occupying forces which must not be excessive – in Northern Ireland, the army was only allowed to detain a suspect for a maximum of four hours before losing this power altogether when police primacy was introduced. There must be a transparent and challengeable mechanism for review of this period and the availability of an alternative to detention. Ideally, the mechanism for review would be independent from those empowered to maintain detention. In addition, the reason for detention must be explained to the detainee.

8 **Module 4 topic (18):**

8.1 ***Is adequate provision made for the inspection of detention facilities on operations?***

8.2 BIRW would argue that adequate provision has not been made for the inspection of detention facilities on operations. We would argue that key in this is the role of the International Committee of the Red Cross (ICRC). The evidence to the Inquiry reveals problematic relations between the British military and the ICRC. For example the evidence of Lieutenant Colonel Duncan described a heated argument in March 2003 when senior officers expressed concern before a visit by journalists and the Red Cross to a British internment centre in southern Iraq. They were worried that “prisoners should not be seen as hooded” he told the Inquiry.<sup>52</sup> In a further session former armed forces minister Adam Ingram was questioned on the accuracy of the British government’s relationship with the Red Cross.<sup>53</sup>

8.3 We understand the constraints of conflict and the difficulties caused by war). However, it is our view that a military force representing a democratic state must undertake its role with human rights considerations as much to the fore as security matters. This may sound naively idealistic but we believe it represents an important test of the rule of law in its most difficult context.<sup>54</sup> This again is a lesson learned from Northern Ireland and nowhere better illustrated that in the US military use of extended internment at the

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<sup>52</sup> See [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_300310/bmi06037.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_300310/bmi06037.pdf) and also “Baha Mousa inquiry: US concerned about ‘milder’ British methods in Iraq” Richard Norton-Taylor, The Guardian 30 March 2010.

<sup>53</sup> See [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/hearings/transcripts/2010-02-06-day97fullday.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/transcripts/2010-02-06-day97fullday.pdf).

<sup>54</sup> We are reminded of the speech of Colonel Tim Collins on the eve of invasion: “But if you are ferocious in battle remember to be magnanimous in victory.” <http://journal.dajobe.org/journal/2003/03/collins/>.

Guantanamo Bay facility. We believe it to be self-evident that troops who do not act in compliance with human rights and humanitarian standards only make any peace-keeping role more difficult and counter-productive.

- 8.4 From the point of view of legitimate action, for those in a position of power, especially in the extreme circumstances of military internment of civilians, there must be in place structures which ensure conformity with legal norms. It is the reason underlying the prohibition against unlawful imprisonment. We reiterate the problems involved in expecting a military system to adapt to a role of detaining civilians in foreign jurisdictions. The evidence to the Inquiry is clear that there were huge failings in training to cover these eventualities which lead to the torture and death of Baha Mousa whilst in British military custody. What is required, and what the Inquiry could recommend, is a complete review of policy and procedure in relation to detaining civilian nationals by occupying forces, and that these policies and procedures must be built upon accepted and understood human rights norms.
- 8.5 Once such a system is in place then the inspection of detention facilities maintained on operations can be developed, incorporating an understanding of why such inspection are important and not just taken as read. There is a further complication regarding the handover of responsibilities between battalions which also needs addressing.
- 8.6 Our advice to the Inquiry would be to recommend a system of temporary detention facility inspection modelled on that in operation in the UK but with two differences. Whilst taking Her Majesty's Inspectorate of Prisons as a model we would urge that in military operations the International Committee of the Red Cross (ICRC) must have a role in inspection and that recommendations of an inspectorate of military detention must be implemented immediately by the MoD.<sup>55</sup>
- 8.7 The question which arises is that of the independence of the inspection regime and the role of the ICRC. The ICRC has the right to inspect detention facilities and this right should be respected by individual states. It should be possible for the UK government to produce a protocol with the ICRC regarding its obligations to allow free access to such facilities and to ensure recommendations are implemented. Conflicts in the 21<sup>st</sup> century, such as the invasion of Iraq and of Afghanistan, have become fiercely complex political

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<sup>55</sup> The terms of reference of the HMIP can be found at the following website: <http://www.justice.gov.uk/inspectors/hmi-prisons/terms-of-reference.htm>

engagements in fragmentary civil arenas. Within these arenas where insurgency clouds civil society, the occupying force, often over a long period of time, assumes the dangerous responsibility for many of the civil functions of a normal state including policing and punishment of criminality as we note above at 7.6. Mechanisms to ensure independent accountability are therefore essential in such situations.

- 8.8 Given the above it is imperative that the UK takes the lead (and in the process possibly regain some of its international standing within the global community and with the UN in particular) in the establishment of battlefield and post-conflict situations. The maintenance of peace and security must be maintained, not at the expense of fundamental human rights, but as underpinned by the philosophy and discourse of human rights. This would ensure that the vanquished are treated with magnanimity and the victors act with humility and with due regard for the fragility of peace.

## 9 Module 4 topic (4):

### 9.1 *Does the prohibition on the use of the 5 techniques extend adequately to all those under the control of the MOD?*

- 9.2 It became clear throughout the course of the oral evidence to the Inquiry that there was confusion or ignorance regarding the prohibition on the use of the 5 techniques at all levels of the political and military establishment and a marked slippage regarding who would take responsibility should an illegal act occur involving one of the prohibited techniques (General Sir Mike Jackson laying the blame firmly with the commanding officer).<sup>56</sup> There was manifest confusion as to what was and was not permitted and much depended on the level of training received and the ethos within a particular battalion. It is for the Inquiry to recommend that both the MOD and its political masters, including all those engaged in “tactical questioning” (interrogation which can amount to torture (see further below at section 12) and Special Forces, that must give effect to an absolute prohibition on the use of the 5 techniques, or, indeed, any form of torture or cruel or inhuman and degrading treatment, without exemption or exception<sup>57</sup>

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<sup>56</sup> See [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/hearings/transcripts/2010-07-06-day100fulldayredacted.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/transcripts/2010-07-06-day100fulldayredacted.pdf)

<sup>57</sup> See for example the evidence of Robin Brims on hooding constituting inhuman treatment: [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/hearings/transcripts/20101006day103fulldayws.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/transcripts/20101006day103fulldayws.pdf)

**10 Module 4 topic (13):**

10.1 ***Is there a need, with suitable adaptations for the military context, for a role similar to Custody Sergeants in police custody facilities?***

10.2 The handling, guarding and welfare of foreign national civilians held in internment by British military personnel is a complex process involving many skills which may not be readily apparent and which require training and supervised experience. There must also be protocols, procedures and policies in place embedding human rights norms in this area. Whilst we are not opposed to a military role similar to that of civilian custody sergeant we are not convinced that at this time the Royal Military Police or battalion Provost Sergeants could fulfil such duties without a conflict of roles. We would much rather see the implementation of inspection and oversight procedures to ensure compliance with human rights norms.

10.3 It is important not to confuse the role of military detention with that of civilian police detention. As we have suggested at section 7, the army should only detain anyone for the shortest possible time before handing them over to the police. To set up mechanisms within the army mimicking those that exist within the police is to entrench prolonged detention by the army, which is to be avoided.

**11 Module 4 topic (20):**

11.1 ***Where deaths, serious injuries suggestive of abuse occur in military custody on operations, is adequate provision made to ensure the retention of evidence and prompt investigation in theatre?***

11.2 The Inquiry should be reminded that one of the reasons it was established was to investigate the failings in the immediate investigation and subsequent court martial surrounding the death of Baha Mousa. The parameters of an Article 2 compliant model of investigation are clearly set out in the Strasbourg jurisprudence and in Lord Bingham's judgment in *Amin*. The investigatory model which approaches these standards is that of the inquest and we would urge the Inquiry to recommend an inquest model when there has been a death in custody. Two models suggest themselves. Either, as for soldiers who die on active service, there should be an inquest into civilian deaths caused by the army in the UK, or the UK should work with the Iraqi government to set up a system of civilian inquests there.

## 12 Module 4 topics 22-26:

### 12.1 *Defence Intelligence “Tactical questioning” and interrogation.*

12.2 The issue of intelligence gathering for security and defence purposes through the use of tactical questioning and interrogation is of central concern to BIRW. Two preliminary points are made. First, BIRW believes that a state of absolute security is a myth and cannot be achieved. Second, mechanisms such as internment and interrogation deployed against selected groups of citizens targeted as insurgents serves only to radicalise further the communities from which these civilians come. As Sir Peter Gibson will hopefully discover, information gained through hostile interrogation is often of very limited value. The nature of terror enclaves is such that intelligence from an individual source is likely to be of marginal significance given the ways in which such groups have mutated after infiltration (take the case of the dissident republican groups in Northern Ireland and MI5’s alarm at paucity of their knowledge about them).<sup>58</sup> Therefore, the use-value of so-called tactical questioning (which we would argue amounts to torture) must be doubtful.

12.3 A further point concerns the line between “tactical questioning”, interrogation and torture, and cruel and inhuman and degrading treatment. It is clear in the case of Baha Mousa, that visual, written and oral evidence his treatment in detention was in fact torture, and cruel and inhuman and degrading treatment. Torture is a war crime. That is clear. What has to be embedded is the absolute sanctity of Articles 2 and 3 of the European Convention in all circumstances and that if this becomes the rule mechanisms to obtain information (after a very careful assessment of need) should be developed to reflect that rule. It is the necessity of deploying tactics which could amount to a breach of Article 3 in a quest for defence or security which must be examined. It is also a question of the assessment of necessity, sanctioned at the highest level. If a senior military official such as Robin Brims was uncertain whether hooding amounted to inhuman treatment, what can we expect from troops under his command? Has there ever been a need to deploy tactical questioning employing the five techniques? We say that the answer to that question must be no, as the use of torture to obtain information can never be justified in any circumstances.

## 13 Conclusion

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<sup>58</sup> See for example <http://www.guardian.co.uk/uk/2010/aug/16/mi5-intelligence-gathering-northern-ireland>

- 13.1 The UK is at a turning point. Baha Mousa, a totally innocent man, has died brutally at the hands of the British army, and he is not the only person to have been tortured or otherwise mistreated. Such a state of affairs is completely unacceptable in this age of human rights.
- 13.2 The Inquiry has the opportunity, supported by a huge depth of legal experience, to recommend a fundamental review of both interrogation methods and conditions in detention and to endorse change premised upon the sanctity of fundamental human rights.

September 2010