



AN ANALYSIS OF THE BAHA MOUSA
INQUIRY AND ITS REPORT

The title section is enclosed in a thin black rectangular border. It features a Celtic knot icon in a square box on the left and another on the right. The text "AN ANALYSIS OF THE BAHA MOUSA" is on the top line, and "INQUIRY AND ITS REPORT" is on the bottom line.

BAHA MOUSA DIED ON 16TH SEPTEMBER 2003
AT THE HANDS OF THE BRITISH ARMY



MAY 2012

The date "MAY 2012" is centered at the bottom of the page, flanked by two square boxes, each containing a white Celtic knot design on a black background.

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"At about 21.40hrs on 15th September 2003, Baha Mousa, an Iraqi citizen, stopped breathing. At the time he was in the centre room of the Temporary Detention Facility (the TDF) at BG Main (the Headquarters of 1 QLR Battlegroup) in Basra having been detained the previous day. He was removed to the Regimental Aid Post (RAP) where attempts were made to resuscitate him. However, those attempts failed and at 22.05hrs he was pronounced dead. A subsequent post mortem examination of his body found that he had sustained 93 different surface injuries. The death certificate, dated 22nd September 2003, recorded the cause of death as "cardiorespiratory arrest".¹

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 On 14th September 2003, British soldiers from A Company, 1st Battalion Queens Lancashire Regiment (1 QLR) raided the Hotel Ibn Al Haitham in Basra looking for suspected insurgents. The controversy surrounding the American-led invasion of Iraq was still raging, but in military terms it had been successful. Civilian policing had broken down and the invaders were effectively in control, but they had taken the country by force and the greatest threat to their hold on Iraq was that of insurgency. As a consequence of the raid on the hotel, ten men were ultimately arrested. Among them was Baha Mousa, a 26 year old hotel worker, a recent widower and the father of two children. He and the other men were taken to 1 QLR's headquarters at Battle Group (BG) Main in Basra, where they were subjected to interrogation and sustained torture which was so brutal that on 15th September Baha Mousa died of his appalling injuries. The Baha Mousa Inquiry found that none of the ten men was implicated in the death of any British personnel.²

¹ The Report of the Baha Mousa Inquiry (TSO; 2011) HC 1452-1, HC 1452 - 2 and HC 1452-3. The Report is available online at <http://www.bahamousainquiry.org/report/index.htm>

This is the opening paragraph of the Report.

² Please see Annex A for the Inquiry Chair's description of what took place.

- 1.3 Our analysis of how the Baha Mousa Inquiry became established reveals a struggle between intransigence and tenacity: the intransigence of the British government and the tenacity of Baha Mousa father's and guardian of his two orphaned grandchildren, Colonel Douad Mousa. It took five years for the British Government to admit its liability toward Baha Mousa and establish a public inquiry. This only happened after a flawed internal British Army investigation, an inconclusive court martial hearing and civil litigation on the point of whether the European Convention on Human Rights applied to the British Army operating beyond the territory of the Council of Europe. Eventually the government did accept that the Convention applied to those in British military custody overseas but it took the European Court of Human Rights in Strasbourg to rule that it applied whether the victim was in custody or not.
- 1.4 It should be emphasised that Baha Mousa was not the only victim of torture at the hands of the British army³. Phil Shiner, who founded the solicitors' firm Public Interest Lawyers and represented Colonel Mousa at the Baha Mousa Inquiry, is also involved in the Al-Sweady Inquiry, which is examining claims that UK soldiers murdered 20 or more Iraqis and tortured others after the "Battle of Danny Boy" in Maysan Province, southern Iraq, in May 2004. He also represents more than 100 Iraqi civilians who say they were abused by UK forces between March 2003 and December 2008⁴. The government has also established the Detainee Inquiry, chaired by Sir Peter Gibson, to examine whether Britain was implicated in the improper treatment of detainees held in third countries in the aftermath of 9/11. (This inquiry is deemed by the victims and by NGOs to be so flawed that they are boycotting it, and it is now on hold pending a police investigation of the discovery of documentation in Libya which allegedly implicates the Security Services MI5 and MI6 in the deportation to Libya of men who were tortured there.)
- 1.5 However, the Baha Mousa Inquiry was the first inquiry into the actions of the British army in Iraq. While the Baha Mousa Inquiry was in progress, the report of the only other inquiry to scrutinise the behaviour of the British army, the Bloody Sunday Inquiry, was announced. BIRW was instrumental in helping to bring about the Bloody Sunday Inquiry, among others, and it was clear to us that none of the lessons that could have been drawn from the efforts to combat domestic terrorism in Northern Ireland had been learned in the intervening three decades since Bloody Sunday. Indeed, it emerged at the outset of the Baha

³ See, for example, *RAF helicopter death revelation leads to secret Iraqi detention camp*, by Ian Cobain, *Guardian*, 7 February 2012
<http://www.guardian.co.uk/world/2012/feb/07/iraq-death-secret-detention-camp>
It was evidence given to the Baha Mousa Inquiry which led to the exposure of a secret, American-run prison in the Iraqi desert where Iraqi civilians were held illegally, tortured, and in at least one case killed by soldiers who included British forces

⁴ *Ali Zaki Mousa v Secretary of State for Defence & Another* [2011] EWCA Civ 1334

Mousa Inquiry that interrogation techniques employed during internment without trial in Northern Ireland in the early 1970s were being used in Iraq in 2003, having been rebranded under the euphemistic description “conditioning”.

- 1.6 When the Baha Mousa Inquiry was announced, BIRW decided to monitor it for three reasons: first, the obvious parallels between what had happened in Northern Ireland and what took place in Iraq; second, the use of the Inquiries Act 2005, and in particular whether it was capable of delivering a human rights-compliant investigation; and third, Baha Mousa's case engaged our charitable object of the abolition of torture and had set an important precedent in terms of territoriality and the reach of the European Convention on Human Rights. We should like to thank the Joseph Rowntree Charitable Trust for their vision in seeing the significance of this project and for funding this piece of work.
- 1.7 As it transpired, BIRW was the only NGO to monitor the Baha Mousa Inquiry, and in some respects we were uniquely qualified to do so. Not only had we helped to bring about four inquiries in Northern Ireland⁵, all of which we monitored in depth, but we were the only NGO to track the progress of the Inquiries Act 2005 through Parliament and to follow its use since it came into force. We had also made submissions to the Iraq Inquiry⁶, drawing on our Northern Ireland experience, again with the support of the Joseph Rowntree Charitable Trust. We made similar submissions to the Baha Mousa Inquiry⁷.
- 1.8 In this report, we consider the Baha Mousa Inquiry and Report in the wider contexts of the impermissible and inexcusable use of torture by the British army, the read-across from Northern Ireland to Iraq, and the development of human rights jurisprudence as the courts attempt to enforce human rights compliance and establish accountability. In particular, we examine the ability of the Inquiries Act 2005 to deliver an effective investigation in compliance with Article 2 of the European Convention on Human Rights, which protects the right to life and Article 3, which prohibits torture. In this regard, we consider not only the legal framework for inquiries, but the procedural issues engaged in the delivery of an effective investigation.

2. **FROM BELFAST TO BASRA: THE EXPORT OF INTERROGATION TECHNIQUES**

- 2.1 It is a truism that the past provides lessons for the present and the future. Whether these lessons are heeded or understood is another matter. Sadly, in the case of Northern Ireland, wave upon wave of

⁵ The Bloody Sunday Inquiry, the Rosemary Nelson Inquiry, the Billy Wright Inquiry, and the Robert Hamill Inquiry

⁶ <http://www.birw.org/reports/submissions/SubmissionIraqInquiry.pdf>

⁷ See http://www.birw.org/reports/submissions/Baha_MousaSubmission.pdf and http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/module_4_submissions/ncp001307.pdf

counter-terrorism legislation and practices failed to change hearts or minds or to prevent domestic terrorism. The intensification of such measures since 9/11 has equally failed to put a stop to international terrorism. Indeed, such approaches have been shown to be counter-productive, radicalising some, creating martyrs to the cause, and acting as a recruiting sergeant for paramilitary groups. Sadly, the unlawful arrest, internment without trial, torture, and unlawful killing, if not murder, by British soldiers of Baha Mousa, as well as the individual and collective failure to accept responsibility for his death, all resonate with Northern Ireland experience, and suggest that nothing has changed and no lessons have been learned from the UK's painful past in relation to Northern Ireland.

- 2.2 It may seem to some that the situation in Iraq was very different to that in Northern Ireland. In Iraq the British army had taken part in an invasion of a third country, in an act of war. In Northern Ireland, the conflict was internal and relatively low-level, although the rate of attrition was devastating in its duration and its effects on a tiny population of only around 1.5 million people. In Iraq, the threat was that of insurgency against an invasion, whereas in Northern Ireland the threat was domestic terrorism. Nevertheless, the apparatus of repression is drearily repetitive and, fortunately, its repertoire is fairly limited, so the methods used to combat both terrorism and insurgency are remarkably similar, especially in the hands of the British army, with its own tradition of learning from the past and its reliance on what, from its point of view, are tried and trusted techniques.
- 2.3 It is not so surprising, then, that the first two weeks of Counsel to the Baha Mousa Inquiry, Gerard Elias QC's submissions on the internment and killing of the innocent Iraqi national centred on the similarities with Northern Ireland in 1971. In Northern Ireland, alongside internment without trial, interrogation methods had been adopted which became known as "the five techniques". They included hooding, stress positioning, noise disorientation, withholding of food and water and sleep deprivation. By 2003 in Iraq these methods had been re-named "conditioning", and consisted of hooding, stress positioning, and lack of food and water. To this toxic mix was added a variable not available in Northern Ireland, exposure to the extreme heat of the Iraqi day. It was also accompanied by frequent and brutal physical assaults (something also complained of in Northern Ireland) and "harshing", a highly aggressive and humiliating form of verbal assault.⁸
- 2.4 The "five techniques" employed in the 1970s in Northern Ireland did not go unchallenged. For the first, and so far the only, time, Ireland took the United Kingdom to the European Court of Human Rights, claiming that internment, or detention without trial, violated Article 5 of the

⁸ Opening remarks of Gerard Elias QC to the Baha Mousa Inquiry, Days 1 – 8, 13 – 23 July 2009, see http://www.bahamousainquiry.org/baha_mousa_inquiry_evidence/evidence_v1.htm#week2

European Convention on Human Rights, which protects the right to liberty, and that the interrogation techniques employed violated Article 3 (freedom from torture)⁹. The European Commission on Human Rights, which gave consideration to the admissibility of cases at that time, found unanimously that the five techniques amounted to torture¹⁰. However, the Court, which sat in plenary session, held by 13 votes to four that they were not torture but, by 16 votes to one, that they did constitute inhuman and degrading treatment, in violation of Article 3¹¹. Nevertheless, their findings were on the whole damning:

“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. They accordingly fell into the category of inhuman treatment within the meaning of Article 3 (art. 3). The techniques were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.

On these two points, the Court is of the same view as the Commission.

In order to determine whether the five techniques should also be qualified as torture, the Court must have regard to the distinction, embodied in Article 3 (art. 3), between this notion and that of inhuman or degrading treatment.

In the Court's view, this distinction derives principally from a difference in the intensity of the suffering inflicted.

The Court considers in fact that, whilst there exists on the one hand violence which is to be condemned both on moral grounds and also in most cases under the domestic law of the Contracting States but which does not fall within Article 3 (art. 3) of the Convention, it appears on the other hand that it was the intention that the Convention, with its distinction between "torture" and "inhuman or degrading treatment", should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.

Moreover, this seems to be the thinking lying behind Article 1 in fine of Resolution 3452 (XXX) adopted by the General Assembly of the United Nations on 9 December 1975, which declares: "Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment".

⁹ Ireland v United Kingdom, ECHR (1978) Series A, No. 25, 90

¹⁰ Judgment, paragraph 147 (iv)

¹¹ *Ibid*, paragraph 246 3. and 4.

Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood."¹²

2.5 If the reappearance of these techniques in Iraq was unsurprising, what did come as a surprise was the fact that the then Prime Minister, Edward Heath, had given a clear undertaking to Parliament that the five techniques would be banned.

2.6 In the Baha Mousa Inquiry Report the history of the prohibition of the conditioning techniques is dealt with at length:

“On 2nd March 1972, the Prime Minister of the day, the Right Hon Edward Heath MP, announced in the House of Commons a ban on these five techniques (the Heath Statement). These techniques were hooding, the use of white background noise, sleep deprivation, wall-standing (a form of stress position) and a limited diet. These techniques came to be known as the five techniques and had originated in internal and counter-insurgency operations post the Second World War. What gave rise to the Heath Statement was the use of the five techniques in 1971 in Northern Ireland. This resulted in two Inquiries, the second being an Inquiry chaired by Lord Parker, the former Lord Chief Justice. The Minority report, written by Lord Gardiner QC, argued that the five techniques were already unlawful and that the law should not be amended to permit their use. While the Majority report was not formally disavowed, the force of Lord Gardiner’s argument was recognised by the Government of the day.

The Heath Statement banned the use of these techniques as an aid to interrogation. I find that the ban clearly applied worldwide. What was not clear was whether the five techniques were banned from all military operations, including full warfare, or only to worldwide security or counter-insurgency operations. Whether or not it was intended that the techniques were banned in all operations is not material, because the MoD recognised then, as they do now, that the five techniques were already prohibited and unlawful in warfare by reason of the Geneva Conventions.

In 1972, the 1965 Directive on Military Interrogation and Internal Security Operations Overseas was revised. Part I of it (the 1972 Directive) contained a ban which specifically prohibited the use of the five techniques. Part II of the Directive was issued with the intention that it was to be observed in all future training on

¹² Ibid, paragraph 167

interrogation in internal security operations and was to be reflected in all interrogation training instructions. Part II included guidance on methods and approaches that were permissible in interrogation. It also had cross references to Part I. I conclude that the limitation of Part II to internal security operations had the unfortunate effect of perpetuating the divide between doctrine on interrogation and prisoner handling in warfare and in internal security operations.

I find that what the Heath Statement did not do was to ban hooding for all purposes. I further find there was no ban on deprivation of sight by the use of blindfolds for security purposes.

Further, the evidence demonstrates that over the 25 years the Heath Statement became largely forgotten and apart from hearing in Part I of the 1972 Directive it mainly faded from policy and training materials and was not replicated in doctrine that related to full warfare. Although compliance with the Geneva Conventions was taught at all levels, there was little reference in any of the policy and training manuals to the prohibition of the five techniques.

By 1997, a revised policy for interrogation and related activities was issued. The revised policy contained the strategic imperative that all operations should comply with the Geneva Conventions and international and domestic law. It cancelled Part II of the 1972 Directive, but not Part I. It provided that procedures used by United Kingdom interrogators in an operational theatre were to be governed by detailed directive which incorporated current legal advice. There was no reference to the prohibition on the five techniques.

I find that by the time of Op Telic¹³ there was no proper MoD doctrine on interrogation of prisoners of war that was generally available. Further, knowledge of Part I of the 1972 Directive (at the time still operative) and the ban on the five techniques on internal security operations had largely been lost. I conclude that this came about by corporate failure of the MoD.

Similarly, and not surprisingly because of the loss of knowledge of this ban on the five techniques, the written doctrine for prisoner handling, like the training materials for the tactical questioning, and interrogation, did not contain any reference to the ban on the five techniques.

I find that training at the Joint Services Intelligence Organisation (the JSIO) did deal with sight deprivation to the extent that prisoners could be deprived of their sight for security purposes. But the prohibition on use using hoods or blindfolds as an aid to an interrogation was not specified in the written material. Further, I find

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The codename for British Army operations in Iraq

that the teaching imputed the message that the deprivation of sight for security reasons had an incidental benefit of maintaining the shock of capture. Finally, so far as the JSIO is concerned, I find there was a wholesale lack of doctrine in interrogation and a lack of legal assessment of JSIO training."¹⁴

2.7 The wording of the forgotten Heath Statement was as follows:

"[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."¹⁵

No special powers in relation to interrogation techniques were sought in relation to the Iraq war.

2.8 The ban was later reaffirmed by an unqualified undertaking by the then Attorney General to the European Court of Human Rights on 8th February 1977 during the hearing of Ireland v UK. The undertaking is quoted in the judgment as follows:

"The Government of the United Kingdom have considered the question of the use of the 'five techniques' with very great care and with particular regard to Article 3 of the Convention. They now give this unqualified undertaking, that the 'five techniques' will not in any circumstances be reintroduced as an aid to interrogation."¹⁶

2.9 Lawyers in the Ministry of Defence (MoD) and in the British Army appear also to have forgotten this important ruling from Strasbourg. Indeed, Lord Goldsmith, the Attorney General in 2003, said that had MoD lawyers contacted his office he would have advised that the conditioning techniques were unlawful, but he made no reference to the earlier ban.¹⁷

2.10 Many commentators have since reflected that if the five techniques reviewed in Ireland v UK were to be examined by the European Court of Human Rights today, the likely result would be a finding of torture¹⁸,

¹⁴ Baha Mousa Inquiry Report, Part IV
http://www.bahamousainquiry.org/f_report/vol%20ii/Part%20IV/Part%20IV.pdf

¹⁵ *Hansard*, House of Commons Debate, 2 March 1972, volume 832 columns 742 – 9

¹⁶ Ireland v United Kingdom, paragraph 153

¹⁷ *Baha Mousa inquiry: 'Serious discipline breach' by army*, BBC Internet News, 8 September 2011 <http://www.bbc.co.uk/news/uk-14825889>

¹⁸ Lord Hope, *Torture*, 53 *International Comparative Law Quarterly* 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

which, as we have seen, was the unanimous conclusion of the European Commission of Human Rights in 1976 prior to the referral of the case to the ECtHR.

3. **THE HUMAN RIGHTS ISSUES RAISED BY BAHAM MOUSA'S CASE AND THE LEGAL CONTEXT**

- 3.1 Baha Mousa's case raises a number of fundamental human rights issues, namely:
- jurisdiction – does the European Convention on Human Rights apply to the actions of British soldiers serving outside the Council of Europe?
 - the right to life (A.2 of the Convention), which includes both the substantive right to life and the procedural protection of an independent investigation into a death;
 - freedom from torture (A.3); and
 - the right to a fair trial (A.6) because Baha Mousa was interned and had no recourse to legal advice or a court.
- 3.2 His case also raises the far wider question of the legality or otherwise of the war in Iraq, and by extrapolation, the war in Afghanistan. The report of the Iraq Inquiry is currently¹⁹ awaited, but is unlikely to be the last word on the matter. We have not sought to deal with this issue in this report²⁰, save to note that Baha Mousa's case cannot be examined in a vacuum. The UK's response to the threat of international terrorism, including its decision to enter into two wars, clearly played its part in Baha Mousa's death and many other deaths and cases of torture. At the risk of stating the obvious, Baha Mousa would not have died if the UK had not gone to war with Iraq.
- 3.3 Similarly, the Baha Mousa Inquiry cannot be considered in isolation. It was the culmination of a chain of litigation around the human rights issues listed at paragraph 3.1 above, in which victims/survivors, human rights lawyers and NGOs challenged the judiciary to overrule the executive's wholesale onslaught on fundamental human rights in the name of counter-terrorism. Baha Mousa's family and lawyers were themselves involved in some of this litigation, and all the relevant cases are examined in this report.
- 3.4 Before examining the Baha Mousa Inquiry itself, therefore, we consider the context in which it arose, both in terms of human rights and in terms of prior litigation.

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.

¹⁹ February 2012

²⁰ Although our views are available in our submission to the Iraq Inquiry: <http://www.birw.org/reports/submissions/SubmissionIraqInquiry.pdf>

4. JURISDICTION

- 4.1 The first human rights issue we examine is jurisdiction, because if the actions of the soldiers who tortured and killed Baha Mousa were not encompassed by the European Convention on Human Rights, then substantive Convention rights such as the right to life become irrelevant.
- 4.2 In our submissions to them, BIRW requested that the Baha Mousa Inquiry consider the extent to which the UK has attempted to avoid the application of human rights and other domestic and international standards, norms and law to its forces in Iraq.
- 4.3 Self-evidently, Iraq lies outside the Council of Europe. A vital question for the UK government, and, indeed, the British army, was whether UK soldiers, acting outside the UK, were bound by the European Convention on Human Rights. The answer was clear while the invasion was taking place. That was an act of war and the proper instruments for the protection of rights were the Geneva Conventions. When it came to the cessation of hostilities, when the British army became an army of occupation, the question became less clear-cut. Clearly Iraq was not under the UK's jurisdiction on any strict legal interpretation, but the Iraqi government had lost its jurisdiction, and a new government was in the process of being established. By the time of Baha Mousa's death, however, Iraq had formed a new government but that government did not have control of all its territory, large swathes of which were under the de facto control of UK and US troops. Baha Mousa died in a British prison, under the sole control of the British army, at the hands of British soldiers. The question that arose, then, was whether the European Convention on Human Rights applied in those circumstances, or as the lawyers would have it, did it have extra-territorial effect? That question was ultimately to be answered in the affirmative, by the House of Lords²¹, in the case of Baha Mousa, and by the European Court of Human Rights in the case of five other men who had been killed in southern Iraq by British soldiers, but had not been held on a British army base²².
- 4.4 In early 2003, the UK government sought the advice of the Attorney General, then Lord Goldsmith, on the application of the European Convention on Human Rights to the British army's operation in Iraq. This advice took the form of seven separate documents, dating from 16th February to 16th April 2003. During the Baha Mousa Inquiry, the MoD claimed legal privilege for this advice and a number of Core Participants to the Inquiry, including those acting for Colonel Mousa and the other detainees, requested disclosure of the advice. The Inquiry Chair, Sir William Gage, decided not to disclose it, but he did read the advice in order to reach his decision on disclosure. He was not swayed by arguments that, since parts of the advice were already

²¹ Now the Supreme Court

²² Al-Skeini and Others v the United Kingdom [2011] ECHR 1093

in the public domain the advice was no longer confidential. However, he did set out in his ruling some of the material that was in the public domain, as follows:

“This material consists of:

- (i) e-mails exchanged between Commander Brown and Rachel Quick. Each was at the time a legal adviser to PJHQ²³. Each referred to the Attorney-General’s Advice. Commander Brown, in his e-mail, stated ‘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[Human Rights Act] was only intended to protect rights conferred by the Convention ...’ ‘This’ was a reference to the ‘A/G’s Advice’.
- (ii) A statement in a Cabinet memo to the following effect: “The Government is arguing the case [Al-Skeini] that the Convention does not apply. Our legal advice has been however that we are likely to be unsuccessful with this argument and that the ECHR will be held to apply.”
- (iii) Passages in Lord Goldsmith QC’s evidence when he was Attorney-General to the Joint Committee on Human Rights of the Houses of Parliament on 26 June 2007.
‘The substantive standards of treatment which are laid down particularly in Articles 2 and 3 of the European Convention in my view do – and this has always been my view – apply to those held in British-controlled and run detention facilities in Iraq.’ (Oral evidence Q185)
‘So there has been an argument that the ECHR does not apply. I, personally, because of another case called Ocalan, did not think that was right and it did apply outside the European space.’ (Q193)
‘What I can say is my view has always been the same as the one I have indicated to you.’ (Q207)
‘In relation to the question whether the United Nations obligations apply or the ECHR obligations in relation to procedures apply, she was right to say, in my view, as the Court of Appeal has said, that it is the United Nations obligations which trump ... or not trump, but which operate in that specific area in relation to the procedures.’ (Q233)
‘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.’ (Written memo to JCHR – PLT000036).
- (iv) Evidence given by Lord Goldsmith QC to the Chilcot Inquiry on 27 Jan2010 at pp 227-9:

Q: What about the MOD and anything to do with human rights issues?

A: I don't recall specifically. There were other issues in relation to our responsibilities, which really meant soldiers' responsibilities towards Iraqi detainees or members – civilian members; for example, did the European Convention of Human Rights apply to activity or at least some activity in relation to Iraq? It is not a part of Europe, but that is a question which I did have to advise and then we got on to the question of treatment of detainees. Fundamentally, my advice was that the obligations about the proper treatment of people, which are contained in the European Convention, did apply in relation to detainees, and, subsequently, I became involved in issues where there were allegations that detainees had not been treated properly, and, indeed I authorised certain prosecutions as a result and was concerned

...

Q: But initially, you had given advice on these issues before the specific cases arose?

A: I'm not sure that's right. I gave advice on – I have to recollect this: I gave advice on the application of the European Convention to certain aspects of the conduct, advising those standards did need to be complied with. Subsequently, a specific issue arose, when it came apparent – this is quite a long time later – that methods of treatment had been used in relation to certain detainees which actually were methods which had been outlawed by – I think by the Heath government in 1972, arising from Northern Ireland. I was surprised that those methods were being used. The prosecution was authorised. We still have not got to the bottom of who it was that apparently said such methods were legitimate. I most certainly did not."²⁴

4.5 Sir William went on to say:

"I should add that if there were one single document which incorporated the Advice in substantially the same terms as enunciated by Lord Goldsmith to the Chilcot Inquiry I would have directed that it be disclosed."²⁵

However, Lord Goldsmith was giving his evidence to the Chilcot Inquiry almost seven years after he wrote his advice, and there had been a lot of water under the bridge since then. On the face of the documents cited by Sir William in his ruling, in 2003 the Attorney General was telling army headquarters in Basra that the European Convention on Human Rights did not apply in Iraq. He had probably changed his mind by

²⁴ Baha Mousa Inquiry, Attorney-General's Advice Ruling, 1 April 2011, paragraph 38
http://www.bahamousainquiry.org/linkedfiles/baha_mousa/key_documents/rulings/bmpi-agruling310310v1.pdf

²⁵ Ibid, paragraph 47

2010, when he testified before the Chilcot Inquiry, but by then there had been alarming revelations about how prisoners were treated in Iraq, and significant litigation, which were sufficient to provide him with ample quantities of hindsight.

- 4.6 Back in 2003, Lieutenant Colonel Nicholas Mercer was a command legal adviser for the 1st Armoured Division of the British army, in other words a very senior legal adviser. His role was to give legal advice to the chain of command within the Division on all matters pertaining to military operations, including the laws of war. He believed that prisoners of war should be treated with humanity and dignity, and he sent memos to the General Officer Commanding in Iraq on 6th March and 29th March 2003, pointing out the army's obligations under the Geneva Conventions, and warning of the possibility of acts of omission on the part of soldiers that could lead to the death of a prisoner.²⁶ In his second memo, he said:

“Finally, I visited the JFIT²⁷ and witnessed a number of PW²⁸ who were hooded and in various stress positions. I am informed that this is in accordance with British Army Doctrine on tactical questioning. Whereas it may be in accordance with British Army Doctrine, in my opinion it violates International Law. Prisoners of War must at all times be protected against acts of violence or intimidation and must have respect for persons and their honour (Articles 13, 14 GCIII²⁹). I accept that tactical questioning may be permitted but this behaviour clearly violates the Convention.”³⁰

- 4.7 Lt Col Mercer expressed the view in his evidence to the Baha Mousa Inquiry that:

“I think if we had had a proper reviewing process in place, I think if we had had a judge in theatre, as we requested, with a detainee/internee management unit, if we had an independent team for prisoners and I think if there wasn't this constant reluctance to accept high legal standards, then I think we could have avoided this tragedy.”³¹

This proposal was blocked by none other than the Attorney General, Lord Goldsmith³². In his statement to the Inquiry, Lt Col Mercer said:

²⁶ [MOD019764-MOD019765](#) and [MOD011447](#)

²⁷ Joint Forward (sometimes Field) Interrogation Team

²⁸ Prisoners of war

²⁹ Third Geneva Convention

³⁰ [MOD011447](#), paragraph 6

³¹ Evidence of Colonel Nicholas Mercer, Day 68, 16 March 2010, page 104
http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/transcripts/2010-16-03day68fullday-redacted.pdf

³² *Baha Mousa inquiry: Attorney general 'blocked' system to stop prisoner abuse*, *Guardian*, 16 March 2010

"The proposal for a UK judge was blocked by PJHQ³³, seemingly on the instructions of the attorney general, and we were instructed to implement a 'suitably vetted' Iraqi judge as a reviewing authority...

This was however, unworkable, unrealistic, ill-informed and based [seemingly] on the basis of what was happening in Baghdad...

I still remain bemused as to why there was such resistance to the establishment of a proper review of prisoners. I cannot understand the opposition to the aspiration towards the highest standards for UK prisoners including the appointment of a UK judge, and why such a decision went up to the attorney general..."³⁴

- 4.8 In response to Colonel Mercer's request for a Detainee and Internee Management Unit, a member of Permanent Joint Headquarters noted:

"There is nothing in GC IV [the Fourth Geneva Convention] which requires us to review the detention of detainees/internees held in UK custody. 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."³⁵

- 4.9 In an e-mail from the Permanent Joint Headquarters, dated 14th May 2004, the unidentified author noted:

"Without going into any detail I had in mind the direction of the AG [Attorney General] 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* [a law applicable to specific circumstances]."³⁶

- 4.10 Major Gavin Davis was the SO2 Legal officer in the National Contingency Command. On 10th June 2010 a supplementary statement made by him was read into the record of the Baha Mousa Inquiry. It read, in part:

"2. I have been asked to confirm whether or not I have ever read the Attorney General's 2003 advice on the application of the European Convention on Human Rights (ECHR). I can confirm that I have read that advice.

³³ Permanent Joint Headquarters

³⁴ Statement of Nicholas Justin Mercer, 9 September 2009, paragraphs 71 – 74 [BMI04058](#) Lt Col Mercer referred to an MoD memo of 9 May 2003, MOD031248, as authority for his assertion that the Attorney General blocked his proposal (this document is not publicly available)

³⁵ Ibid, paragraph 70

³⁶ See

http://www.bahamousainquiry.org/linkedfiles/Baha_mousa/baha_mousa_inquiry_evidence/evidence_160310/mod020218.pdf

3. I have also been asked what my own view was as the application of the ECHR in Iraq in 2003. During my period of deployed service on Op TELIC 1, I believed that the Lex Specialis for the conflict was the Law of Armed Conflict and not Human Rights Law. I considered that Human Rights Law would become applicable at some stage during the course of the conflict when sufficient control was exercised over Iraq to be able to apply it.

4. I have been asked to describe what impact the ECHR had on the prisoner handling issues that I was involved in. As explained above, I did not believe that the ECHR applied during my time in theatre. I would add that even if I had taken the opposite view it would not have changed my views on the standards to be applied to prisoners."³⁷

- 4.11 There was clearly no recognition that either domestic or international human rights standards applied to the army's treatment of detainees in Iraq. It also seems very likely that the Attorney General's initial advice on Iraq was that the European Convention on Human Rights did not apply; either that, or a lot of very senior officers misunderstood his advice.
- 4.12 There was, however, clearly some unease on the part of the army command about what was going on, because they tried to suppress it from the International Committee of the Red Cross (ICRC) when they visited Basra. Lt Col Mercer was ordered not to speak during a meeting with the ICRC³⁸. Ewan Duncan, deployed as Staff Officer with responsibility for human intelligence operations, told the Baha Mousa Inquiry that he was told by Colonel Vernon, Chief of Media Operations at headquarters, that visitors from the International Committee of the Red Cross must not witness prisoners being hooded.³⁹
- 4.13 It must be said in fairness to both the government and the army, that the question of the extra-territorial scope of the European Convention on Human Rights had not been decided at the time of Baha Mousa's death. Hard on the heels of 9/11⁴⁰, the European Court of Human Rights ruled⁴¹ inadmissible an application by six citizens of the Federal Republic of Yugoslavia that a NATO bombing of the Radio-Television Serbia building in April 1990, which caused 16 deaths, had violated A. 2 of the Convention, which protects the right to life. The Court ruled that

³⁷ Supplementary statement of Lieutenant Colonel Gavin Davis, 9 June 2010 http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/transcripts/20101006day103fulldayws.pdf at page 3

³⁸ Evidence of Colonel Nicholas Mercer, Day 68, 16 March 2010, page 58 http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/transcripts/2010-16-03day68fullday-redacted.pdf

³⁹ Evidence of Ewan Duncan, Day 76, 30 March 2010, page 24 http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/transcripts/2010-30-03-day76fulldaywithwitnessstatements.pdf

⁴⁰ The four suicide attacks in the USA which took place on 11 September 2001

⁴¹ On 19 December 2001

that there was no jurisdictional link between the persons who were victims of the bombing and the respondent States.⁴² This case, which became known as Bankovič, became the basis for the government's view, which was argued before the High Court in Al-Skeini (a case brought on behalf Baha Mousa and others, which is discussed below).

- 4.14 However, before Al-Skeini put the matter beyond all possible doubt, the European Court of Human Rights (ECrTHR) gave a very strong pointer on the jurisdictional question in the case of Al-Saadoon⁴³. The ECtHR examined the transfer by the UK to the Iraqi authorities of two Iraqi nationals being held by UK troops in Basra who were charged with capital offences under Iraqi law. It was argued that to expose the men to a risk of the death penalty breached the UK's obligations under the Convention. The Court held that Article 3 of the European Convention (freedom from torture) was to be interpreted to include a state obligation to prohibit the death penalty and that, accordingly, any transfer to a state where there was a risk of the death penalty being used must be unlawful. The Court held that, "given the total and exclusive de facto, and subsequently also de jure control" exercised by the UK, the individuals were at all times within UK jurisdiction for the purposes of Article 1 of the Convention (which establishes jurisdiction). BIRW, along with a number of other NGOs, made a third party intervention in this case⁴⁴. Although Al-Saadoon applied to the post-2004 establishment of the new Iraqi government, while Baha Mousa died in 2003, before that transfer had taken place, the Court's decision, which issued in 2009, would have given the Baha Mousa Inquiry a clear indication on the answer to the jurisdictional question and the likely outcome of the Al-Skeini case, which directly involved Baha Mousa (which was decided by the ECrTHR in 2010) and in which litigation was in progress during the Inquiry's hearings.
- 4.15 On the 26th March 2004 the then Secretary of State for Defence, Geoff Hoon, decided not to conduct independent investigations into the deaths of Baha Mousa and five others⁴⁵, not to accept liability and not to award compensation. The relatives of the six victims decided to judicially review this refusal. The case became known as Al-Skeini, named on behalf of one of the other victims. On an application for judicial review on 14th December 2004 the Divisional Court found that there had been a breach of the investigative duty under Articles 2 and 3 of the Convention, concerning the right to life and freedom from torture, concerning the death of Baha Mousa, but dismissed the other claims. On 21st December 2005 the Court of Appeal upheld the

⁴² Decision as to the admissibility of Application no. 52207/99 of 12 December 2001 (Grand Chamber) in the case Bankovič and Others v. Belgium and 16 Other Contracting States

⁴³ Al-Saadoon and Mufdhi v UK (App No. 61498/08 (2009))

⁴⁴ <http://www.unhcr.org/refworld/pdfid/4a78522a2.pdf>

⁴⁵ Of these, three of the victims were shot dead or shot and fatally wounded by British soldiers; one was shot and fatally wounded during an exchange of fire between a British patrol and unknown gunmen; and one was beaten by British soldiers and then forced into a river, where he drowned.

judgment of the Divisional Court and similarly the House of Lords did the same on 13th June 2007, while remitting the question of whether there should be an inquiry back to the Divisional Court for consideration. Importantly, though, the case established that the Convention did apply to a death caused by British soldiers in Iraq. It was this ruling which led directly to the Baha Mousa Inquiry. An application to the European Court of Human Rights was lodged on 11th December 2007. On 18th January 2010 the Chamber relinquished jurisdiction in favour of the Grand Chamber and on 19th June 2010 there was a public hearing and judgment was delivered on 7th July 2011. The Court held that the Baha Mousa Inquiry, which was nearing its close, provided an effective investigation under A.2 of the Convention, but in the other five cases there had been no independent or effective investigation.⁴⁶ The Court referred to its previous case law in which it held that a State is normally required to apply the Convention only within its own territory. An extra-territorial act would fall within the State's jurisdiction under the Convention only in exceptional circumstances. One such exception established in the Court's case-law was when a State bound by the Convention exercised public powers on the territory of another State. On the facts of *Al-Skeini*, following the removal from power of the Saddam Hussein's Ba'ath regime and until the accession of the Iraqi Interim Government, the UK (together with the USA) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the UK assumed authority and responsibility for the maintenance of security in South East Iraq. In those exceptional circumstances, a jurisdictional link existed between the UK and individuals killed in the course of security operations carried out by British soldiers during the period 1st May 2003 to 28th June 2004. Thus *Al-Skeini* finally clarified the jurisdiction question. If a European army performs the public powers normally exercised by a sovereign government outside Europe, then the Convention runs.

- 4.16 An interesting question raised by the jurisdiction issue which has yet to be answered by the courts is that of whether soldiers who come from a country bound by the European Convention carry their domestic obligations with them when there are in a country that is outside the territorial scope of the Convention. It seems to BIRW that if a British soldier is not permitted to torture a prisoner in Surrey, it could be argued that s/he is not permitted to do so anywhere.
- 4.17 A question which has been litigated is that of the duty of care owed to its personnel by the military. Private Jason Smith died of hyperthermia (heat stroke) while on active service in Iraq. Following a Coroner's Inquest into her son's death, during which the family were initially denied access to important documents, Catherine Smith sought a judicial review. The High Court ruled that future investigations into similar deaths will have to be independent, open to scrutiny, and involve the family (who should be entitled to public funding). The court

⁴⁶ *Al-Skeini and Others v the United Kingdom* [2011] ECHR 1093

also held that the Human Rights Act, and therefore the European Convention on Human Rights, applied to all armed forces personnel serving outside the UK whether or not the death took place on an army base. The MoD challenged this decision at the Court of Appeal, which upheld the High Court's ruling. The MoD subsequently appealed to the Supreme Court, which ordered a full, Article 2-compliant inquest. However, the Supreme Court also ruled that the Human Rights Act only applies to British troops serving abroad when they are physically inside a British base. Once they step off the base, they lose their human rights protection.⁴⁷

5. THE RIGHT TO LIFE

- 5.1 With the question of jurisdiction settled, other human rights issues raised by Baha Mousa's case become relatively straightforward.
- 5.2 Since Baha Mousa died in British custody at the hands of British soldiers in an area under UK jurisdiction, his case self-evidently engages A. 2 of the Convention, which protects the right to life.
- 5.3 Article 2 both bestows a substantive right – "Everyone's right to life shall be protected by law" – and a procedural right to an effective investigation once a death has occurred. In Baha Mousa's case, the House of Lords ruled in Al-Skeini⁴⁸ that his right to life had been violated and that he was entitled to an effective investigation.
- 5.4 There is settled case law on what constitutes an effective investigation. The European Court of Human Rights has distilled the following element in such an investigation:
- where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, the burden of proof rests on the authorities to provide a satisfactory and convincing explanation⁴⁹
 - A. 2 covers unintentional as well as intentional deprivation of life⁵⁰
 - the investigation must be capable of determining whether use of force was justified⁵¹
 - it must lead to the identification and punishment of those responsible⁵²
 - sufficient public scrutiny is required to secure accountability⁵³
 - the legitimate interest of the next of kin is to be protected by their involvement⁵⁴

⁴⁷ R (on the application of Smith) (FC) (Respondent) v Secretary of State for Defence (Appellant) and another [2010] UKSC 29

⁴⁸ Al-Skeini and Others v Secretary of State for Defence [2007] UKHL 26

⁴⁹ Jordan v the United Kingdom (2001) 37 EHRR 52, paragraph 103

⁵⁰ Ibid, paragraph 104

⁵¹ Ibid, paragraph 107

⁵² Ibid, paragraph 115

⁵³ Ibid, paragraph 109

⁵⁴ Ibid

- the payment of damages alone are not enough to meet the requirement for an effective investigation⁵⁵
- reasons to be given for any non-prosecution of perpetrators⁵⁶
- civil proceedings, criminal trials and inquests not adequate to provide an effective investigation⁵⁷
- deprivations of life must be subjected to the most careful scrutiny, taking into consideration all the surrounding circumstances⁵⁸
- the authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident⁵⁹
- there must be an effective official investigation when individuals have been killed as a result of the use of force. The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility⁶⁰
- a prompt response is essential ⁶¹
- the authorities must act of their own motion, once the matter has come to their attention; they cannot leave it to the initiative of the next of kin⁶²
- the persons responsible for and carrying out the investigation must be independent from those implicated in the events⁶³.

This investigative duty was summarised by Lord Bingham in the House of Lords case in 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.”⁶⁴

- 5.5 The search and arrests of Baha Mousa and the other men were carried out inside the hotel by a unit, known as a multiple, from A Company 1 QLR with the radio call-sign G10A. The multiple was commanded by Lieutenant Craig Rodgers and has therefore come to be known as “the Rodgers Multiple”.⁶⁵ Those taken to Basra Main were intermittently supervised by Corporal Donald Payne, who was personally responsible

⁵⁵ Ibid, paragraph 115

⁵⁶ Ibid, paragraph 123

⁵⁷ Ibid, paragraphs 141, 120 and 128

⁵⁸ Ibid, paragraph 103

⁵⁹ Ibid, paragraph 107

⁶⁰ Ibid, paragraph 105

⁶¹ Ibid, paragraph 108

⁶² Ibid, paragraph 105

⁶³ Ibid, paragraph 106

⁶⁴ R (Amin) v Secretary of State for the Home Department [2004] 1 AC 653

⁶⁵ Baha Mousa Inquiry Report, Summary, paragraph 9

http://www.bahamousainquiry.org/f_report/vol%20iii/Part%20XVIII/Part%20XVIII.pdf

for much of the ill-treatment suffered by Baha Mousa⁶⁶ and was the only soldier to be found guilty, by a court martial, of a war crime⁶⁷. Once Baha Mousa died, an investigation by the Special Investigation Branch (SIB) of the Royal Military Police (RMP) became inevitable. Baha Mousa was pronounced dead at 10:05 pm⁶⁸. Shortly after this, Brigade headquarters were informed and as SIB investigation was initiated at 10:30 pm, although in practical terms it was unable to begin until the next day⁶⁹. The SIB investigation was obstructed from the outset. Cpl Payne told his colleagues in the Rodgers multiple , "If anyone asks, we were trying to put his plasticuffs [plastic handcuffs] on and he banged his head."⁷⁰ Lieutenant Rodgers was informed of Baha Mousa's death and reported it to Major Richard Englefield. Lt Rodgers went to the detention centre but 1 QLR's Commanding Officer, Lt Col Jorge Mendonça, told Lt Rodgers that this was now a SIB matter and he should not talk to his men. Nevertheless, Lt Rodgers did speak to one of his men, Private Gareth Aspinall, who duly told him that there had been a struggle and that Baha Mousa had banged his head against a wall.⁷¹ Cpl Payne's evidence was that the only person he discussed the death with was Captain Mark Moutarde, 1 QLR's Adjutant. He told the Captain that he had restrained Baha Mousa, who had banged his head, but Moutarde said he had no recollection of this discussion⁷². However, during the Baha Mousa Inquiry, a memorandum to Lt Col Mendonça from Captain Moutarde, dated 15th September 2003 (the night Baha Mousa died), emerged. In his summary of his finding, Sir William Gage said of this memo:

"It named Payne and Pte Cooper as having been involved in a violent struggle with Baha Mousa and said that Baha Mousa had banged his head. It stated that Baha Mousa was of significant intelligence interest because he was suspected of being involved in the RMP killings. Moutarde asserted that he had been given this information and it was not a fabrication to blacken Baha Mousa's character. (As I have recorded earlier, there was in fact no evidence to substantiate this allegation.)

This document for Mendonça must be compared to a document headed "Provisional SINCREP" (a military abbreviation of "serious incident report") from 1 QLR to 19 Mech Bde [Mechanical Brigade] Headquarters, timed and dated at 23.40hrs on 15th September. It did not name Payne and Pte Cooper as having been involved, nor did it mention the struggle or the banging of Baha Mousa's head. Moutarde told the Inquiry that this SINCREP would have been

⁶⁶ Ibid, paragraph 49

⁶⁷ Ibid, paragraph 218

⁶⁸ Ibid, paragraph 134

⁶⁹ Ibid, paragraph 144

⁷⁰ Ibid, paragraph 145

⁷¹ Ibid, paragraph 146

⁷² Ibid, paragraph 147

produced by the Operations Room staff possibly with some input from him."⁷³

- 5.6 Permanent Joint Headquarters promptly informed the Minister's office of Baha Mousa's death, but passed on inaccurate information gleaned from the ground to the effect that Baha Mousa had repeatedly tried to escape⁷⁴. Tellingly, on 17th September 2003, only two days after Baha Mousa's death, the army divisional legal officer sent out a directive by email banning hooding for all purposes and a tightening up of both tactical questioning and guarding practice⁷⁵. However, the guidance which ultimately issued was insufficiently rigorous to ensure no repetition of what happened to Baha Mousa⁷⁶. By 18th September the Brigade Chief of Staff, Major Edward Fenton, had delivered a report to his Commander headed *Death in Detention*, which once again repeated inaccurate information⁷⁷.
- 5.7 During the initial hearing by the Divisional Court of the Al-Skeini case, the court heard that:

"SIB investigations in Iraq were hampered by a number of difficulties such as security problems, lack of interpreters, cultural difficulties (e.g. the Iraqi practice of burying a body within 24 hours and leaving it undisturbed for 40 days), the lack of pathologists and post-mortem facilities, the lack of records, problems with logistics and the climate and general working conditions..."⁷⁸

The officer in charge of the SIB investigation was Captain Logan. The court was told:

"Captain Logan described the SIB investigation into the death of Baha Mousa and the difficulties that were encountered. In particular, there were logistical problems with identification parades, the local hospitals were on strike and doctors were unavailable at the time. In the event, arrangements were made for a home office pathologist to be flown out from the UK to carry out the post-mortem in very makeshift conditions. According to Captain Logan, the SIB investigation was concluded in early April 2004 and the report of the investigation distributed to the unit's chain of command."⁷⁹

The court summarised the SIB investigation thus:

⁷³ Ibid, paragraphs 150 – 151

⁷⁴ Ibid, paragraph 508

⁷⁵ Ibid, paragraph 509

⁷⁶ Ibid, paragraphs 514 – 521

⁷⁷ Ibid, paragraph 510

⁷⁸ The Queen on the Application of Mazin Jumaa Gatteh Al Skeini and others (Claimants) and The Secretary Of State For Defence (Defendant) and The Redress Trust [2004] EWHC 2911 (Admin), paragraph 53

⁷⁹ Ibid, paragraph 89

“The SIB were immediately called in to investigate. The body was taken to a British military hospital. A home office pathologist, Professor Hill, was flown out from England to conduct a post mortem, since the local hospitals were on strike and doctors were unavailable. The scene of death was forensically examined, and photographs were taken of the deceased's injuries. The autopsy itself was carried out under difficult conditions, but an Iraqi doctor was present on behalf of the family. It is not clear how long after the death the autopsy took place. Nor is there any evidence as to when interviews with other detainees and soldiers at the time of arrest and at the prison were conducted. The evidence somewhat equivocally states that, whereas all the medics involved ‘were interviewed’, ‘arrangements were made to interview’ the other potential witnesses. The SIB investigation was concluded by early April 2004. The report was distributed to the unit's chain of command, but has not been made public.”⁸⁰

The court found the SIB investigation to have been highly unsatisfactory:

“At the time of the main hearing before us, at the very end of July 2004, there was no further information about the outcome of the report. Its conclusions are unknown. It is not even known whether it has been possible to assign any responsibility of a direct or indirect nature: whether any culprit or culprits have been identified; whether any prosecutions are contemplated. The only clue to any of this is the opaque statement made by Captain Logan ... that ‘At this time ... there was no evidence to suggest who had been involved in any mistreatment apart from the soldier restraining the deceased at the time of his death’ ... which suggests that at most one person guilty of mistreatment, but only one, has been identified. Although there has been evidence of a rather general nature about the difficulties of conducting investigations in Iraq at that time – about basic security problems involved in going to Iraqi homes to interview people, about lack of interpreters, cultural differences, logistic problems, lack of records, and so forth – without any further understanding of the outcome of the SIB's report, it is impossible to understand what, if any, relevance any of this has to a death which occurred not in the highways or byways of Iraq, but in a military prison under the control of British forces. Indeed, Mr Greenwood's skeleton argument... accepts that the fact that Mr Mousa ‘died in the custody of British forces and allegedly at the hands of British forces meant that some of the practical difficulties of carrying out an investigation into his death did not arise’.

Although Captain Logan says that identity parades were logistically very difficult, detainees were moved to a different location, and

⁸⁰

Ibid, paragraph 327

some military witnesses had returned to the UK, she also says that these problems only delayed the process but did not prevent it taking place 'satisfactorily'... There is nothing else before us to explain the dilatoriness of the investigative process: which might possibly be compared with the progress, and open public scrutiny, which we have noted seems to have been achieved with other investigations arising out of possible offences in prisons under the control of US forces. As for the SIB report itself, on the evidence before us ... that would not contain any decision as to the facts or any conclusions as to what has or might have happened.

In these circumstances we cannot accept Mr Greenwood's submission that the investigation has been adequate in terms of the procedural obligation arising out of article 2 of the Convention. Even if an investigation solely in the hands of the SIB might be said to be independent, on the grounds that the SIB are hierarchically and practically independent of the military units under investigation, as to which we have doubts in part because the report of the SIB is to the unit chain of command itself, it is difficult to say that the investigation which has occurred has been timely, open or effective.

As for its timeliness, Mr Greenwood submits that the complaint under this heading is premature: but we are unable to accept this submission now nearly a year after Mr Mousa's death, particularly in circumstances where this issue had been ordered to be heard at the hearing in July as a preliminary point together with the issues on jurisdiction. It was for that hearing that the Secretary of State's evidence needed to be prepared. If, following the SIB report of early April, the investigation was still ongoing, we need to be put in a position where we can understand what is going on. For the same reason, we are unable to accept that the investigation has been open or effective. Other than in the early stages and at the autopsy, the family has not been involved. The outcome of the SIB report is not known. There are no conclusions. There has been no public accountability. All this in a case where the burden of explanation lies heavily on the United Kingdom authorities.

Mr Greenwood submitted, in a part of his argument which almost formed a bridge between his submissions on jurisdiction and his submissions on the article 2 investigative duty but which was formally part of the former, that the application of the Convention to an Iraqi held in British custody during the period of the occupation 'would create a raft of intractable legal issues'.

Thus he raised the following questions: Could such a prisoner be handed over to the Iraqi authorities for trial in circumstances where he could face the death penalty? What if the British authorities had not been able to conduct a post mortem or to investigate the death with the assistance of the SIB? What about other Convention

rights, such as the right to respect for private and family life and the right to freedom of thought, conscience and religion?

We have not, however, been deterred by our consideration of these difficulties from our conclusions. They illustrate perhaps the significance of the essentially territorial aspect of jurisdiction and the importance of maintaining a firm control over the exceptions to that territorial principle. However, where a prisoner held in the custody of British forces has been tortured or killed, such difficulties, which can no doubt find their own proper resolutions, in our judgment shrink before the importance of state accountability, not only under the Hague and Geneva conventions, but under our own domestic views of human rights. Despite problems in the investigative process, the evidence is that they were overcome.

We hold that there has been a breach of the procedural investigative obligation under articles 2 and 3."⁸¹

- 5.8 Thus the SIB investigation, an investigation of the army by the army, failed to meet the procedural requirements of Article 2. There were no criminal prosecutions over Baha Mousa's death, but on 19th July 2005 it was announced that seven officers of 1 QLR and the Intelligence Corps were to face a court martial. Corporal Donald Payne was charged with inhumane treatment, manslaughter, and perversion of the course of justice. Lance Corporal Wayne Crowcroft and Private Donald Farren were also both charged with inhumane treatment. Sergeant Kelvin Stacey was charged with assault. Colonel Jorge Mendonça, 1 QLR's commanding officer, Warrant Officer Mark Davies, and Major Michael Peebles were all charged with neglect of duty.⁸²
- 5.9 The court martial, which cost an estimated £20 million and lasted 93 days (the longest in British military history), led to bitter recriminations, with anger on the part of some of army officers over claims that the prosecution was driven by the Attorney-General, Lord Goldsmith, whose legal advice paved the way for the Iraq invasion.⁸³ It was presided over by the Judge Advocate General⁸⁴, Mr Justice McKinnon and lasted six months⁸⁵. It convened in September 2006 and concluded in September 2007.
- 5.10 Donald Payne pleaded guilty to inhumane treatment of Baha Mousa, a war crime under s. 51 (1) of the International Criminal Court Act 2001. On April 30th 2007, Payne was dismissed from the army and sentenced to serve one year in a civilian jail.⁸⁶ He was acquitted of manslaughter and perversion of the course of justice. All the other soldiers were also

⁸¹ Ibid, paragraphs 329 – 366

⁸² Court martial charge sheet

<http://www.publications.parliament.uk/pa/ld200506/ldlwa/50719ws1.pdf>

⁸³ Goldsmith under fire over Iraq 'abuse' trial, *The Telegraph*, 14 March 2007

⁸⁴ The judge with overall responsibility for courts martial

⁸⁵ Q & A: Baha Mousa Inquiry, BBC Internet News, 8 September 2011

⁸⁶ Baha Mousa inquiry: timeline of key events, *The Telegraph*, 2012

cleared for lack of evidence. The lack of substantial evidence provoked Mr Justice McKinnon to blame a "more or less obvious closing of the ranks" for the failure of the guilty to be identified.⁸⁷

5.11 On 25th January 2008 the Ministry of Defence published the Aitken Report concerning six cases of alleged deliberate abuse and killing of Iraqi civilians, including the death of Baha Mousa. The report criticised both the lack of an immediate, effective system for referring important information to those with the capacity to analyse it, and the delays in resolving some of the cases.⁸⁸

5.12 On 27th March 2008, Minister of State for Defence, Des Browne MP, finally admitted in a written statement to the House of Commons, that Baha Mousa's right to life had been violated:

"It is proposed to serve a defence on 28 March 2008 in response to the claim brought in the High Court against the Ministry of Defence by Dawood Salim Musa Al-Maliki—on his own behalf and as executor of the estate of Baha Mousa—admitting a substantive breach of Articles 2 (right to life), and 3 (prohibition of torture), of the European Convention on Human Rights."⁸⁹

5.13 On 10th July 2008 the MoD paid £2.83 million in compensation to the mistreated detainees including £575,000 to the family of Baha Mousa.

"The settlement is with an admission of liability by the Ministry of Defence which follows on from a statement on 27 March 2008 by the Secretary of State for Defence when substantive breaches of Article 2 (right to life) and 3 (prohibition of torture) of the European Convention on Human Rights were admitted.

"The settlement was accompanied by an apology from the Ministry of Defence."⁹⁰

However, as has been seen above, the payment of compensation cannot discharge the state's obligations under Article 2.

5.14 As can readily be seen, Baha Mousa's death could not be said to have received an effective investigation when judged against the criteria laid down by the ECtHR, despite the many measures taken along the way. The court deemed the Baha Mousa Inquiry to be

⁸⁷ *Soldiers cleared in Iraqi death trial*, Reuters, 13 March 2007

⁸⁸ *The Aitken Report: An Investigation into Cases of Deliberate Abuse and Unlawful Killing in Iraq in 2003 and 2004*, MoD, 25 January 2008 at http://www.mod.uk/NR/rdonlyres/7AC894D3-1430-4AD1-911F-8210C3342CC5/0/aitken_rep.pdf

⁸⁹ *Hansard*, 27 March 2008, column 13WS
<http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080327/wmstext/80327m0001.htm>

⁹⁰ *Mod to pay £3m to Iraqis tortured by British troops*, *Guardian*, 10 July 2008
<http://www.guardian.co.uk/world/2008/jul/10/iraq.military>

capable of providing an effective investigation in its Al-Skeini judgment. Whether it did so or not will be addressed later in this report.

6. FREEDOM FROM TORTURE

6.1 The House of Lords also found in Al-Skeini that Baha Mousa's right under Article 3 of the Convention to freedom from torture had been violated. Des Browne in his admission of 10th July 2008 admitted that the UK had breached Article 3.

6.2 It is notable that, while lawyers, NGOs and the media have all described what happened to Baha Mousa as torture, there has been no official finding of torture, even by the European Court of Human Rights or the Baha Mousa Inquiry. Corporal Payne for found guilty of inhumane treatment. No-one has stood trial in the civilian courts for the crime of torture under s. 134 of the Criminal Justice Act 1998, which says:

“A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties.” [emphasis added]

Interestingly, there is no jurisdictional issue in this language.

6.3 It is now common ground that Baha Mousa suffered 93 separate injuries. He was hooded; handcuffed; forced to adopt stress positions; deprived of sleep, food and water in very hot weather; and repeatedly assaulted. One of the Baha Mousa Inquiry's most disturbing findings was that the standing order that detainees were to be delivered to the Theatre Internment Facility (TIF) within 14 hours or as soon as practicable thereafter. In the case of those detained with Baha Mousa, it took 55 hours to deliver them to the TIF. Sir William Gage found that the principal reason for this was the soldiers wanted to continue their “tactical questioning” of the prisoners. Baha Mousa, of course, never arrived at the TIF, because he was dead 36 hours after his arrest.⁹¹

6.4 BIRW have no difficulty at all, in the light of all the evidence, in concluding that not only was Baha Mousa tortured, he was murdered.

6.5 The failure to make an explicit finding of torture in Baha Mousa's case is all the more puzzling because the issue of torture has been a matter of anxious scrutiny in the UK courts in the aftermath of 9/11. In 2005, in the case of A and Others (another case in which BIRW and other NGOs made a third party intervention) the House of Lords ruled on the

⁹¹ Baha Mousa Inquiry Report, Summary, paragraphs 205 – 210
http://www.bahamousainquiry.org/f_report/vol%20iii/Part%20XVIII/Part%20XVIII.pdf

question of whether evidence obtained under torture in a third country was admissible in the UK courts⁹². In Al-Saadoon, previously discussed, the European Court of Human Rights held that the transfer of prisoners into a jurisdiction where they possibly faced the death penalty was a breach of Article 3. Al-Skeini, also previously discussed, found in terms that Baha Mousa's and his companions' Article 3 rights had been violated in terms. All these cases were litigated in the run-up to and during the Baha Mousa Inquiry, and all formed part and parcel of the debates surrounding extraordinary rendition⁹³, secret prisons, and the alleged complicity of MI5 and other UK agencies in torture.

- 6.6 Like Article 2, Article 3 carries with it an implied procedural requirement to carry out an effective investigation. In Kurt v Turkey⁹⁴ the European Court of Human Rights found that a failure to provide an effective investigation is both a breach of A. 3 in itself and in some cases may amount to cruel and inhuman treatment. As has been seen, in Al-Skeini the Divisional Court found specifically that there had been a breach of Article 3 procedural rights⁹⁵.
- 6.7 For all the reasons given in section 5 above in relation to Article 2, prior to the instigation of the Baha Mousa Inquiry, Baha Mousa's case did not receive an effective investigation. Although the European Court of Human Rights held that the Baha Mousa Inquiry met the requirements of an Article 2 compliant investigation, they were not asked to rule on the procedural aspects of Article 3.
- 6.8 As was mentioned in the introduction to this report, Baha Mousa and his companions are by no means the only victims of torture in Iraq. In Ali Zaki Mousa the Court of Appeal ruled that the government's Iraqi Historical Allegation Team (IHAT) lacked independence because it was based within the MoD, and ordered the Defence Secretary to reconsider his refusal to hold a systemic inquiry into allegations of abuse. The court also found that other inquiries failed fully to meet the needs of Article 3 and that it was also "entirely foreseeable" that the Baha Mousa inquiry could not satisfy the Government's legal obligations under Article 3 to investigate the allegations being made by the Iraqi civilians in today's case.⁹⁶ Ali Zaki Mousa was refused at the Divisional Court stage but was successful in the Court of Appeal. One of the reasons for the original dismissal of this application was a "wait and see" approach taken by the Secretary of State for

⁹² A and others v Secretary of State for the Home Department (No 2) [2005] UKHL 71

⁹³ The euphemism adopted by the USA for kidnapping people and taking them to third countries for the purpose of torture

⁹⁴ Application No. 15/1997/799/1002, European Court of Human Rights, 25 May 1998

⁹⁵ The subsequent hearings in the House of Lords and the European Court of Human Rights did not deal with Article 3, but concentrated on Article 2

⁹⁶ Ali Zaki Mousa v Secretary of State for Defence & Another [2011] EWCA Civ 1334

Defence pending the outcomes of the Baha Mousa Inquiry and the work of the IHAT.

7. THE RIGHT TO A FAIR TRIAL

7.1 Baha Mousa was not a prisoner of war, he was a non-combatant. Nor had he committed any crime. He was, in fact a totally innocent civilian. In that capacity, his right to a fair trial may not seem to be at issue, but once he was arrested by British soldiers, his right to a fair trial, as protected by Article 6 of the European Convention on Human Rights came into play. Article 6 confers the right to a public hearing before an independent and impartial established by law, and to be produced promptly before a judicial authority. Crucially, it confers the presumption of innocence. Baha Mousa was accorded not of these rights.

7.2 In his summary of findings, Sir William Gage summed up exactly why Baha Mousa was arrested:

“On 14 September 2003, 1 QLR undertook Op[eration] Salerno, an operation seeking to identify and arrest specific individuals suspected of being former regime loyalists (FRLs) involved in terrorist activities in Basra. It involved searches of hotels thought to be harbouring these individuals. One of the hotels searched by 1 QLR was the Hotel Ibn Al Haitham (the Hotel). 1 QLR did not find any of the targeted individuals there, but following the discovery of weaponry and other suspicious items it arrested seven male Iraqi civilians, including Baha Mousa, at the Hotel.”⁹⁷

7.3 As has been seen, instead of being delivered within 14 hours to the Theatre Internment Camp, Baha Mousa and the others were taken to the Temporary Detention Facility, described by the Baha Mousa Inquiry report as “an unfurnished building”⁹⁸. To call such a place a facility was a misnomer; it had no facilities. It was, in fact, the perfect place to practice the dark arts of “conditioning”. It was also a place of internment without trial; a place where similar things were done as had been done in Northern Ireland four decades earlier.

7.4 The legality of Baha Mousa's arrest is inextricably linked with the legality or otherwise of the invasion of Iraq, an issue which the Baha Mousa Inquiry did not address and which has been left to the non-statutory Iraq Inquiry, whose report is awaited, to determine. However, the European Court of Human Rights has looked, in the case of Al-Jedda, at the UK's argument that UNSC Resolution 1546 created an obligation to use internment in Iraq and that, under Article 103 of the UN Charter, that obligation prevailed over its ECHR duties. The court held that:

⁹⁷ Baha Mousa Inquiry Report, Summary, paragraph 8
http://www.bahamousainquiry.org/f_report/vol%20iii/Part%20XVIII/Part%20XVIII.pdf

⁹⁸ Ibid, paragraph 22

“...there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law.”⁹⁹

8. THE MILITARY AND POLITICAL RESPONSE TO BAHU MOUSA'S DEATH

- 8.1 Although the SIB investigation failed to get to the bottom of the death of Baha Mousa, there can be no doubt that his death rang serious alarm bells within the military hierarchy. Within two days hooding was banned and a review of “tactical questioning” was put in place. However, the publication of the Aitken Report, commissioned by the MoD, on 25th January 2008 was denounced by some as a whitewash after it found no evidence of systemic abuse of detainees¹⁰⁰. The inadequate result of the court martial, together with the remittal of the Colonel Mousa's application for a statutory inquiry to the Divisional Court in *Al-Skeini*, prompted the MoD to admit breaching Baha Mousa's human rights in its announcement on 27th March 2008. This statement was made one week before Mr Justice Collins in the Divisional Court was expected to order an inquiry under the Inquiries Act 2005. A little over four years later and after putting up barriers at every point the MoD made a volte face.
- 8.2 This about turn was clearly politically led. Back in 2004, Secretary of State for Defence Geoff Hoon MP and Minister of State Adam Ingram MP were responsible for the decision to refuse to admit liability, to undertake to investigate, and to accept the jurisdiction of the European Convention on Human Rights (ECHR) which led to the litigation in *Al-Skeini*. That refusal most probably sprang from two motivations. First, it was well-known that Prime Minister Tony Blair MP had lived to regret his decision to give effect to ECHR rights through the Human Rights Act 1998, and that the Labour Party's embrace of human rights compliance was lukewarm at best. The idea of being bound by the Convention outside the Council of Europe, especially in the theatre of war, would hardly have appealed. Secondly, to admit liability for Baha Mousa's death would have intensified the spotlight which had already been thrown on the Attorney General's advice and the thorny issue of the legality of the invasion of Iraq.

⁹⁹ *Al-Jedda v UK* (Application No. 27021/08 (2011))

¹⁰⁰ *Baha Mousa inquiry: Death cast 'dark shadow' over Army*, BBC Internet News, 8 September 2011 <http://www.bbc.co.uk/news/uk-14835527>

8.3 By 2008, Des Browne MP and Bob Ainsworth MP were the respective Secretary of State and Ministers at the MoD. It was their decision to admit to breaching Baha Mousa's and the other detainees' human rights on 27th March 2008. Des Browne's announcement, quoted at paragraph 5.12 above, was terse. Bob Ainsworth was a little more conciliatory, expressing "deep regret" over the death of Baha Mousa and "sincere apologies and sympathy" to his family and the eight other Iraqis abused with him, while struggling to contain the damage done every time the harrowing picture of Baha Mousa's dead face appeared in the media:

"I deeply regret the actions of a small number of troops and I offer my sincere apologies and sympathy to the family of Baha Mousa and the other eight Iraqi detainees. All but a handful of more than 12,000 British troops who served in the Iraq war have conducted themselves to the highest standards of behaviour, displaying integrity and selfless commitment.

But this does not excuse that, during 2003 and 2004, a very small minority committed acts of abuse and we condemn their actions."¹⁰¹

8.4 With Mr Justice Collins and the Divisional Court duly defused, Des Browne announced the Baha Mousa Inquiry on 14th May 2008 in a written Parliamentary statement. Once again, damage limitation was to the fore:

"In my statement of 25 January¹⁰² (Official Report, columns 65-66WS), I promised to make an announcement once I had reached a decision on what form any future inquiry into the circumstances surrounding the death of Mr Baha Mousa in Iraq in September 2003 might take.

After wide consultation and after considering the representations that I have received, and with the full support of the military chain of command, including the Chief of the Defence Staff and the Chief of the General Staff, I have decided that the right thing to do is to establish a public inquiry under the Inquiries Act 2005. The inquiry will examine the circumstances surrounding the death of Baha Mousa. The terms of reference and other details will be made public once they have been established in accordance with the provisions of the Act, and the inquiry report will be published.

This reinforces my determination, and that of the Chief of the General Staff, to do everything we can to understand how it came to be that Mr Mousa lost his life. The Army has no wish to hide

¹⁰¹ MoD admits human rights breaches over death of tortured Iraqi civilian, *Guardian*, 28 March 2008

<http://www.guardian.co.uk/world/2008/mar/28/humanrights.military>

¹⁰² The day the Aitken Report was published

anything in this respect. It has looked at itself very critically since 2003, and has made a number of significant changes that were enumerated in Brigadier Aitken's report of January this year. It nevertheless remains anxious to learn all the lessons that it possibly can from this disturbing incident.

Overall, the conduct of tens of thousands of our people in Iraq has been exemplary; it is a tiny number who have caused a stain on the reputation of the British Army. But that does not mean we can allow these events to pass without looking into them thoroughly. I hope this independent inquiry will reassure the public that no stone has been left unturned. The Army and the Ministry of Defence will be giving the fullest co-operation to this inquiry."¹⁰³

- 8.5 As has already been mentioned, on 10th July 2008 the MoD paid out £2.83 million in settlement of the outstanding civil claim for damages, of which only £575,000 went to Baha Mousa's family – doubtless a drop in the ocean compared to costs of defending the Al-Skeini litigation. There was no longer any impediment to the inquiry Colonel Mousa had been seeking ever since he lost his son.

9. **THE STATUTORY BASIS FOR THE BAHA MOUSA INQUIRY: THE INQUIRIES ACT 2005**

- 9.1 When it was finally established, the Baha Mousa Inquiry was held under the Inquiries Act 2005. This Act replaced the Tribunals of Inquiry (Evidence) Act 1921 and with the repeal of the 1921 Act the popular notion of a public inquiry quietly disappeared from English law. It is noticeable that the Inquiries Act does not have the word "public" in its title, nor does it speak anywhere of "public inquiries".
- 9.2 The Inquiries Act 2005 brought about a fundamental shift in the manner in which the actions of government and other public bodies, including the British army and the security services, can now be subjected to scrutiny in the United Kingdom. The powers of independent chairs to control inquiries have been usurped and those powers have been placed in the hands of government Ministers. Under the Act, the relevant 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, and

¹⁰³ *Hansard*, column 61WS, 14 May 2008
<http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080514/wmstext/80514m0001.htm#08051459000004>

- 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 1921 Act reports of public inquiries were laid before 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 Parliament.

9.3 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 is empowered to investigate itself. Thus, the Baha Mousa Inquiry which was so critical of the Ministry of Defence (MoD) was required by statute to report to the Secretary of State for Defence. This goes against the letter and spirit of the UK's obligations under the Convention in relation to investigation of deaths under Article 2, which provides for effective investigations into deaths, especially those caused by agents of the state. A key element of such an investigation is the independence from the state of those conducting the investigation.¹⁰⁴

9.4 Of special concern are the provisions of s. 19 of the Act, which gives the Minister the power to make Restriction Notices forbidding the attendance of anyone at an inquiry or any part of an inquiry, and/or disclosure or publication of any evidence or documents provided to an inquiry. Another cause for concern is s. 2 (1) of the Act, which states that,

“An inquiry panel is not to rule on, and has no power to determine, any person's civil or criminal liability.”

However, s. 2 (2) does provide some leeway:

“But an inquiry panel is not to be inhibited in the discharge of its functions by any likelihood of liability being inferred from facts that it determines or recommendations that it makes”.

9.5 BIRW therefore were very concerned when the Baha Mousa Inquiry was established, especially in light of the official denials of accountability and the failure of all other mechanisms designed to provide justice in his case previously, that it would not have the powers it needed to conduct an effective investigation.

9.6 In the event, and in the so far unique circumstances of this Inquiry, our fears were allayed, for two reasons. First, Sir William Gage proved to be a robust Chair who did all in his power to circumvent the problems

¹⁰⁴ See, for example, Jordan v the United Kingdom (2001) 37 EHRR 52; Kelly and Others v the United Kingdom no. 30054/96 (Sect. 3), 4.5.2001; McKerr v the United Kingdom no. 28883/95 (Sect. 3), 4.5.2001; Shanaghan v. the United Kingdom no. 37715/97 (Sect. 3), 4.5.2001; and In the matter of an application by Brigid McCaughey and another for Judicial Review (Northern Ireland), 18 May 2011, [2011] UKSC 20

inherent in the legislation. Secondly, the then Minister for Defence, Dr Liam Fox, refrained from exercising his powers to intervene in the inquiry.

- 9.7 By virtue of s. 3 and Schedule 1 of the Freedom of Information Act 2000, an inquiry under the Inquiries Act is not a public authority¹⁰⁵ and so is not subject to freedom of information legislation. However, Sir William Gage decided to act as if the Baha Mousa Inquiry was subject to the Act. He published his policy on freedom of information on his website, as follows:

“The Freedom of Information Act 2000 is intended to promote a culture of openness among public authorities and to give people the right to access much of the information they hold.

As an independent Public Inquiry the Act does not apply to the Baha Mousa Inquiry. However, in keeping with the spirit of freedom of information we will operate in as transparent and open a manner as possible in keeping with the interests of justice...

In common with many other organisations that are not covered by the Freedom of Information Act we will consider your request for information as if we were covered. This means that we will release the information if we hold it, unless one of the provisions under the Act applies and we determine that complying with the request would not be in keeping with the public interest.

We will respond to your request within 20 working days, either providing the information or explaining why we cannot provide it.”¹⁰⁶

This commitment to transparency, which to the best of our knowledge is unique so far among inquiries held under the Inquiries Act, and went a long way towards dispelling any fears that the Inquiry would preside over a whitewash or a cover-up.

- 9.8 Sir William Gage entered into a Protocol¹⁰⁷ with the MoD, brokered by the Cabinet Office, concerning disclosure of documents and other evidence. This Protocol is reproduced in full at Annex B. It states, in part,

“This protocol is designed to ensure:

- (a) that all Core Participants and the public know how the Inquiry approaches the provision of documents to the Inquiry by MoD, and the procedure for applications to redact documents. Practical and transparent procedures in this regard will be an important part of the effective running of the Inquiry;

¹⁰⁵ Because such inquiries are not listed in Schedule 1

¹⁰⁶ See

http://www.bahamousainquiry.org/about/information_charter/freedom_information/index.htm

¹⁰⁷ Reproduced in full at Annex B

- (b) that the Inquiry promptly receives documents from MoD;
- (c) that the provision of these documents to the Inquiry is not delayed by the need for prior applications to be made in respect of the documents;
- (d) that the distribution of documents to other Core Participants is achieved expeditiously even if, initially, the documents are redacted. In particular, the Inquiry wishes to avoid a backlog in the distribution of documents to other Core Participants pending decisions under section 19 of the Inquiries Act 2005;
- (e) that appropriate provision is made for MoD to make applications for a restriction order from the Chairman;
- (f) that other Core Participants are able to raise concerns about the extent of redaction of documents."¹⁰⁸

It goes on to provide that the MoD must give reasons for non-disclosure¹⁰⁹, in such a format that those reasons can be made public¹¹⁰. Unless legal privilege is claimed, all documents provided to the Inquiry must be unredacted¹¹¹, and must be provided without delay¹¹². The MoD must exercise restraint in making redactions¹¹³, and the Inquiry has the right to publish provisionally redacted documents¹¹⁴. The Inquiry will decide whether a redaction is justified¹¹⁵, and if so, the Chair will issue a Restriction Order¹¹⁶ (rather than the Minister issuing a Restriction Notice). The Inquiry can query any redactions¹¹⁷, and if they did not accept a redaction then the MoD will have to apply to the Chair for a Restriction Order¹¹⁸, giving their reasons in full¹¹⁹. If s. 19 of the Inquiries Act 2005 is engaged, the expectation is that a Restriction Order should be sought from the Chair, rather than the Minister issuing a Restriction Notice¹²⁰.

- 9.9 This very robust disclosure regime did much to boost confidence in the Inquiry. In practice, the Secretary of State refrained from issuing any Restriction Notices under s. 19, although it should be noted that the Protocol did not entirely preclude him from doing so.
- 9.10 Sir William Gage and his team are to be applauded for the approach they took to the conduct of the Inquiry, which allowed them to proceed with relative dispatch and to thoroughly examine the issues

¹⁰⁸ Available at http://www.bahamousainquiry.org/linkedfiles/baha_mousa/key_documents/protocol_production.pdf

¹⁰⁹ Protocol, paragraph 6

¹¹⁰ Ibid, paragraph 7

¹¹¹ Ibid, paragraph 10

¹¹² Ibid, paragraph 11

¹¹³ Ibid, paragraph 15

¹¹⁴ Ibid, paragraph 18

¹¹⁵ Ibid, paragraphs 19 – 20

¹¹⁶ Ibid, paragraph 21

¹¹⁷ Ibid, paragraph 24

¹¹⁸ Ibid, paragraph 25

¹¹⁹ Ibid, paragraph 26

¹²⁰ Ibid, paragraph 29

before them, thus enabling them to produce a hard-hitting report. The Secretary of State's self-imposed restraint in not exercising his s. 19 powers is also welcome. However, the way in which the Baha Mousa Inquiry was conducted serves to underline the flaws in the Inquiries Act 2005, which can only be used in a human rights-compliant fashion if special measures are taken. The right to an effective investigation, because it is a procedural requirement of the right to life, is absolute and non-derogable. The exercise of that right cannot be left to the whims of government Ministers or the luck-of-the-draw in finding a strongly independent Chair.

10. THE TERMS OF REFERENCE OF THE BAHAMOUSA INQUIRY

10.1 The Baha Mousa Inquiry opened in London on 13th July 2009. Sir William Gage had been appointed to chair the Inquiry with the following terms of reference:

“To investigate and report on the circumstances surrounding the death of Baha Mousa and the treatment of those detained with him, taking account of the investigations which have already taken place, in particular where responsibility lay for approving the practice of conditioning detainees by any members of the 1st Battalion, The Queen's Lancashire Regiment in Iraq in 2003, and to make recommendations.”¹²¹

10.2 The drafting of the terms of reference is a crucial factor in determining an inquiry's ambit, length, complexity, cost and ultimate success.¹²² Under the Inquiries Act 2005 the relevant Minister has responsibility for drafting the terms of reference. The argument in support of such an arrangement is that it is the government which has the ultimate responsibility for investigating failures and for maintaining or restoring public confidence, and for preventing recurrence. Section 5(4) of the 2005 includes a requirement that, before setting out the terms of reference of an inquiry, the minister must consult the person he or she has appointed or proposes to appoint as Chair. Sir William Gage was appointed by Secretary of State Des Browne on 21st July 2008. The terms of reference for the Inquiry were published on the Baha Mousa Inquiry website in 2009, which suggests that Sir William Gage may not have been consulted about them by the MoD until after he accepted the post of Chair¹²³. Section 5(6) of the 2005 Act sets out the minimum content of the terms of reference and section 5(5) of the 2005 Act limits the inquiry to those terms of reference with no authority to act outside the scope of the terms of reference.

¹²¹ <http://www.bahamousainquiry.org/>

¹²² Jason Beer, *Public Inquiries* (Oxford, Oxford University Press, 2011), paragraphs 2.97 and 2.98, page 73, citing the Government's Consultation Paper *Effective Enquiries*, CP12/04, paragraph 19

¹²³ This was certainly what happened in the ill-fated non-statutory Detainee Inquiry

10.3 A fundamental flaw in the Inquiries Act is the fact that there is no requirement to consult the injured party(ies) about the terms of reference. This omission contrasts with the Strasbourg jurisprudence relating to the procedural obligation arising from an Article 2 violation by the state where it is clear that,

“In, all cases, however, the victim's next-of-kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.”¹²⁴

10.4 In Northern Ireland three inquiries into the murders of Robert Hamill, Rosemary Nelson and Billy Wright¹²⁵ were established without any consultation with the next-of-kin concerning the terms of reference. They were set up directly as a result of the reports of ex-Canadian Supreme Court judge Peter Cory and commissioned by the British government. Each of these reports was called a *Cory Collusion Inquiry Report* as collusion was central to the concerns of those pressing for inquiries.¹²⁶ The Terms of Reference of the three inquiries which were established do not mention the word collusion at all. Their respective Terms of Reference are stated as follows:

Robert Hamill: “To inquire into the death of Robert Hamill with a view to determining whether any wrongful act or omission by or within the Royal Ulster Constabulary facilitated his death or obstructed the investigation of it, or whether attempts were made to do so; whether any such act or omission was intentional or negligent; whether the investigation of his death was carried out with due diligence; and to make recommendations.”¹²⁷

Rosemary Nelson: “To inquire into the death of Rosemary Nelson with a view to determining whether any wrongful act or omission by or within the Royal Ulster Constabulary, Northern Ireland Office, Army or other state agency facilitated her death or obstructed the investigation of it, or whether attempts were made to do so; whether any such act or omission was intentional or negligent;

¹²⁴ Since the Jordan case cited earlier, this has become settled jurisprudence. See for example Ahmet Ozkan and Others v Turkey [2004] (Application 21689/93) at paragraphs 311 – 314

¹²⁵ Originally these inquiries were all established under other statutes, but the Billy Wright and Robert Hamill Inquiries were converted to inquiries under the Inquiries Act 2005

¹²⁶ Judge Peter Cory defined collusion in relation to the police as “This is to say that police forces must not act collusively by ignoring or turning a blind eye to the wrongful acts of their servants or agents or by supplying information to assist others in committing their wrongful acts or by encouraging them to commit wrongful acts.” <http://www.patfinucanecentre.org/cory/gibson.pdf> at paragraph 124.

¹²⁷ <http://www.roberthamillinquiry.org/>

whether the investigation of her death was carried out with due diligence; and to make recommendations."¹²⁸

Billy Wright Inquiry: "To inquire into the death of Billy Wright with a view to determining whether any wrongful act or omission by or within the prison authorities or other state agencies facilitated his death, or whether attempts were made to do so; whether any such act or omission was intentional or negligent; and to make recommendations."¹²⁹

- 10.5 The absence of the word collusion in these three inquiries has led, in the two inquiries that have reported (Rosemary Nelson and Billy Wright), to criticism that the core point of each inquiry – any role played on the part of the state in the human rights violation – was missed despite the clear conclusions reached by Judge Peter Cory and the concerns of the families and the general public. The Strasbourg jurisprudence is clear on this point in that to discharge the procedural obligation arising from a state's violation of Article 2,

"There must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory."¹³⁰

- 10.6 At first glance, the terms of reference of the Baha Mousa Inquiry also seemed to be drawn very narrowly, confining themselves to "the practice of conditioning detainees by any members of" 1 QLR. The compelling evidence being produced through the satellite litigation clearly suggested institutional abuse at a general level within the British army and not limited to 1 QLR. However, the inclusion of the phrase "where responsibility lay for approving" these actions broadened the scope of the Inquiry to potentially include the higher echelons of the army and even their political masters. Similarly, the Inquiry was charged "to investigate", which took it beyond the normal inquisitorial role of inquiries. Finally, the phrase "the circumstances surrounding the death of Baha Mousa and the treatment of those detained with him" also created the opportunity to widen the horizons of the Inquiry. Northern Ireland inquest law is relevant here. For many years the word "how" in relation to a death was restricted by the courts to an examination of "by what means"¹³¹. However, eventually the Northern Ireland Court of Appeal reversed itself and declared that "how" meant

¹²⁸ See <http://webarchive.nationalarchives.gov.uk/20110612081947/http://www.rosemarynelsoninquiry.org/>

¹²⁹ See <http://webarchive.nationalarchives.gov.uk/20101210142120/http://www.billywrightinquiry.org>

¹³⁰ *Al-Skeini and others v UK*, paragraph 167 <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Al-Skeini&sessionid=80761394&skin=hudoc-en>

¹³¹ *McKerr v Armagh Coroner and Others*, House of Lords, [1990] 1 All ER 865, 1990 1 WLR 649

“in what broad circumstances”¹³², thus bringing inquests back within the remit of Article 2 compliance.

- 10.7 Sir William Gage wrote the following about how he saw his terms of reference in his report:

“It will be seen that the terms of reference were restricted to the incident which led to the death of Baha Mousa and the responsibility for the use by members of 1 QLR of the practice of conditioning detainees. I have not been asked to examine any other incidents where the practice of conditioning detainees may have been used; nor any other incidents involving allegations of ill-treatment of detainees. I have adhered to these terms of reference and have only investigated other satellite incidents where they appear to throw light on the issues with which I am directly concerned.”¹³³

However, in the Introduction to Part II of the report, he further discussed his general approach. At the end of the Introduction, he said:

“Finally, I have not resolved all of the very large number of conflicts in the evidence. In many places I have found it either unnecessary or impossible to do so. I have sought to reach findings on all of the issues which seem to me most relevant.”¹³⁴

The last of these three sentences indicates Sir William's approach to the evidence before him. Coupled with his robust attitude towards disclosure by the MoD and freedom of information, described above, and taken together with the overall tenor of his report, it would not appear that Sir William felt himself inhibited by his terms of reference.

11. THE CRUCIAL ROLE OF INQUIRY PERSONNEL

- 11.1 Northern Ireland experience has shown us that, whatever the structure of an inquiry, the people who conduct it make a profound difference to its ability to achieve its objectives, and, in consequence, to how satisfied victims feel about the outcome. For example, of the three Cory inquiries, the Billy Wright Inquiry was the most opaque and the least user-friendly. The Inquiry watered down Judge Cory's definition of collusion, and then found that there had been none, despite finding a catalogue of failings on the part of the authorities that contributed to Billy Wright's murder inside the Maze prison. Unsurprisingly, Billy Wright's father, David Wright, was deeply dissatisfied with the result. The Rosemary Nelson Inquiry ducked the issue of alleged official collusion in her death altogether. Her family were satisfied that attempts to

¹³² [In the matter of an application by Hugh Jordan for judicial review \[2004\] NICA 29 \(1\)](#)

¹³³ Baha Mousa Inquiry Report, Part I, Chapter 1, paragraph 1.5
http://www.bahamousainquiry.org/f_report/vol%20i/Part%20ii/Part%20ii.pdf

¹³⁴ Ibid, paragraph 2.11

blacken Rosemary Nelson's character did not succeed and that the authorities were blamed for not preventing her murder, but not all their questions were answered. The report of the Robert Hamill Inquiry is still awaited, but the fact that it's Interim Report led to a prosecution has satisfied the family.

- 11.2 In the case of the Baha Mousa Inquiry, those with responsibility for ensuring that the inquiry was effective all made a significant contribution to achieving that end. The Chair, Sir William Gage was rigorous and robust. Counsel to the Inquiry Gerard Elias QC and his team were exhaustively thorough and clearly worked extremely hard in order to keep the Inquiry on schedule, without losing sight of their overview of the proceedings. Similarly, Rabinder Singh QC and his team, who represented Baha Mousa and the other detainees, instructed by Phil Shiner of Public Interest Lawyers, ensured that no stone was left unturned in order to obtain justice for their clients. This was a contentious and contested inquiry, but none of these crucial personnel allowed that fact to daunt them.
- 11.3 Also crucial to the success of any inquiry is the amount of preparation that goes into it and the way in which it is conducted, and these matters are considered later in this report.

12. **OTHER PROCEDURAL ASPECTS OF THE BAHA MOUSA INQUIRY FROM A HUMAN RIGHTS PERSPECTIVE**

- 12.1 The first hearing of the Baha Mousa Inquiry was held in July 2009. Hearings were held on 115 days, with closing submissions in October 2010. 277 witnesses gave oral evidence, mostly in person but occasionally by video link for reasons of ill-health or residence/service abroad. A further 111 witness statements were read into the record of the Inquiry. Many thousands of documents were perused by the Inquiry and 10,600 were deemed to be relevant.¹³⁵ Its report was produced in September 2011 and runs to three volumes and 1,366 pages.
- 12.2 In addition to the matters already examined in this report, we now turn to look at a number of other issues:
- the scope of the Inquiry
 - the degree to which it achieved transparency
 - the extent to which it was able to hold anyone to account
 - the standard of proof it adopted
 - victim participation, and
 - fairness.
- 12.3 Finally, we examine the cost of the Inquiry; its findings and recommendations; reactions to them; whether it was able to deliver a human rights-compliant, effective investigation; and what lessons, if any the Baha Mousa Inquiry holds for the future.

¹³⁵ Ibid, paragraphs 1.8 – 1.9

13. THE SCOPE OF THE INQUIRY

13.1 As has been seen above, the issue of whether the European Convention on Human Rights applied to Baha Mousa had been settled by the House of Lords in *Al-Skeini*, before the Baha Mousa Inquiry commenced, but the issue of whether it applied to the other detainees had to await the outcome of the ruling by the European Court of Human Rights, which did not issue until July 2011, by which time the Inquiry was writing its report. In practice, the Inquiry does not appear to have drawn any distinction between Baha Mousa and his fellow detainees, an approach which was vindicated when the Court found that the other detainees did come within the remit of the Convention.

13.2 The Inquiry followed what has become standard practice by publishing a list of issues and dividing its work into modules. These matters determine the shape of the inquiry. On 17th November 2008 the legal team to the Inquiry published an *Issues List*. The *Issues List* is signed by Counsel to the Inquiry but it must have received the authorisation of the Chair and the Core Participants would have been consulted about its contents. Best practice would have suggested that the list be put out to public consultation, as happened in the Rosemary Nelson Inquiry, but the time constraints on the Baha Mousa Inquiry may have precluded this. The full list is reproduced at Annex C¹³⁶.

13.3 The Issues were divided into four modules:

Module 1: The history of what has been labelled “conditioning techniques”

Module 2: Baha Mousa and the other detainees

Module 3: Training and the Chain of Command

Module 4: The future.

Opening submissions by Counsel to the Inquiry and other Counsel took place between 13th July 2009 and 23rd July 2009 followed by the Summer Recess. Modules 1, 2 and 3 started on 21st September 2009 and ran until 10th June 2010. Closing submissions by counsel were made between 19th July 2010 and 22nd July 2010 and Module 4 evidence was taken between 5th October 2010 and 14th October 2010 following the 2011 Summer Recess.

13.4 The direction the Inquiry wanted to take was clear from a number of questions asked and points raised in the *Issues List*. For example,

¹³⁶ See http://www.bahamousainquiry.org/linkedfiles/baha_mousa/key_documents/issues_list.pdf

Module 1 specifically addressed the use of the five conditioning techniques after the introduction of internment (detention without trial) in Northern Ireland in 1971 and the subsequent European Court of Human Rights case of Ireland v UK in which the five techniques were defined as amounting to inhuman and degrading treatment. In relation to Baha Mousa and the other victims/detainees, the *Issues List* specifically asks “Who was responsible for the cause of his death?” directly leading to the attribution of responsibility, as permitted by the terms of reference. Module 3 was to examine what training and guidance was given and what orders were issued to those in 1 QLR involved in the detention, and to follow the chain of command upward in relation to these matters. Specifically Question 23 asks “Within the wider and higher Army chain of command and MoD, who knew that ‘conditioning techniques’ were being used?” This question demonstrates that the Inquiry placed a broad interpretation on its terms of Reference, enabling a wider examination of accountability and responsibility beyond 1 QLR. Interestingly the *Issues List* notes the following (original square brackets):

“[Note: within this Module the Inquiry will not consider allegations regarding any specific incidents other than the arrest and detention of Baha Mousa and the other detainees. However, strictly limited to the extent necessary properly to examine issues 23 and 24, the Inquiry will obtain evidence from 1 Black Watch (the predecessor Battalion to 1 QLR) and from those at the TIF concerning the use (if any) of the five techniques prior to 14 September 2003.]”¹³⁷

- 13.5 Module 4 was to consider what happened since 2003 in relation to ‘conditioning techniques’ and to examine any appropriate recommendations for the future. The *Issues List* asks at Question 30 “Specifically, what if any, instructions are now given in relation to the use or otherwise of ‘conditioning techniques’?” This goes directly to the suggestion in the litigation in Ali Zaki Mousa and Others that abuse, including “conditioning” and other forms including “harshing”, was suffered on greater scale than originally considered, for a prolonged period of time beyond 2003 and at a widespread level beyond 1 QLR, and that it was interpreted sanctioned at a senior military and possibly also political level. It also shows that the Baha Mousa Inquiry its terms of reference, and hence its scope, very broadly indeed. Had it not been for the Protocol agreed with the MoD, this might have been an example of a situation where the Secretary of State could have used his powers under the Inquiries Act 2005 to limit the scope of the Inquiry.

14. TRANSPARENCY

- 14.1 Since an inquiry is a remedy of last resort, its examination of events and its report are likely to provide the final official account¹³⁸, at least until

¹³⁷ Ibid, page 4 (TIF stands for Theatre Internment Facility)

¹³⁸ With the unique exception of the Bloody Sunday Inquiry, which repeated the ill-judged Widgery Tribunal

such time as history can provide its judgement. Transparency is therefore crucial if the public concern which usually proceeds an inquiry is to be allayed. Indeed, Sir William Gage, in a ruling on anonymity for soldiers, emphasised the need for transparency in the following terms:

"I am very conscious of the need for the proceedings of this Inquiry to be conducted as openly and transparently as possible. This means that the hearings should so far as possible be conducted in public; evidence given to the Inquiry should be made public wherever possible so as to maintain public confidence in the Inquiry; the detainees and the families of the two deceased men should be able, so far as possible, to participate in the proceedings and should, for this reason, as a general rule know the identity of a witness; and the Inquiry's ability to hold persons to account and make recommendations should be inhibited to the least possible extent."¹³⁹

In order to examine the transparency of the Baha Mousa Inquiry, we consider the following matters:

- the conduct of the Inquiry
- Restriction Orders made by the Chair
- the number of times the Inquiry sat in camera
- the Inquiry's approach to anonymity
- its approach to redaction, and
- the Inquiry's website.

14.2 The conduct of the Inquiry

14.2.1 Before commencing hearings of its four modules, the Inquiry held three Directions Hearings, necessary in the absence of a detailed procedural code. Such hearings serve to ensure that all preliminary matters have been determined and that all parties have had the opportunity to make submissions on matters such as disclosure and anonymity, contested Core Participant status, the interpretation of the terms of reference and the making of Restriction Orders. Directions Hearings result in Orders being made the Chair.

14.2.2 The Baha Mousa Inquiry Directions Hearings took place during the six months between December 2008 and June 2009. On 6th January 2009, after the first Directions Hearing, Sir William Gage issued an Order¹⁴⁰ which dealt with extensions of undertakings of protection against criminal and disciplinary proceedings based on evidence disclosed to the Inquiry. These are dealt with in detail under the section on

¹³⁹ Ruling on Anonymity Applications, paragraph 33
http://www.bahamousainquiry.org/linkedfiles/baha_mousa/key_documents/genericrulingonanonymityforpublication268112.pdf

¹⁴⁰ Rulings (First Directions Hearing)
http://www.bahamousainquiry.org/linkedfiles/baha_mousa/key_documents/rulings1.pdf

accountability below. On 5th February 2009 another Order¹⁴¹ was made, following the second Directions Hearing. This concerned an application made on behalf of some of the detainees for anonymity, and is dealt with in the section on anonymity below. This Order was a public version of a longer Order, restricted to Core Participants, in order not to frustrate the object of ruling on anonymity. No Order followed the third Directions Hearing.

14.2.3 Crucial to the transparency of any inquiry is the extent to which all participants feel that every relevant question has been put. The Inquiries Act 2005 does not provide a right for Core Participants to cross-examine witnesses. Section 17 of the 2005 Act gives the Chair of Inquiry discretion to determine the procedure in an inquiry, subject to the provisions of the Inquiry Rules 2006. Rule 10 of the 2006 Rules provides that Counsel to the Inquiry and the inquiry panel may ask questions of witnesses subject to (a) the discretion of the Chair to direct that a witness' own legal representative may ask him questions; (b) a right for the legal representatives of the Core Participants to apply to the Chair to cross-examine and (c) a right for legal representatives of non-Core Participant to cross-examine. In general questioning by Counsel to the Inquiry is deemed sufficient. In the Rosemary Nelson Inquiry, for example, all questions were put by Counsel to the Inquiry. A legal challenge¹⁴² to this procedure by the Police Service of Northern Ireland failed.

14.2.4 In the Baha Mousa Inquiry, Sir William Gage determined that all Core Participant legal representatives be permitted to cross-examine for ten minutes following examination by Counsel to the Inquiry. This process was facilitated by a Protocol¹⁴³ whereby legal representatives submitted issues and topics for questioning to Counsel to the Inquiry in advance of the witness evidence, and he then indicated which areas he would pursue, which matters legal representatives could pursue, and which issues were regarded as falling outside the terms of reference and so would be the subject of an application to the Chair. Applications could also be made to Chair to extend the period of cross-examination of particular witnesses. This was the model followed in the Robert Hamill Inquiry. It has generally been agreed that the Baha Mousa Witness Protocol worked well.¹⁴⁴

14.2.5 Jason Beer describes this model of inquiry as hybrid, not being as adversarial as the model used in the Billy Wright Inquiry, or as restricted

¹⁴¹ Open Ruling (Second Directions Hearing)
http://www.bahamousainquiry.org/linkedfiles/baha_mousa/key_documents/rulings2.pdf

¹⁴² Chief Constable of Police Service of Northern Ireland, Re Judicial Review, [2008] NIQB 9

¹⁴³ This Protocol has not been made public

¹⁴⁴ *The Role of the Victims and their Families*, by Tessa Hetherington, *Public Inquiries Conference*, Lexis Nexis, 12 October 2011 at note 115 paragraphs 29 – 36, pages 10 – 12, and comment of Phil Shiner of Public Interest Lawyers, who represented the victims, to BIRW

as that used in the Rosemary Nelson Inquiry. Beer lists the advantages and disadvantages of the three models. In relation to the Baha Mousa Inquiry he considers that it engenders a sense of participation amongst the participants and ensures fairness to the witnesses through ample preparation time and the issuing of warning notices if they are to face critical questioning. Beer notes that the disadvantage of this model is that it places the burden on Counsel to the Inquiry and requires an interventionist Chair.¹⁴⁵ From our own observation, we would note that it can be confusing for witnesses when questions from all corners of an inquiry are channelled through one voice, and that Counsel who represent Core Participants often find it frustrating to sit as silent observers of the proceedings for hours at a time.

14.2.6 Module 1 dealt in detail with the history of "conditioning techniques". Module 2 dealt with what happened to Baha Mousa, with Colonel Mousa and the detainees giving evidence, as well as soldiers and other eye witnesses. The oral evidence in Module 3, which looked at training and the chain of command, came from members of the armed forces, serving and retired civil servants and politicians. The oral evidence in Module 4, which looked to the future, was taken in two parts. The first examined the military perspective. This covered policy and doctrine; detention practice on operations; medical issues; specialist training; and finally the wider training in the three armed services. The second considered the evidence of the nominated Inquiry Experts. These were: Professor Brice Dickson, a human rights expert; Professor Sir Adam Roberts, who has written extensively on international legal matters, including the laws of war; Dr Jason Payne James, a leading forensic physician; Dame Anne Owers, formerly the Chief Inspector of Prisons, who had visited military facilities in Afghanistan; Mr Jon Collier of the National Offender Management Service, who provided a helpful report on control and restraint matters; and lastly, Professor Vivienne Nathanson, Director of Professional Activities at the British Medical Association.

14.2.7 Three NGOs made written submissions on Module 4: ourselves¹⁴⁶, Redress¹⁴⁷ and Human Rights Watch¹⁴⁸. BIRW observed as much of the oral evidence as possible and produced summaries of the lengthy daily inquiry transcripts which we posted on our website.

14.2.8 With the single exception of public consultation on the *List of Issues*, the Baha Mousa Inquiry achieved a high degree of transparency, particularly in view of its relatively short timescale.

¹⁴⁵ *Public Inquiries*, by Jason Beer, Oxford University Press, 2011 note 13 at paragraphs 5.176 – 5.190, page 230 – 234

¹⁴⁶ <http://www.birw.org/reports/submissions/BahaMousaSubmission.pdf>

¹⁴⁷ See

http://www.redress.org/downloads/publications/Submission_for_Baha_Mousa_Inquiry_13_September2010.pdf

¹⁴⁸ <http://www.hrw.org/news/2010/09/24/baha-mousa-submission-module-4>

14.3 Restriction Orders made by the Chair

- 14.3.1 As has been seen, the Protocol entered into with the MoD laid the emphasis on any Restriction Orders under the Inquiries Act 2005 being made by the Chair rather than the Secretary of state, who in fact refrained from issuing any Restriction Notices.
- 14.3.2 Sir William Gage issued six Restriction Orders in the course of the Inquiry.
- 14.3.3 The first was made on 5th February 2009 as part of the Order made following the second Directions Hearing¹⁴⁹. It confirmed an interim Order on anonymity for some of the detainees.
- 14.3.4 The second was made on 16th July 2009 and related to previous day's hearing, Day 3. It ruled that no-one may reveal any matter redacted by the Chair at pages 128 – 130 of the transcript of Day 3.¹⁵⁰ This is a perfect example of the frustrations that Restriction Orders can cause. These passages of Counsel to the Inquiry's opening remarks were heard in open court, no doubt with journalists and perhaps others present and taking notes, yet that are not to be reported. These redactions referred to a document entitled *HUMINT* [human intelligence] *operations in Support of UK forces deployed on Op Telic*.
- 14.3.5 The third Restriction Order was made in relation to Day 47, 18th January 2010, two days after the hearing. It too referred to redaction in the transcript.¹⁵¹ However, this is puzzling, as there appear to be no redactions at all in the transcript.
- 14.3.6 The fourth referred to Day 61, 17th February 2010, and was made on the same day. Once again, it concerned redactions in the transcript.¹⁵² The redactions referred to the name of someone who had been granted anonymity that had been inadvertently revealed, and to details of army training for soldiers who might be captured and questioned.
- 14.3.7 Unlike other Orders made by the Chair, none of these Restriction Notices gave any reasons, do doubt because to do so would have defeated the object of the exercise, but they certainly did not contribute to transparency.

¹⁴⁹ Open Ruling (Second Directions Hearing)
http://www.bahamousainquiry.org/linkedfiles/baha_mousa/key_documents/rulings2.pdf

¹⁵⁰ See
http://www.bahamousainquiry.org/linkedfiles/baha_mousa/key_documents/rulings/restrictionordertranscript-day3160709.pdf

¹⁵¹ See
http://www.bahamousainquiry.org/linkedfiles/baha_mousa/key_documents/rulings/restrictionordertranscript-day47200110.pdf

¹⁵² See
http://www.bahamousainquiry.org/linkedfiles/baha_mousa/key_documents/rulings/restrictionordertranscript-day611702102.pdf

14.3.8 On 8th September 2011 the Chair made a general Restriction Order (referred to on the Inquiry's website as a "global" Restriction Notice), ordering that all redacted material could not be disclosed until further notice either from the Inquiry or from the Minister for State¹⁵³.

14.3.9 The sixth and final Restriction Order was an amendment to what is referred to as the Restriction Order (Detainees), which had been made following the second Directions hearing. Made on 13th September 2011, this sixth Restriction Order released detainee Radif Taher Muslim, formerly referred to as D003, from anonymity.¹⁵⁴

14.3.10 Although Restriction Orders were used with restraint by Sir William Gage, the fact that four out of six of them concerned redacting material already heard in open court underlines BIRW's concerns about this aspect of the Inquiries Act 2005.

14.4 **The number of in camera hearings**

14.4.1 To the best of our knowledge, there were only two brief sessions held in private throughout the Inquiry. On neither occasion were the legal representatives of the Core Participants excluded.

14.4.2 On 23rd March 2010, the final part of the evidence given by the witness known as SO34, who was a senior MoD policy adviser on Operation Telic, was given in camera¹⁵⁵. The other closed session heard sensitive evidence from one of the victim Core Participants¹⁵⁶.

14.5 **Anonymity**

14.5.1 The Inquiry granted 39 witnesses anonymity. Seven of these were detainees, 30 were soldiers, and there were two others (0-001 and 0-002) whom we have not been able to identify. Witness 0-001 is listed in the table of witnesses supplied in Part I of the Baha Mousa Inquiry Report¹⁵⁷, but does not appear on the witness schedule supplied on the Inquiry's website¹⁵⁸.

14.5.2 In an Interim Anonymity Order on 19th January 2009, seven detainees were granted anonymity – only Baha Mousa, Colonel Mousa, Ahmad

153 See http://www.bahamousainquiry.org/linkedfiles/baha_mousa/key_documents/globalrestrictionorder8911.pdf

154 See http://www.bahamousainquiry.org/linkedfiles/baha_mousa/key_documents/amendmenttorestrictionorderdetaineesred003130911.pdf

155 See http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_220310/summaryofproceedingswc220310v1.pdf

156 Email from Tessa Hetherington to BIRW, 28 February 2012

157 Baha Mousa Inquiry Report, Part I, page 33
http://www.bahamousainquiry.org/f_report/vol%20i/volume%20i.pdf

158 See http://www.bahamousainquiry.org/baha_mousa_inquiry_evidence/evidencev1.htm

Taha Mousa Matairi and Kifah Taha Mousa Matairi (who had died before the Inquiry began) were named. In a Restriction Order issued as part of the Order made after the second Directions Hearing¹⁵⁹, the Interim Anonymity Order was made permanent because the Chair accepted that the lives of these seven detainees were at risk in Iraq. One of the detainees, Ahmed Maitam, formerly known as D007, was later named, we believe at his own request. On 13th September 2011 Radif Taher Muslim, previously known as D003, had his anonymity removed¹⁶⁰, again at his own request, to the best of our knowledge.

14.5.3 On 31st August 2011 the Inquiry issued a Generic Ruling on Anonymity¹⁶¹, making public a ruling he had first made in July 2009 concerning anonymity for certain soldiers. The Chair ruled that the test for providing anonymity, and in some cases screening from public view, was a common law test seeking to balance the level of threat faced by any individual soldier against the need for transparency, and was essentially a test of fairness. In the course of his ruling he had regard to litigation arising out of three Northern Ireland inquiries. In satellite litigation arising from the Rosemary Nelson Inquiry, the Northern Ireland Court of Appeal had ruled¹⁶² that Lord Woolf in R v Lord Saville of Newdigate ex parte A and Others (a case arising out of the Bloody Sunday Inquiry) did not propound a rule of general application that compelling justification was required before anonymity could be refused where a risk to life arose. In another case, arising out of the Robert Hamill Inquiry¹⁶³, the House of Lords ruled that requests for anonymity were essentially matters of common law “with an excursion, if the facts require it, into the territory of Article 2”.

14.5.4 If a witness was screened from public view, the public gallery was cleared and anyone in the audience was moved to the press gallery, where the video link was turned off but the audio feed remained open, so that the evidence could be heard in public¹⁶⁴.

14.6 Redaction

14.6.1 In its report the Inquiry cited the following reasons for reacting documents, “... national security, personal safety, privacy and other grounds”¹⁶⁵.

¹⁵⁹ See http://www.bahamousainquiry.org/linkedfiles/baha_mousa/key_documents/rulings2.pdf

¹⁶⁰ See http://www.bahamousainquiry.org/linkedfiles/baha_mousa/key_documents/amendmenttorestrictionorderdetaineesred003130911.pdf

¹⁶¹ See http://www.bahamousainquiry.org/linkedfiles/baha_mousa/key_documents/genericrulingonanonymityforpublication268112.pdf

¹⁶² In re A and Others Application [2009] NICA 6

¹⁶³ In re Officer L [2007] 1 UKHL 36, per Carswell LJ, paragraph 19

¹⁶⁴ Email from Tessa Hetherington to BIRW, 28 February 2012

¹⁶⁵ Baha Mousa Inquiry Report, Part I, Chapter 1, paragraph 1.8
http://www.bahamousainquiry.org/f_report/vol%20i/Part%20I/Part%20I.pdf

14.6.2 The Core Participant most likely to want to make redactions was the MoD, as and has been seen Sir William Gage entered into a detailed Protocol¹⁶⁶ with them which ensured that he was the final arbiter of what would and would not be redacted. It was our impression that the majority of redactions concerned personal information. The Inquiry website made available the vast majority of material.

14.6.3 There was one area, however, where there was a serious contest. The MoD failed to disclose interrogation training material to the Inquiry. The discovery of this undisclosed material resulted from the satellite Baha Mousa litigation in the case of Ali Zaki Mousa.¹⁶⁷ The controversial material was leaked.¹⁶⁸ An MoD spokesperson told the media:

"The Baha Mousa inquiry is examining in detail the MoD's current detention practices, including the training of tactical questioning and interrogation and the MoD has given evidence on this subject. This evidence is a matter of public record and it would be inappropriate for us to comment further outside that forum. We are committed to learning all possible lessons from the inquiry and are giving it our full support."¹⁶⁹

The materials were passed to the Baha Mousa Inquiry and the Core Participants, but were not raised in public and therefore did not appear on the Inquiry's website. The Inquiry was told they were no longer used by the MoD.¹⁷⁰

14.6.4 On the day the Baha Mousa Inquiry Report was published Sir William Gage issued what he called a general Restriction Order in relation to redactions made to evidence and documents released by the Inquiry. The total number of documents covered was 2,126.¹⁷¹ Thus around 20% of the 10,600 documents deemed relevant by the Inquiry were redacted to some extent.

¹⁶⁶ Please see Annex B

¹⁶⁷ Ali Zaki Mousa v Secretary of State for Defence & Another [2011] EWCA Civ 1334

¹⁶⁸ *Humiliate, strip, threaten: UK military interrogation manuals discovered*, *The Guardian*, 25 October 2010
<http://www.guardian.co.uk/uk/2010/oct/25/uk-military-interrogation-manuals>

¹⁶⁹ *British interrogation techniques advice 'included sensory deprivation'*, *The Telegraph*, 26 October 2010
<http://www.guardian.co.uk/uk/2010/oct/25/uk-military-interrogation-manuals>

¹⁷⁰ *Baha Mousa Inquiry: MoD pressed for full evidence on Iraq abuse*, *The Guardian*, 26 October 2010
<http://www.guardian.co.uk/world/2010/oct/26/baha-mousa-inquiry-interrogation-manuals>

¹⁷¹ See
http://www.bahamousainquiry.org/linkedfiles/baha_mousa/key_documents/globalrestrictionorder8911.pdf

14.7 The Inquiry website

- 14.7.1 As has become the norm, the Baha Mousa Inquiry made heavy use of technology and was therefore in a position to produce transcripts of its hearings very promptly on its website¹⁷². The Inquiry has also posted a large number of key documents on the website.
- 14.7.2 The website is well-designed and easy to use, although a few more user-friendly instructions would have been helpful. For example, it has a very useful page with the transcripts of all the hearings, showing which witness gave evidence on which day, and using hyperlinks to take the viewer to the relevant witness statement and other relevant documents, but there is no explanation of how this works, so the user is reduced to trial and error.
- 14.7.3 There is a brief section on the website in Arabic¹⁷³. This simply refers to the government statement setting up the Inquiry, its statutory basis, and its terms of reference. It contains links to Sir William Gage's opening statement and to the Inquiry's list of issues in Arabic, but makes no mention of whether or not the Inquiry's report is available in Arabic. The section of the website that contains the report¹⁷⁴ makes no reference to the availability of an Arabic version either. While it would doubtless have been expensive to translate the whole report into Arabic, to have done so would have sent a clear message to Iraqis in particular and the Middle East in general, as well as the wider Arabic-speaking world, about the willingness of the United Kingdom to uphold transparency and accountability. The failure even to translate the report's main findings and recommendations into Arabic sends the unfortunate message that the victims whose human rights had been so seriously violated were not seen as being at the heart of the Inquiry process, and that the Inquiry was mainly focussed on its domestic audience.

15. ACCOUNTABILITY

- 15.1 When the Secretary of State for Defence announced the Baha Mousa Inquiry he promised that "the Army and the Ministry of Defence will be giving the fullest co-operation to this inquiry."¹⁷⁵ With the exception of the non-disclosure of army interrogation training manuals mentioned above, by and large this promise was fulfilled. In his report Sir William Gage expressed his "gratitude to the legal representatives and advisers of all Core Participants for their spirit of co-operation throughout the Inquiry"¹⁷⁶.

¹⁷² <http://www.bahamousainquiry.org>

¹⁷³ See http://www.bahamousainquiry.org/arabic_home/index_arabic.htm

¹⁷⁴ See <http://www.bahamousainquiry.org/report/index.htm>

¹⁷⁵ See Hansard, Column 61WS, 14th May 2008, at <http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080514/wmstext/80514m0001.htm#08051459000004>

¹⁷⁶ Baha Mousa Inquiry Report, Part I, Chapter 1, paragraph 1.7 http://www.bahamousainquiry.org/f_report/vol%20i/Part%20I/Part%20I.pdf

15.2 Undertakings

- 15.2.1 As has become standard practice in inquiries, Sir William Gage sought and obtained an undertaking from the Attorney General that no criminal charges would be brought against anyone based on written, oral or documentary evidence provided to the Inquiry. The undertaking did not protect anyone who gave false evidence or who had committed an offence under s. 35 of the Inquiries Act 2005, which covers suppressing or failing to disclose evidence.¹⁷⁷ Such undertakings are intended to encourage witnesses to be honest and, in effect, to waive the privilege against self-incrimination.
- 15.2.2 At the first Directions Hearing Counsel for the MoD and some of the soldiers successfully argued for an extension of this undertaking to prevent the use of evidence given to the Inquiry being used for the purpose of deciding whether to bring criminal proceedings, including a court martial, against anyone. The Attorney General agreed to this proposal.
- 15.2.3 Counsel also sought a number of additional undertakings:
- a further extension of the Attorney General's undertaking to cover hearsay evidence
 - a similar undertaking to that given by the Attorney General should be sought from the DPP
 - an undertaking be given by the Permanent Under-Secretary of the MoD and/or by the Heads of the Armed Services that no material provided by a witness to the Inquiry would be used in any administrative proceedings to his detriment in the future or against any other witness to the Inquiry
 - an undertaking by the Secretary of State for the Home Department and the Attorney-General, on behalf of the government that no record of evidence given, nor a copy of any report produced by the Inquiry would be formally or informally transmitted to a foreign state or a foreign court or tribunal.
 - an undertaking by the Secretary of State for Defence that in the event of proceedings being taken against any witness in overseas proceedings the Secretary of State would meet the witness's costs.
- 15.2.4 In his ruling on the hearsay point, which he described as “unprecedented” Sir William Gage said, somewhat sternly:
- “All counsel agree that a balance has to be struck between measures taken by the Inquiry to promote an environment which will enable it to discover the truth and the public interest enshrined in Articles 2 and 3 of the European Convention on Human Rights. In regard to the latter the Inquiry must so far as possible not only

¹⁷⁷ The Attorney-General's undertaking can be read at http://www.bahamousainquiry.org/linkedfiles/baha_mousa/key_documents/rulings1.pdf in a letter to the Inquiry dated 31 December 2008

establish the facts, but do so in such a way that those responsible for what occurred may be held accountable."¹⁷⁸

He went on to rule:

"In my judgment it is neither necessary nor appropriate to invite the Attorney-General to give this proposed undertaking in respect of hearsay evidence. The Inquiry has power to compel witnesses to give evidence. The process of examination and cross-examination of witnesses is, in my view, sufficiently robust to determine where the truth lies. Where it is appropriate to do so, I will not shrink from drawing inferences from witnesses who choose to remain silent... Soldiers are public servants, who should feel obliged to tell the truth..."¹⁷⁹

15.2.5 Sir William agreed, however, to seek similar undertakings to those made by the Attorney General from the DPP.

15.2.6 He also agreed to seek undertakings in respect of disciplinary proceedings but only where they arose from a failure to disclose relevant evidence to a previous disciplinary or administrative hearing:

"But in my judgment, any undertaking should be limited to such failure to disclose. To go further would protect a witness from disciplinary or administrative proceedings if he or she admitted to other and possibly more serious misconduct. In such circumstances it seems to me wholly inappropriate that the authorities should be prevented from using that evidence in disciplinary or administrative proceedings against the witness or any other witness. Such a restriction would, in my view, unreasonably restrict the ability of the authorities to hold accountable by disciplinary or administrative proceedings those who had been guilty of misconduct. Nor do I think it unfair that any witness who was a defendant in the Court Martial proceedings should be at risk of administrative proceedings despite the fact that he was acquitted of charges made against him in the Court Martial."¹⁸⁰

15.2.7 Sir William dismissed as impractical and remote any need to seek undertakings before foreign courts, the key ones being the Iraqi courts and the International Criminal Court.

15.2.8 Despite this armature of undertakings, no particularly startling new admissions were made by witnesses to the Inquiry, and not all of them told the truth. For example, in relation to Donald Payne, Sir William Gage found:

¹⁷⁸ Rulings (First Directions Hearing), paragraph 26
http://www.bahamousainquiry.org/linkedfiles/baha_mousa/key_documents/rulings1.pdf

¹⁷⁹ Ibid, paragraph 27

¹⁸⁰ Ibid, paragraph 35

“While he would not admit that this behaviour by him started before Sunday evening I reject his evidence on this point and find that it started soon after the Detainees’ arrival at the TDF.”¹⁸¹

Similarly:

“Both Fallon and Crowcroft denied kicking or punching the Detainees, or seeing anyone else assault them; but they accepted that the Detainees were manhandled into stress positions and kept hooded... I reject their evidence that they neither saw nor participated in assaults.

The Inquiry has seen a video clip depicting Payne shouting, swearing and manhandling into stress positions six of the hooded Detainees in the right-hand room of the TDF. I find that the video was filmed at around 12.00hrs on Sunday 14 September 2003 and therefore near the start of the Fallon and Crowcroft stag [standing guard]. They must have witnessed this type of behaviour. Further, I suspect they know who took the video but have declined to tell the Inquiry.”¹⁸²

To give just one more example among many others;

“I do not accept that those who have admitted some violence during this incident, namely Payne, Pte Cooper, MacKenzie and Aspinall, were the only perpetrators of violence against the Detainees at this time. It is nevertheless not possible to determine with certainty the identity of those others who punched or kicked the Detainees.”¹⁸³

Sadly, when witnesses have something to hide, no number of undertakings will force them to tell the truth.

15.3 The attribution of responsibility

15.3.1 Although the Inquiries Act frowns on the attribution of liability – s. 2 (1) of the 2005 Act states:

“An inquiry panel is not to rule on, and has no power to determine, any person’s civil or criminal liability.”

it does not prohibit the attribution of responsibility, which is a crucial aspect of accountability.

15.3.2 Sir William Gage took full advantage of the phrase “where responsibility lay for approving the practice of conditioning detainees”,

¹⁸¹ Baha Mousa Inquiry Summary, paragraph 43
http://www.bahamousainquiry.org/f_report/vol%20iii/Part%20XVIII/Part%20XVIII.pdf

¹⁸² Ibid, paragraphs 49 – 50

¹⁸³ Ibid, paragraph 62

which was included in his terms of reference, in order to attribute both individual and corporate responsibility.

15.4 Individual responsibility

15.4.1 The Baha Mousa Inquiry Report is unflinching in naming and shaming, supported by robust factual evidence and a forensic analysis of the oral evidence of the perpetrators, those who were responsible for the abuse of the detainees and the tragic death of Baha Mousa. These include those directly responsible, their commanders and those who knew what was happening but refused to respond and turned a blind eye:

“It hardly needs saying that the events I have described raise very serious concerns about discipline within 1 QLR. The assaults were not perpetrated by just one or two rogue individuals. I have found that at least nineteen different men were involved in assaulting the Detainees. They did so in the middle of the Battlegroup’s main camp, in a building with no doors, apparently with little regard for the consequences of being caught. At least three senior NCOs were personally involved in the assaults. And I have found that several officers must have been aware of at least some of the abuse. There was undoubtedly a severe breakdown in military discipline on this particular occasion.”¹⁸⁴

He summarised his findings under the uncompromising heading, “Loss of Discipline and Moral Courage”.¹⁸⁵

15.4.2 Sir William identified a number of key individuals as bearing responsibility:

- Corporal Donald Payne “bears a very heavy responsibility”;
- Lieutenant Craig Rogers “must take responsibility for the serious instances of ill-discipline of members of his Multiple”;
- Lieutenant Colonel Jorge Mendonça: “As commanding officer, he ought to have known what was going on in the building long before Baha Mousa died”;
- Provost Sergeant Paul Smith: “He ought then to have made time to go the TDF¹⁸⁶ to supervise Payne”;
- Regimental Sergeant Major George Briscoe “ought to have known what was going on. The role of the RSM has been described as being the eyes and ears of the Adjutant and the Commanding Officer (CO). The RSM, in part, is also responsible for the discipline of the soldiers and the Non-Commissioned Officers (NCOs). Had this function been carried out properly Briscoe should have

¹⁸⁴ Baha Mousa Inquiry Report, Part II, Chapter 20, paragraph 2.1330
http://www.bahamousainquiry.org/f_report/vol%20i/Part%20II/Part%20II.pdf

¹⁸⁵ Baha Mousa Inquiry Report, Summary, paragraph 203
http://www.bahamousainquiry.org/f_report/vol%20i/Part%20II/Part%20II.pdf

¹⁸⁶ Temporary Detention Facility

discovered the abuse of the Detainees being perpetrated in the TDF”;

- Adjutant Mark Moutarde “accepted it was highly likely that he visited the TDF after the death of Baha Mousa, although again he had no recollection of doing so. If he did so, he must have seen the disgusting conditions”;
- Major Michael Peebles’ “failure to order conditioning to cease prolonged the ordeal the Detainees were subjected to and was an unacceptable failure”;
- Commander Richard Englefield: “In some respects Englefield was an unsatisfactory witness whose credibility was undermined by two notable aspects of his evidence. Firstly, he attempted to say that Pte David Fearon had not stolen money from the Hotel; secondly, Englefield had referred in an SIB statement to the use of hoods as a method to ‘break’ detainees. During his oral evidence to the Inquiry, initially, but without success, Englefield tried to deny the plain English meaning of this aspect of the account he had given to the SIB.”¹⁸⁷
- 2nd Lieutenant Crosbie: “A guard demonstrated to Crosbie ‘the choir’ by kicking the Detainees on their backs causing them to make some noise such as a cry or groan. Crosbie then left the TDF as he thought what he had seen was distasteful. He assumed the soldier would stop, but he took no action to stop him nor did he report what he had seen. This was a serious and inexcusable breach of duty.”¹⁸⁸

15.4.3 The Baha Mousa Inquiry Report includes a table¹⁸⁹ under the heading “Those Responsible for Violence and Broader Issues Raised by the events of 14th to 16th September 2003”. The table contains the headings: Name, Rank, Description of Assault or Offence and a cross reference to the relevant paragraph in the Report. For example:

Fallon	Pte	Indulged in acts of gratuitous assaults on the Detainees. Indulged in violent and unjustified conduct against the Detainees in the course of his stag (standing guard).	2.441 2.447
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15.4.4 In addition, Sir William named those individuals who knew what was happening to the detainees but did nothing about it. He was

¹⁸⁷ These extracts are taken from the Baha Mousa Inquiry Summary, paragraphs 217 – 252

http://www.bahamousainquiry.org/f_report/vol%20iii/Part%20XVIII/Part%20XVIII.pdf

¹⁸⁸ Ibid, paragraph 53

¹⁸⁹ Baha Mousa Inquiry Report, Part II, Chapter 20, paragraph 2.1312

http://www.bahamousainquiry.org/f_report/vol%20ii/Part%20II/Part%20II.pdf

particularly critical of the priest attached to 1 QLR and the doctor who pronounced Baha Mousa dead

15.4.5 Of Father Peter Madden he said:

"I find it inconceivable that when Madden went into the TDF he could not have observed what others had seen and described, namely the appallingly squalid conditions in the TDF and the obvious distress of the Detainees. Having reached this conclusion, it is inevitable that Madden, in my opinion, ought either to have intervened there and then or, more realistically, straight away reported it up the chain of command. It is a matter of regret that he did not find the courage to do either."¹⁹⁰

15.4.6 Sir William had this to say about Dr Derek Keilloh:

"I find it difficult to accept that, when attempting to resuscitate Mousa, he did not see signs of mistreatment to his body."¹⁹¹ "He [Saxton] even saw some of Baha Mousa's blood on Keilloh's face, and thought he commented on this to Keilloh. It follows that the only person apparently not to notice any injuries to Baha Mousa's body was Keilloh."¹⁹²

15.4.7 The post mortem carried out by Dr Ian Hill describes the true extent of the abuse inflicted on Baha Mousa, which could hardly have been missed by Dr Keilloh and was summarise by the Inquiry as follows:

"There is no dispute that Baha Mousa's body had sustained 93 different external injuries, as well as numerous internal injuries. In summary, Dr Hill identified multiple bruises and grazes situated on the head, neck, torso and the upper and lower limbs. There was distortion, swelling and bleeding from the nose, which had been fractured. There was slight swelling of the brain, a large area of bruising on the left side of the chest measuring 12 cm x 10 cm, and fractures of the 7th and 8th ribs close to the spine and the 8th and 9th ribs in the mid axillary line."¹⁹³

Dr Hill Concluded:

"...I support the view that his bodily injuries contributed to his death because, in my opinion, the accumulation of other injuries and insults to the body would have acted detrimentally on his body's functioning. The injuries would have caused pain and he had been

¹⁹⁰ Baha Mousa Inquiry Report, Part II, Chapter 14, paragraph 2.844
http://www.bahamousainquiry.org/f_report/vol%20i/Part%20ii/Part%20ii.pdf

¹⁹¹ Baha Mousa Inquiry, Summary,, paragraph 188
http://www.bahamousainquiry.org/f_report/vol%20iii/Part%20xviii/Part%20xviii.pdf

¹⁹² Baha Mousa Inquiry Report, Part II, Chapter 19, paragraph 2.1240
http://www.bahamousainquiry.org/f_report/vol%20i/Part%20ii/Part%20ii.pdf

¹⁹³ Baha Mousa Inquiry Report, Part II, Chapter 16, paragraph 2.1005
http://www.bahamousainquiry.org/f_report/vol%20i/Part%20ii/Part%20ii.pdf

kept in a hot environment and subjected to stress and all of these would have contrived to make him unwell adding to the load of adverse stimuli caused during the final struggle."¹⁹⁴

15.5 Corporate Responsibility

15.5.1 Before the Baha Mousa Inquiry Report had been published it was known that there were many other cases of abuse by members of the British army against Iraqi civilians in south eastern Iraq. The litigation bought by Public Interest Lawyers in Ali Zaki Mousa and Others represents 100 claims including that of Ali Kaki Mousa:

"The Claimant, an Iraqi citizen, was arrested on 16 November 2006 by British soldiers. They beat him severely, slammed him against a wall and forced him into a stress position in which they stood on his knees and back. His 11 month old son's arm was stamped on and broken, and his father had to urinate on himself. The soldiers removed business documents, computers, mobile telephones, licensed guns and 40 million Iraqi dinars. They hooded and handcuffed the claimant. He was transported to the BPF at COB. They beat and sat on him, then dragged him, scarring his feet. At the BPF the Claimant was initially hooded and ear muffed, then goggled. He was interrogated aggressively, struck with a stick and threatened with Guantanamo. In between sessions he was forced into a stress position in the cold for 30 hours and stoned and beaten. He was twice taken to medics, but not to the toilet, so he urinated on himself. Transported to al-Shaibah DTDF in a helicopter, cold water was poured over his head and he was kicked. On arrival he was goggled and earmuffed, forced to undress in public and examined by a medic while naked. A female saw him nude. He spent 36 days in solitary confinement in a tiny freezing cell with restricted bedding, food and water. Soldiers beat him, prevented him sleeping by banging his door and shouting insults, restricted his privacy in toileting and showering and twice had sexual intercourse in front of him. Pornographic movies were played loudly and pornographic magazines left in sight. Soldiers exposed themselves, groped each other and masturbated in front of him. Repeated interrogations involved forced standing for hours and interrogators threatening to attack his family and himself. Humiliations continued at Camp B with poor conditions, beatings, food deprivation, threats, intimate searches and intimidation with dogs. In mid 2007 the Claimant was moved to Basra airport DIF, beaten, goggled, earmuffed and cuffed, then kept in a boiling hot cell with no food or water the first day. He was released in November 2007 having had no explanation for his detention. His property was never returned."¹⁹⁵

¹⁹⁴ Ibid, paragraph 2.1023

¹⁹⁵ The Aitken Report: An Investigation into Cases of Deliberate Abuse and Unlawful Killing in Iraq in 2003 and 2004, MoD, 25 January 2008, paragraph 3 http://www.mod.uk/NR/rdonlyres/7AC894D3-1430-4AD1-911F-8210C3342CC5/0/aitken_rep.pdf

15.5.2 The MoD in set up its own Iraqi Allegations Team (IHAT), modelled to some extent on the Police Service of Northern Ireland's Historical Enquiries Team. It commenced work in November 2010 with a two-year mission to investigate allegations of abuse of Iraqi citizens by British Service personnel.¹⁹⁶ The IHAT has a staff of 83, of which 38 have been provided by private company, G4S. It will cost £7.5m and aims to take statements from more than 140 alleged victims.¹⁹⁷ The Iraqi civilians complain the abuse happened between 2003 and late 2008. The allegations include sexual abuse, deprivation of food, water and sleep, prolonged solitary confinement and mock executions.

15.5.3 The Baha Mousa Inquiry certainly found evidence of abuse of many Iraqi civilians, other than Baha Mousa and his fellow detainees, by 1 QLR evidenced, for example, in a diary kept by Private Stewart McKenzie which describes multiple incidents of verbal and physical abuse.¹⁹⁸ The Report also examines a range of individual incidents of so-called casual violence witnessed by other soldiers¹⁹⁹, and other allegations (although not always accepted by the Inquiry) including the treatment of members of the Garamsche Tribe and institutional racism and violence.²⁰⁰ However, the Report goes further than looking at incidents and allegations of abuse by C Company of 1st Battalion QLR. The Report specifically points to systemic abuse within the British army in relation to detention, internment and interrogation of Iraqi civilians and a corporate failure by the MoD:

“This position had developed over decades and was the product not only of failings but also of missed opportunities. In those circumstances, although I make comments about the role played by some individuals at certain times, it is fair and appropriate to conclude that the position outlined above was as a result of a corporate failure by the MoD.”²⁰¹

“I attribute the main fault for the inclusion of inappropriate training and/or exclusion of appropriate material to a systemic failure over a number of years. As dealt with in detail in this Report, and touched on elsewhere in this Summary, central features of this systemic failure were a wholesale lack of MoD doctrine in interrogation under which JSIO could formulate its training, and the

¹⁹⁶ See the MoD's web announcement at <http://www.mod.uk/DefenceInternet/DefenceNews/DefencePolicyAndBusiness/IraqHistoricAllegationsTeamStartsWork.htm>

¹⁹⁷ *Iraq Historic Allegations team probe 'is a shambles'*, BBC Internet News, 14 June 2011 <http://www.bbc.co.uk/news/uk-13757766>

¹⁹⁸ Baha Mousa Inquiry Report, Part III, Chapter 1, paragraph 3.5 http://www.bahamousainquiry.org/f_report/vol%20i/Part%20III/Part%20III.pdf

¹⁹⁹ Ibid. at paragraphs 3.22 – 3.42

²⁰⁰ Ibid. at paragraphs 3.43-3.65

²⁰¹ Baha Mousa Inquiry Report, Summary, paragraph 1330 http://www.bahamousainquiry.org/f_report/vol%20iii/Part%20XVIII/Part%20XVIII.pdf

lack of proper accessible legal advice and legal assessment of JSIO training".²⁰²

15.5.4 The Report was also critical of the MoD response to these allegations:

"Against this background, it would have been better had the MoD faced more squarely and more openly the mistakes and shortcomings that had already been identified in relation to hooding and tactical questioning. Many of the difficulties stemmed from what I detect was at times something of a corporate approach of taking overly defensive lines in response to difficult questions. As a result, some (but by no means all) elements of the statements, assurances and explanations about hooding and tactical questioning in 2004 were inaccurate, and several of them gave a false sense of reassurance."²⁰³

"I find that there was an unsatisfactory pattern of too many inaccurate assurances and explanations being given within the MoD statements and briefing materials."²⁰⁴

15.5.5 The Press Statement issued by Public Interest Lawyers and Leigh Day and Co Solicitors on behalf of the victims on 8th September 2011 contains a useful précis of the Report's findings on corporate failure and systemic deficiencies:

"There was a failure to plan for the Iraq conflict and its implications for prisoner handling, the Report referring to historic failures, corporate failings and missed opportunities and corporate responsibility.

There were systemic failings in training and policy shortcomings contributing to the process of unlawful conditioning including a wholesale lack of MoD guidance in relation to interrogation.

When allegations of unlawful conditioning techniques arose in the first phase of the invasion, the intelligence community defended the actions and had the support of some lawyers who were not prepared to condemn the techniques even though they took no steps to discover what they entailed.

The Government responded to emerging complaints from the International Committee of the Red Cross, Amnesty International and Members of Parliament with what the Report found to be "unsatisfactory pattern of too many inaccurate assurances and explanation". It concluded that many of the difficulties (including some statements about hooding) were misleading and stemmed

²⁰² Ibid, paragraph 318

²⁰³ Baha Mousa Inquiry Report, Part XV, paragraph 15.77
http://www.bahamousainquiry.org/f_report/vol%20iii/Part%20XV/Part%20XV.pdf

²⁰⁴ Ibid, paragraph 15.173

from what it called a corporate approach of overly defensive lines in response to difficult questions".²⁰⁵

16. THE STANDARD OF PROOF

16.1 Sir William Gage opened his statement on the *Ruling on the Standard of Proof* with the following remark:

"I indicated that my very provisional view was that I should not apply an across-the-board standard of proof but that I should adopt a flexible approach indicating the level of satisfaction which I found established in relation to any significant finding of fact which warrants such an indication. As has been correctly pointed out by a number of counsel, this approach is the one which Dame Janet Smith DBE adopted in the Shipman Inquiry and was followed in a ruling by the Bloody Sunday Inquiry".²⁰⁶

16.2 He focused on the 2005 Act and held:

"The 2005 Act makes no express provision as to what standard or degree of certainty is required before an inquiry is able to express its findings of fact or make its recommendations. In my judgment it must follow that it is for me to determine what standard I should apply when reaching my findings and whether or not I should

²⁰⁵ Statement on behalf of the victims, by Phil Shiner, Public Interest Lawyers, and Sapna Malik, Leigh Day and Co, 8 September 2011. As recently as 3 October 2011 the High Court ruled in Equality and Human Rights Commission and Ali Bazzouni v Prime Minister and Others [2011] EWHC 2401 (HC) that part of the Government's *Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas and on the Passing and Receipt of Intelligence Relating to Detainees* was not precise enough in that its language might be interpreted by individual officers as meaning that hooding by foreign liaison officers might be acceptable for particular security reasons. The Court expressed the hope that the language in the Guidelines be made more precise. In the ECtHR case of Al-Skeini the British Government sought to argue that applying the Convention to Iraq amounted to human rights imperialism. The Court rejected this and Judge Bonello memorably said:

"I confess to be quite unimpressed by the pleadings of the United Kingdom Government to the effect that exporting the European Convention on Human Rights to Iraq would have amounted to "human rights imperialism". It ill behoves a State that imposed its military imperialism over another sovereign State without the frailest imprimatur from the international community, to resent the charge of having exported human rights imperialism to the vanquished enemy. It is like wearing with conceit your badge of international law banditry, but then recoiling in shock at being suspected of human rights promotion."

See Al-Skeini v UK, section 5, paragraph 37 of his judgment.

²⁰⁶ *Ruling on the Standard of Proof*, 7 May 2011, paragraph 1 http://www.bahamousainquiry.org/linkedfiles/baha_mousa/key_documents/rulings/standardofproofruling7may2010.pdf

approach this task by adopting an across-the-board standard or a variable standard."²⁰⁷

- 16.3 He considered that the available case law and other authorities did not assist him as to whether he should apply a uniform standard of proof across the board. He proceeded to note:

"18. All counsel stressed that in making my findings I am required to act fairly. Of course, I am well aware of the need to be fair to soldiers and others whose reputations and careers may be affected by my findings. Throughout the Inquiry I have endeavoured with counsel to the Inquiry to ensure that those who may be open to criticisms are treated fairly and I am grateful to Mr Singh for his endorsement that the level of natural justice afforded to those who may be criticised has been 'above and beyond' the strict requirements of the 2006 Rules.

19. I must also be fair to the detainees who, on any view of the evidence I have so far heard, suffered serious and traumatic injuries following their arrest and detention in the TDF at Battlegroup Main between 14 and 16 September 2003. In addition, this is a Public Inquiry and it is in the public interest that my findings in the Report are expressed in such a way as can be readily understood as my judgment on what occurred, who was responsible and why I have made recommendations. In my opinion, this can best be achieved by adopting the flexible and variable standard of proof as applied in the Shipman Inquiry."²⁰⁸

- 16.4 While recognising the potential implications of his findings on individuals connected with the events being investigated by the Inquiry, and the flexibility of the standard of proof that might be adopted, Sir William Gage did not consider that this meant that he was obliged to adopt the criminal standard of proof (beyond reasonable doubt), which in any event does not fit easily with an inquisitorial (as opposed to an adversarial) model of investigation:

"20. I recognise that in relation to some issues in this Inquiry, the more serious the allegation the more cogent must be the evidence to support a finding of wrongdoing. I must as a matter of fairness bear in mind the consequences of an adverse finding to any individual against whom serious allegations are made. However, by section 2 of the 2005 Act, I have no power to determine criminal liability, and the mere fact that criminal culpability might be inferred from my findings, does not in my judgment mean that I must adopt the criminal standard in making findings of fact. On the contrary, I think that the usual starting point will be to apply the civil

²⁰⁷ Ibid, paragraph 14

²⁰⁸ Ibid, paragraphs 19 – 20

standard but taking account of the 'inherent improbability' concept where it properly applies".²⁰⁹

16.5 He concluded his ruling by indicating that:

"21. There are some cases where criminal conduct is considered in the criminal courts applying the criminal standard of proof, the facts of which arise in later civil litigation where the balance of probabilities standard falls to be applied. In order properly to report who is responsible, in my judgment, I must reserve to myself the right to state, where I find the evidence sufficient, that I find a fact proved on a balance of probabilities. To do otherwise would necessarily be to limit my findings of responsibility to the high criminal standard."²¹⁰

16.6 Once again, Sir William Gage was bold enough to make his own decision about the standard of proof he was prepared to apply and when necessary to apply the lower civil standard of the balance of probabilities. Thus he was able to attribute responsibility at many different levels, as his final report demonstrated. Sir William refuted the point that he was not empowered to make comments expressing suspicion, or some other such phrase, that an allegation is true. He was clear on this point:

"25. I do not accept that I may not make such comments. In my opinion the terms of section 24(1) (a) [of the Inquiries Act 2005] do not restrict me from doing so. In any event, as Mr. Singh pointed out, section 24(1) of the 2005 Act provides that 'The report may also contain anything else that the panel considers relevant to the terms of reference.'"²¹¹

17. VICTIM PARTICIPATION

17.1 The dictum in the Jordan case that, in order to comply with the procedural requirements of Article 2 by providing an effective investigation,

"In, all cases, however, the victim's next-of-kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests."²¹²

has become imbedded in domestic case law. It should be noted that the involvement of victims is an imperative ("must") but the scope of their involvement is circumscribed ("to the extent necessary to safeguard... legitimate interests").

²⁰⁹ Ibid, paragraph 20

²¹⁰ Ibid, paragraph 21

²¹¹ Ibid. paragraph 25; see also the commentary in *Public Inquiries*, by Jason Beer, paragraphs 9.67 – 9.72, pages 373 – 374

²¹² Jordan v the United Kingdom (2001) 37 EHRR 52

- 17.2 Tessa Hetherington, junior Counsel for the victims in the Baha Mousa Inquiry, has given consideration to the factors that will be relevant when considering the appropriate level of participation. First, the more serious the violation of the state's substantive obligation to protect life under Article 2 or freedom from torture under Article 3 the greater the need for involvement in the procedural aspect of investigation. Second, the seriousness of the case and the need for victim involvement may be increased if there are legitimate suggestions that other participants may be concealing the truth. Third, the level of connection of the victim to the subject matter of the inquiry is relevant. Finally, the extent to which the victims have been involved in prior investigations may be relevant to the level of involvement required in the public inquiry in order to meet the procedural obligations required flowing from a breach of Article 2 or 3.²¹³ The Baha Mousa Inquiry in part arose out of the failings of the internal military investigation into the events in 2003 and the flawed court martial process. In both of these processes victim participation was minimal, partly because the victims were in Iraq and the court martial took place in the UK.
- 17.3 As has already been seen, the Inquiries Act 2005 does not provide for consultation with victims over an inquiry's terms of reference. Neither does the Act expressly forbid such consultation, but in practice victims are not usually consulted, as they were not in the Baha Mousa Inquiry. On the other hand, it has become the norm that victims are granted legal representation at inquiries held under the Act. The right to be represented hangs on the grant of Core Participant status. Section 40(3) (b) of the Inquiries specifies that a Core Participant must be attending the inquiry to give evidence, or producing evidence to the Inquiry, or have a particular interest in the proceedings or outcome of the inquiry. Colonel Mousa and the other detainees clearly qualified on all three grounds. Section 40 of the Act and in the Inquiry Rules 2006 set out the criteria for funding legal representation, and this issue is examined below in the section on the cost of the Baha Mousa Inquiry to the public purse.
- 17.4 The level of victim participation is linked to the mechanisms through which the inquiry progresses, in terms of taking evidence from witnesses. Again, this issue is also related to the question of cost. With a range of Core Participants, if all legal representatives are anxious to be engaged in the process of investigation, this will inevitably lead to the cross-examination of witnesses taking place and possibly to repetitive questioning. This is time consuming and creates an adversarial as opposed to inquisitorial method of investigation. This was a criticism levelled at the Bloody Sunday Inquiry.²¹⁴ .

²¹³ Tessa Hetherington, "The Role of the Victims and their Families," *Public Inquiries Conference*, Lexis Nexis, 12 October 2011

²¹⁴ Sir Louis Blom-Cooper QC, *Public Law*, "What went wrong on Bloody Sunday: a critique of the Saville Inquiry", January 2010, pages 61-78

- 17.5 Another significant aspect of victim participation in the inquiry process is related to what Lord Justice Moses described in the case of Lin²¹⁵ as the restorative aspect, whereby the victims are enabled to confront the perpetrators:

“If those individuals, whose actions or omissions might have saved life or contributed to death, fear that they may one day have to come face to face with those who suffer as a result of what they have done or failed to do, life may be protected in future.”²¹⁶

In addition to influencing the results of an inquiry, the involvement of the victims can also assist in securing accountability during the course of an inquiry. The simple act of the victims being able to confront the individuals alleged to be responsible for the wrongs done to them or their loved one, and to watch those individuals give evidence and be cross-examined is a form of accountability.²¹⁷ Indeed, it has been BIRW’s observation at the Bloody Sunday, Rosemary Nelson, Robert Hamill and Billy Wright Inquiry that, for victims, process is as important as substance.

- 17.6 Victim participation also assists in the maintenance of public confidence in an inquiry, and therefore its ability to perform its functions. Public confidence will be inhibited if the public are aware that the victims of the ill-treatment which forms the subject-matter of the inquiry are absent from the process. This is amply demonstrated by the currently suspended Detainee Inquiry. As a non-statutory inquiry with no powers to compel and without a Core Participant model available, the decision by the detainees not to participate in this inquiry has undoubtedly fatally damaged public confidence in its credibility.
- 17.7 Victim participation requires careful consideration in practical terms. Until relatively recently only those practitioners engaged in asylum representation would have represented victims of torture, and those practitioners recognise the potentially traumatic effects of giving evidence (or even providing a witness statement) for both the victim and the representative. Recounting acts of brutality can re-traumatise an individual and palliative mechanisms should be put in place in an investigation involving allegations of such a nature. Anecdotally, Phil Shiner of Public Interest Lawyers, who represented the Baha Mousa Inquiry victims/detainees, has commented that no support mechanisms were available to his clients or his legal team either prior to the Inquiry or during the Inquiry itself. In addition, during the Baha Mousa Inquiry, there was no separate space provided for victims, so they had the possibility of sitting with or encountering the perpetrators; these problems were exacerbated because the victims required simultaneous interpretation from Arabic to English. These practical

²¹⁵ R (Lin) v Secretary of State for Transport [2006] EWHC Civ 2575 (Admin)

²¹⁶ This point was reiterated by Professor Ian Kennedy, Chair of the Bristol Royal Infirmary Inquiry http://www.bristol-inquiry.org.uk/final_report/sect1_chapter_2_8.htm

²¹⁷ Ibid and also Tony Marshall, *Restorative Justice: An Overview*, Report of the Home Office Research and Development and Statistics Directorate, 1999

aspects of victim participation in inquiries have been examined by BIRW's Director, Jane Winter, who has substantial experience of assisting families and making submissions to a number of statutory inquiries.²¹⁸

18. FAIRNESS

- 18.1 The procedures followed by the Baha Mousa Inquiry were governed by three sets of principles:
- those laid down by the Inquiries Act 2005 and the Inquiries Rules 2006
 - the procedural obligations arising under Articles 2 and 3 , and
 - the residual common law principles of fairness and natural justice.
- 18.2 Sir William Gage chose to sit alone as the Chair of the Baha Mousa Inquiry, which meant that he was the sole arbiter of which procedures to adopt and was solely responsible for ensuring that those procedures were fair.
- 18.3 Sir William devoted a whole section of his report to his approach to his task. He noted that he had had to consider a large volume of evidence which in some respects sharply conflicted. He explained that he had sought undertakings of non-prosecution in the hopes of overcoming the closing of ranks observed by Mr Justice McKinnon at the court martial and what the media had termed a “wall of silence” on the part of soldiers. When soldiers gave evidence that contradicted that they had given at the court martial, Sir William took those undertakings into account in assessing the credence that could be placed on the evidence now given to the Inquiry. He reminded himself that he was enquiring into events that had taken place seven years previously, and that memories could have been affected the passage of time, although he did not believe some soldiers' claims to have no recollection of those events. He recognised that some of the detainees' identification of individual soldiers was necessarily unreliable and that some soldiers might blame others in order to exculpate themselves. He gave his reasons for having adopted a variable standard of proof. He explained that, in view of the fact that many witnesses had supplied more than one account of their actions, at different times and in different situations, he had decided to assess witnesses on the basis of their oral evidence to him, which was given first hand and in the light of all that had emerged prior to and during the Inquiry. Finally, he freely admitted that he had not been able to resolve every conflict of evidence, but said that he had sought to make findings on all relevant matters.²¹⁹ In this way, Sir William demonstrated that he was an experienced judge who has approached a difficult task both fairly and firmly.

²¹⁸ *The Role of the Victims and their Families*, by Jane Winter, Public Inquiries Conference, Lexis Nexis, 12 October 2011

²¹⁹ Baha Mousa Inquiry Report, Part II, Chapter 1, paragraphs 2.1 – 2.11
http://www.bahamousainquiry.org/f_report/vol%20i/Part%20II/Part%20II.pdf

18.4 Many, if not the majority, of the witnesses were granted Core Participant status because they were likely to face criticism for their actions. People in such a situation are entitled to be warned in writing of the criticisms they face and must be given an opportunity to respond to those criticisms. The statutory provisions on warning letters under the 2005 Act are contained in Rules 13, 14 and 15 of the 2006 Inquiry Rules. Significantly the Rules impose no duty on an inquiry to serve a warning letter and Rule 13(1) makes it clear that they are issued at the discretion of the Chair. However, compliance is secured indirectly through Rule 13(3) by providing that an inquiry may not include criticism of a person in a report unless a warning letter has been sent and there has been a reasonable opportunity to respond by the recipient. This will only occur after he or she has given evidence. What is meant by 'explicit or significant' at Rule 13(3) is not defined. However, the contents of a warning letter are provided for pursuant to Rule 13(1) (a) or (c). First, it must state what the proposed criticism is. Second, it must contain a statement of facts substantiating the criticism. Third, it must refer to any evidence which supports those facts. Channel 4 News reported that a number of warning letters had been sent to members of the British army, in addition to those who had been charged and subjected to a court martial.²²⁰

18.5 Such warning letters are usually sent out during the drafting of an inquiry's report, once it is clear that a person is to be criticised and on what grounds. Since the witness has almost certainly already faced the criticism during the course of the inquiry, it is not clear what impact their response to a warning letter is likely to have on the final report. It is possible that minor adjustments are made to the report for the sake of accuracy and/or fairness, but it is not usually possible to tell from the face of the report whether any changes were made because of what was said in a response to a warning letter. While on the face of it the issuing of warning letters seems a fair procedure, it is only fair to the person who faces criticism, since there is no provision for anyone other than the inquiry panel and its legal team to see what a person has said in reply to criticism, or to counter what has been said. Indeed, the purpose of warning letters is made even more obscure by Rule 16, which states:

"In determining the weight to be accorded to any evidence, the inquiry panel must disregard the fact that a warning letter was, or was not, sent to any person before the determination is made."

18.6 The first body to see the report of an inquiry is the commissioning government department, in this case the MoD. In recent years successive governments have adopted the practice of restricting this early access to members of the Treasury Solicitors office, whose task is to vet the report for any threat to the safety or life of anyone named in the report or any implications for national security. Given that the Baha Mousa Inquiry was chaired by a retired judge of the Court of

²²⁰ *Baha Mousa 'suffered appalling violence'*, *The Guardian*, 8 September 2011 <http://www.channel4.com/news/army-facing-criticism-in-baha-mousa-death-report>

Appeal, who was well-versed in the requirements of Article 2 and the need to protect national security, and given the redaction process that had operated throughout the inquiry, this government vetting of the report was unnecessary and offensive. It also delayed the process of publication.

- 18.7 Under Rule 17 of the Inquiry Rules, after a report has been sent to the appropriate Minister, but before it is published, a copy must be sent to all Core Participants and their legal representatives, who are bound to keep the report confidential until publication. In BIRW's experience, this provision has always been interpreted by successive governments as meaning that Core Participants and their lawyers are deprived of their mobile telephones and allowed to read the report just a few hours before publication, which usually takes the form of a statement by the relevant Minister in the Houses of Parliament. The Core Participants and their lawyers are usually held incommunicado until the Minister has spoken. This can be very unfair when others have had an opportunity to leak or speculate about the report's findings in advance. A little over a week before the Baha Mousa Inquiry published its report the MoD briefed a journalist working for the *Sunday Telegraph* newspaper. An unnamed official stated:

"The inquiry has found no evidence of systematic abuse because there wasn't any. That is not to say that abuse did not happen but claims that there was a culture or a conspiracy to torture alleged insurgents has not been proved."²²¹

This attempt at spin backfired when the report was published and the gravity of its criticisms became apparent.

19. THE COST TO THE PUBLIC PURSE

- 19.1 The Inquiry has given its own breakdown of its costs as follows:²²²

Costs to 31 January 2012	
General staffing	£1,251,542
Legal services	£6,802,140
Running costs	£1,749,410
Consultancy	£380,972
IT services	£380,972
Total	£12,998,759

It has not been possible to obtain a more detailed breakdown. It is not clear from the figures provided whether the fees paid to Sir William Gage and his legal team are included in "general staffing costs" or "legal services".

²²¹ Daily Telegraph, *British Army cleared of systematic abuse by Baha Mousa inquiry*, 31 October 2011 <http://www.dailymail.co.uk/news/article-2031009/Army-cleared-systematic-torture-Iraqis--captives-WERE-abused-says-report.html>

²²² <http://www.bahamousainquiry.org/costs/index.htm>

- 19.2 What can be seen that, as inquiries go, the Baha Mousa Inquiry was relatively cheap, although no inquiry is ever cheap. In truth, once everything that could go wrong has gone wrong, an inquiry to put things right will always cost the public purse dear. As can be seen, the costs of "legal services" made up about half of the total cost, but that is not surprising or concerning; all parties have the right to legal representation.
- 19.3 Judge Peter Cory in his Collusion Inquiry Report into the murder of Patrick Finucane commented (under what has become the ironic heading of "The importance and necessity of holding a public inquiry in this case", given the Coalition government's refusal to hold an inquiry):
- "Time and costs can be reasonably controlled. For example, a maximum allowance could be set for counsel appearing for every party granted standing. That maximum amount should only be varied in extraordinary circumstances duly approved by a court on special application. Counsel and the Commissioner or Commissioners could undertake to devote their full time to the inquiry until it is completed. If the Commissioner found that the actions of a counsel were unnecessarily and improperly delaying the proceedings the costs of that delay could be assessed against that counsel or his or her client."²²³
- 19.4 This thinking has been wholeheartedly adopted by successive governments following the Bloody Sunday Inquiry, which took almost 12 years and cost almost £200m. Several factors helped to keep down the costs of the Baha Mousa Inquiry. First, Sir William Gage sat alone, thus saving on the costs of any additional panel members or special advisors. Secondly, from announcement to publication, the Inquiry was over in two years and four months. Thirdly, the Minister of State for Defence, Bob Ainsworth MP, capped the number of hours per week that Core Participants' legal teams could work at 40, with discretion to the Chair to increase this to up to 60 hours in the eight weeks prior to the commencement of the Inquiry and during oral hearings, and he capped their fees.²²⁴ Leading Counsel were paid £200 per hour while juniors received half that rate. Solicitors with eight years' experience received £150 an hour, while those with between four and eight years' experience received £125. Solicitors with less experience than that were paid £100, and trainees, paralegals and so on got £75. With salaries ranging between £3,000 and £8,000 for a 40-hour week, many would regard these as very good rates, but by commercial standards these were modest fees. Sir William Gage issued exhaustive guidance

²²³ <http://cain.ulst.ac.uk/issues/collusion/cory/cory03finucane.pdf>

²²⁴ See http://www.bahamousainquiry.org/linkedfiles/baha_mousa/key_documents/note23oct2.pdf

on claiming and paying fees²²⁵. It is quite clear that, given the time span of the Inquiry, many anti-social hours' work must have gone into preparation on the part of the lawyers.

19.5 A copy of the Baha Mousa Inquiry Report costs £155 to purchase. Luckily, it is available for free in the internet.

20. **RECOMMENDATIONS AND FINDINGS OF THE BAHAMOUSA INQUIRY**

20.1 We have already commented on the Baha Mousa Inquiry's findings in respect of both individual and corporate responsibility. At the very outset of his summary of his report, Sir William Gage made his opinion on the fate of Baha Mousa and his fellow detainees:

"During his detention, Baha Mousa was subjected to violent and cowardly abuse and assaults by British servicemen whose job it was to guard him and treat him humanely. At about 21.40hrs on 15 September 2003, following a final struggle and further assaults, Baha Mousa stopped breathing. By that time he was in the centre room of the TDF, a small disused toilet, quite unfit as a place to hold a prisoner. All reasonable attempts were made to resuscitate Baha Mousa, to no avail. He was pronounced dead at 22.05hrs. A subsequent post mortem examination of his body found that he had sustained 93 external injuries. Nine other Iraqis were detained with him. All were subject to significant abuse. They all sustained injuries, physical and/or mental, some of them serious."

Sir William went on to describe what had happened as "grave and shameful events".²²⁶ At the end of the statement he made on the publication of his report, he described them as "an appalling episode of serious, gratuitous violence on civilians".²²⁷

20.2 Sir William Gage made 73 recommendations.²²⁸ These included:

- That the British Army should retain its current absolute prohibition on the use of hooding (having now been reminded that there was in force an absolute prohibition).
- In the interests of clarity for all, the five techniques should be referred to as being banned or prohibited rather than proscribed.

²²⁵ See http://www.bahamousainquiry.org/linkedfiles/baha_mousa/key_documents/protocol23oct.pdf

²²⁶ Baha Mousa Inquiry Report, Summary, paragraph 1 http://www.bahamousainquiry.org/f_report/vol%20iii/Part%20XVIII/Part%20XVIII.pdf

²²⁷ See http://www.bahamousainquiry.org/linkedfiles/baha_mousa/report/2011-09-08-chairmansstatement.pdf

²²⁸ Baha Mousa Inquiry Report, Part XVII http://www.bahamousainquiry.org/f_report/vol%20iii/Part%20XVII/Part%20XVII.pdf

- The MoD should give careful consideration as to whether referring to the five techniques as being prohibited “*as an aid to interrogation*” remains the most effective means of communicating the prohibited techniques.
- Urgent consideration must be given to amending the tactical questioning policy to make clear what approaches are and are not authorised for use in tactical questioning. In future all tactical questioning and interrogational policies should descend to greater detail on approaches, as a minimum making clear which approaches are authorised for use in which discipline, tactical questioning or interrogation.
- The harsh approach should no longer have a place in tactical questioning. The MoD should forbid tactical questioners from using what is currently known as the harsh approach and this should be made clear in the tactical questioning policy and in all relevant training materials.
- The MoD should urgently consider other routes to achieving independent inspection/validation of those facilities by the best means that can be achieved short of full Her Majesty’s Inspectorate of Prisons involvement.
- Greater clarity and guidance should be given in training in relation to the concept of “restraint positions”.
- Training materials across the Services need to be reviewed to ensure that the messages about all aspects of handling of captured personnel (CPERS) are clear and consistent.

21. **MILITARY REACTION TO THE REPORT**

- 21.1 The army Chief of Staff, General Sir Peter Wall, considered that the Report of the Inquiry had “cast a dark shadow” over the service’s reputation:²²⁹

“What happened to Baha Mousa and his fellow detainees in 2003 was, in the words of the inquiry, grave and shameful. Both at home and on operations, the Army must act within the law. It must prepare for and conduct operations in accordance with our core ethos, and it must behave properly, particularly in demonstrating respect for others. The nation places its trust in us and we expect our soldiers’ conduct to reflect that trust, no matter how challenging the environment may be. Our operational effectiveness depends on this, and we expect commanders at all

²²⁹ *Army suspends Baha Mousa soldiers as more prosecutions are considered, The Guardian*, 9 September 2011
<http://www.guardian.co.uk/world/2011/sep/08/army-suspends-baha-mousa-soldiers>

levels to lead by example. We also expect our soldiers, no matter how junior, to understand the clear distinction between right and wrong in the heat of the moment. This did not happen in the case of Baha Mousa and others at the temporary detention facility run by 1st Battalion The Queen's Lancashire Regiment in Basra in September 2003. Although the challenges that soldiers faced in Iraq in 2003 were hostile and intense, there can be no excuse for the loss of discipline and lack of moral courage that occurred. The shameful circumstances of Baha Mousa's death have cast a dark shadow on that reputation. This must not happen again."²³⁰

- 21.2 In his evidence to the Inquiry on 10th June 2010, the former army Chief of Staff, General Sir Mike Jackson, had said that the death of Baha Mousa had left a stain on the character of the British army²³¹, a sentiment echoed by Sir William Gage in his statement on the publication of his report²³².

22. THE GOVERNMENT'S REACTION TO THE REPORT

- 22.1 The Secretary of State for Defence, Dr Liam Fox MP, made a statement²³³ in the House of Commons on the day of the publication of the Report, 8th September 2011.

- 22.2 He commenced his statement by echoing the words of Edmund Burke on the impeachment of Warren Hastings²³⁴:

"In any conflict, no matter what the reason for our country's involvement and no matter how difficult the circumstances, what separates us from our adversaries are the values with which we prosecute it and the ethics that guide our actions. To represent Britain, in war as well as in peace, is to represent our inherent democratic values, the rule of law and respect for life. When those values are transgressed, it is vital that we get to the bottom of what has happened, are open about the issues and their causes, ensure

²³⁰ See <http://www.mod.uk/DefenceInternet/DefenceNews/DefencePolicyAndBusiness/ChiefOfTheGeneralStaffRespondsToBahaMousaInquiryReport.htm>

²³¹ *Baha Mousa hooding inhumane, says ex-army chief*, BBC Internet News, 7 June 2010 <http://www.bbc.co.uk/news/10251780> and Baha Mousa Inquiry, Day 100, 7 June 2010, page 147 http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/transcripts/20100706day100fulldayredacted.pdf

²³² See http://www.bahamousainquiry.org/linkedfiles/baha_mousa/report/2011-09-08-chairmansstatement.pdf

²³³ *Hansard*, 8 September 2011, columns 571 – 573 <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110908/debtext/110908-0002.htm>

²³⁴ Warren Hastings was the first Governor of India and was charged with corruption for the way in which he governed the province including extortion and cruelty

that what reparations we can make are made and do all that we can to prevent it from happening again. Only in that way can we ensure that those values hold firm in how we think of ourselves and in how others perceive us.”

22.3 Dr Fox stated that the Report was sober, focused and detailed, but also shocking:

“Above all, I believe it to be both fair and balanced. It is, however, a painful and difficult read. What happened to Baha Mousa and his fellow detainees in September 2003 was deplorable, shocking and shameful.”

He took some comfort from his belief that,

“We can take some limited comfort that incidents like this are extremely rare, but we cannot be satisfied by that.”

However, Dr Fox was forced to concur with the findings of the Inquiry that

“... there was inadequate doctrine on prisoner handling and a ‘systemic failure’ that allowed knowledge of the prohibition on abusive techniques put in place by the Heath Government to be lost over the years.”

22.4 Regarding the findings and recommendations, Dr Fox said:

“However, we are in no way complacent about the issues identified by Sir William, and I can inform the House that I am accepting in principle all his recommendations with one reservation. It is vital that we retain the techniques necessary to secure swiftly, in appropriate circumstances, the intelligence that can save lives. I am afraid that I cannot accept the recommendation that we institute a blanket ban, during tactical questioning, on the use of certain verbal and non-physical techniques.”

Dr Fox was referring here to technique we have referred to before called harshing, involving sustained extremely loud shouting and hostile posturing. The Report makes it clear that, “... the MoD has previously permitted the harsh approach to include practices which are entirely unacceptable and should never have been taught.”²³⁵ The technique was described and assessed by the MoD as acceptable in a letter to the Baha Mousa Inquiry dated 7th March 2011 in relation to the Module

²³⁵ Baha Mousa Inquiry Report, Part XVI, paragraph 16.191
http://www.bahamousainquiry.org/f_report/vol%20iii/volume%20iii.pdf at

4 submissions²³⁶. Public Interest Lawyers have started legal proceedings in the High Court to have the practice of harshing ruled unlawful.

22.5 Dr Fox concluded by making a veiled reference to the rotten apple theory:

"However, the vast majority of armed forces personnel faced these same challenges and did not behave in the way outlined in this report. They represent the fine ethical values found day in and day out in our armed forces, and we must not allow the unspeakable actions of a very few to damage the reputation of the whole. I want to make it clear that Baha Mousa was not a casualty of war. His death occurred while he was a detainee in British custody. It was avoidable and preventable, and there can be no excuses.

There is no place in our armed forces for the mistreatment of detainees, and there is no place for a perverted sense of loyalty that turns a blind eye to wrongdoing or erects a wall of silence to cover it up. If any serviceman or woman, no matter the colour of uniform that they wear, is found to have betrayed the values this country stands for and the standards that we hold dear, they will be held to account. Ultimately, whatever the circumstances, rules or regulations, people know the difference between right and wrong. We will not allow the behaviour of individuals who cross that line to taint the reputation of the armed forces, of which the British people are rightly proud."

Dr Fox might have felt rightly proud, but others would disagree.

23. **THE AFTERMATH**

- 23.1 In the immediate aftermath of the publication of the Baha Mousa Inquiry report the following events took place.
- 23.2 The British Army suspended 14 serving soldiers named in the Report²³⁷.
- 23.3 The files on 14 of the serving soldiers named in the Baha Mousa Inquiry Report were sent to the Crown Prosecution Service (CPS)²³⁸.
- 23.4 The files on the other five soldiers were sent to the Services Prosecuting Authority (SPA), the military equivalent of the CPS²³⁹.

²³⁶ See http://www.bahamousainquiry.org/linkedfiles/baha_mousa/written_submissions/miv012736.pdf

²³⁷ *Army suspends Baha Mousa soldiers as more prosecutions are considered*, *The Guardian*, 9 September 2011

²³⁸ Address by Phil Shiner, Public Interest Lawyers, to the *Baha Mousa Annual Memorial Lecture 2011*, 13 September 2011

²³⁹ Ibid

- 23.5 A file on Dr Derek Keilloh was sent to the General Medical Council who have scheduled a 30-day hearing on his case²⁴⁰.
- 23.6 A file on Father Peter Madden was sent to the Roman Catholic Archdiocese of Birmingham, who will be examining his conduct²⁴¹.
- 23.7 Public Interest Lawyers have publically stated that they are considering sending files to the International Criminal Court in relation to the two relevant politicians, Geoff Hoon and Adam Ingram²⁴².
- 23.8 Public Interest Lawyers continues to demand an inquiry into the British Army detention regime in Iraq between 2003 and 2008 and is litigating this through the application of Ali Zaki Mousa and Others²⁴³.
- 23.9 It was reported that British troops were being asked to secretly inform on their comrades as part of an investigation into allegations that soldiers systematically abused civilians during the Iraq War by the MoD's Iraqi Historical Allegations Team (IHAT).²⁴⁴

24. CONCLUSIONS

24.1 Have any lessons been learned from Northern Ireland?

- 24.1.1 The answer to the question of whether any lessons have been learned from Northern Ireland is "only bad lessons". The five techniques were condemned and prohibited decades ago but that fact was conveniently forgotten by both the army and the state. Any illusions that may have been harboured that 2003 was a more civilised era than 1971 and that mistakes and crimes like internment without trial and the torture of internees would not be repeated were shattered by the first two weeks' hearings of the Baha Mousa Inquiry.
- 24.1.2 The death of Baha Mousa and the torture of him and his companions is indeed shameful, but what is more shameful is that no-one in authority thought it was wrong. Given Northern Ireland experience, there was no excuse for such an attitude.
- 24.1.3 Sadly, very basic lessons from Northern Ireland about how to hold an inquiry in the 21st century have also not been learned. In the Bloody

²⁴⁰ Statement on behalf of the victims, by Phil Shiner, Public Interest Lawyers, 8 September 2011 http://www.publicinterestlawyers.co.uk/news_details.php?id=143

²⁴¹ Ibid

²⁴² Address by Phil Shiner, Public Interest Lawyers, to the *Baha Mousa Annual Memorial Lecture 2011*, 13 September 2011

²⁴³ Ali Zaki Mousa v Secretary of State for Defence & Another [2011] EWCA Civ 1334

²⁴⁴ *Iraq War probe asks soldiers to inform on each other*, *The Telegraph*, 25 February 2012
<http://www.telegraph.co.uk/news/uknews/defence/8739406/Iraq-War-probe-asks-soldiers-to-inform-on-each-other.html>

Sunday, Robert Hamill, Rosemary Nelson and Billy Wright Inquiries separate facilities for families were made available so that they were not forced to sit with alleged –perpetrators or those who had failed them. This did not happen in the case of the Baha Mousa Inquiry, where detainees had to be granted anonymity because of a real threat to their lives. This was wholly unacceptable and should not be allowed to happen in any future inquiry.

24.2 **Have any lessons been learned from the Baha Mousa Inquiry?**

- 24.2.1 It would be comforting to believe that Baha Mousa's death was a deafening wake-up call to both the military and the politicians. However, the Al-Sweady Inquiry, the Ali Zaki Mousa litigation and the revelations about MI5/6's cooperation with Gaddafi regime in Libya, which brought the Detainee Inquiry to a halt, all suggest otherwise. Lawyers acting for victims of torture by British soldiers in Afghanistan and Iraq tell BIRW that they receive new cases every week. It is not a problem of the past, or a historic situation, that we are dealing with here; it is a pressing issue of the present.
- 24.2.2 No-one can deny that many soldiers deployed overseas are young men and women, often ill-trained and ill-equipped, who find themselves in terrifying situations that are difficult to endure. Many of them have been killed and many others are living with terrible physical and psychological injuries. Many of them have shown great bravery. However, none of that reality is any excuse for the murder and torture of innocent civilians. Those who lead those young men and women, the politicians who send them to war, and the whole of society will ultimately be judged on their actions.
- 24.2.3 What happened to Baha Mousa and the others was not a one-off. It was not the result of the actions of a few rotten apples in an otherwise sound army. "Conditioning techniques" and "harshing" were policies adopted by the army and at least tacitly approved by successive governments.
- 24.2.4 The Baha Mousa Inquiry has set out the lessons to be learned from what happened to Baha Mousa and the rest, and has made many recommendations for the prevention of a repetition, but the Al-Sweady Inquiry and the Ali Zaki Mousa litigation have shown us that the problems identified by the Baha Mousa Inquiry were not confined to 1 QLR. Only time will tell whether the recommendations of the Baha Mousa Inquiry have been properly implemented and the lessons honestly learnt.
- 24.2.5 On 19th March 2010, in *The Times*, Colonel Richard Kemp had written, "A commander has more than enough on his mind already without having to worry about whether he might be in breach of the Human Rights Act."²⁴⁵ Admittedly, he wrote this before the Baha Mousa Inquiry

²⁴⁵ *Lawyers have no place on the battlefield*, by Richard Kemp, *The Times*,

Report was published, and perhaps he has revised his views since then, but we rather doubt it, and we fear that he speaks for many a commanding officer.

24.3 **Did the Baha Mousa Inquiry provide a human rights-compliant inquiry?**

24.3.1 In our view, the Baha Mousa Inquiry was human rights-compliant for the following reasons:

- The Inquiry was allowed to proceed with minimal political intervention;
- The Inquiry had a strong and independently minded interventionist Chair;
- The Inquiry adopted a modular structure which was successful in facilitating its investigation;
- The Inquiry placed a broad interpretation on its terms of reference;
- The Inquiry was stringent on the disclosure of state documents;
- Counsel to the Inquiry worked hard to ensure constructive co-operation between the Core Participants;
- The Chair of the Inquiry adopted the correct standard of proof thus enabling him to attribute responsibility;
- The victims were granted Core Participant status;
- The Inquiry was open and accountable to the public;
- The Inquiry was conducted with almost no recourse to private sessions, and anonymity, screening of witnesses and redaction were kept to an acceptable level;
- The Inquiry demonstrated that such an investigatory exercise could be conducted within budget and within a realistic timescale;
- The Inquiry produced a compelling Report which made the MoD and the British Army react to the allegations;
- The Inquiry bought a sense of closure and the achievement to the family of Baha Mousa and the other victims and was therefore part of the process of restorative justice.

24.3.2 However, the Baha Mousa Inquiry does not represent a resounding vindication for the Inquiries Act 2005. On the contrary, it only succeeded in providing a human rights-compliant inquiry because of a self-denying ordinance on the part of the Secretary of State, who decided not to use his considerable discretionary powers. The Inquiry was fortunate in benefitting from a combination of a strong Chair, a rigorous Counsel to the Inquiry, and strong legal representation for the victims, without which the Inquiry could have had a very different outcome.

24.3.3 It remains to be seen whether the Al-Sweady Inquiry is allowed to proceed in a similar fashion to the Baha Mousa Inquiry, and whether the Ali Zaki Mousa litigation leads to a similar inquiry.

24.3.4 It also remains to be seen whether the political will exists to root out the practice of torture within the British army. Northern Ireland experience shows that descending to the level of the enemy is not the way to combat terrorism and that the infliction of oppression does nothing but damage democracy. It is doubtful that invading Iraq has made the United Kingdom a safer place. It is certain that the treatment meted out to Baha Mousa and so many other innocent Iraqi civilians has shamed the UK and has shown that there is still a long way to go before respect for human rights and the rule of law is fully embedded in all our institutions.

24.4 We end with this chilling passage from the Baha Mousa Inquiry Report:

“But for Baha Mousa's death it is possible that the events with which this Inquiry has been concerned would never have seen the light of day... It is at least possible that if Baha Mousa had survived and not died, the incident giving rise to his injuries would quickly have been forgotten or at least provided no more than a footnote in any history of the post-war occupation of Iraq by British forces.”²⁴⁶

²⁴⁶ Baha Mousa Inquiry Report, Part I, Chapter 1, paragraph 1.2
http://www.bahamousainquiry.org/f_report/vol%20i/Part%20I/Part%20I.pdf



ANNEX A

The Facts concerning the Killing of Baha Mousa

These are the facts concerning the killing of Baha Mousa, as described by the Chair of the Baha Mousa Inquiry, Sir William Gage, in his Statement on the publication of the Baha Mousa Inquiry Report, 8th September 2011:

“On 14 September 2003, a group of soldiers from A Company, 1 Battalion Queens Lancashire Regiment (1 QLR) raided the Hotel Ibn Al Haitham in Basra looking for suspected insurgents. A multiple of 25 soldiers from A Company, commanded by 1 Lieutenant Craig Rodgers ("the Rodgers' Multiple") played a principal role in the raid. After finding some weapons, grenades and other paraphernalia, seven men employed in the Hotel were arrested. One of these men was Baha Mousa. Another man in the Hotel at this time escaped. Six of the seven men were removed to 1 QLR's headquarters at Battle Group (BG) Main in Basra. The seventh accompanied a further party of soldiers from A Company to a house nearby where in due course two civilians were arrested. They were an elderly man and his young son. All three arrested men were eventually transferred to BG Main. The elderly man, D006, not in the best of health, was the father of the man who had escaped. Later that day a tenth man, D007, was arrested in another part of Basra. He, too, was transported to BG Main. He was wholly unconnected with the Hotel and the nine other civilian Detainees. The MoD conceded that there was no evidence implicating them in the death of British personnel.

On arrival at BG Main the Detainees were received by Corporal Donald Payne, the 1 QLR Regimental Provost Corporal. They were searched, handcuffed, hooded and placed in the temporary detention facility, the TDF. Some were hooded with two, if not three, hoods. In the TDF they were made to adopt stress positions, at first in a ski position. Subsequently they were permitted to sit down but had to maintain their hands outstretched in front of their bodies and still handcuffed. I find that for almost the whole of the period up to Baha Mousa's death on the evening of 15th September the Detainees were kept handcuffed, hooded and in stress positions in extreme heat and conditions of some squalor. They were guarded first by two men from another A Company multiple, but from about 19.00hrs on 14th September until Tuesday morning by members of the Rodgers' Multiple.

I find that from the outset of their incarceration in the TDF the Detainees were subjected to assaults by those who were guarding them and, in particular, by Payne. I find that they were also assaulted from time to time by others who happened to be passing by the TDF. The assaults by the guards were instigated and orchestrated by Payne. He devised a particularly unpleasant method of assaulting the Detainees, known as the "choir". It consisting of Payne punching or kicking each Detainee in sequence, causing each to emit a groan or other sign of distress. Payne, as Provost Corporal, was himself supposed to be supervising the welfare of the Detainees in the TDF. I also find

that Payne and the guards should have been supervised by Major Michael Peebles, the Battlegroup Internment Review Officer (the BGIRO).

From the evening of 14 September and into the afternoon of 15 September, the Detainees were questioned by two tactical questioners. The whole process was lengthy and in one instance involved a Detainee (D005, the youngest) being placed for over an hour very close to a noisy and hot generator. The tactical questioning went on well past the 14-hour time limit, at the end of which the Detainees should have been either released or transferred to the Theatre Internment Facility, the TIF. In fact, the nine surviving Detainees did not arrive at the TIF until Tuesday, 16 September, some 55 hours after the arrest of those in the Hotel.

At about 21.30hrs on Monday the whole Rodgers' Multiple returned to the TDF to join three of their number who had been carrying out guard duty throughout Monday afternoon. At that time Rodgers left his Multiple at the TDF for another duty. Their followed a very serious incident when Baha Mousa was found standing in the TDF without his hood and handcuffs. A struggle ensued, involving principally Private Aaron Cooper, Payne and Baha Mousa. It did not last long, but in the final moments I find Payne violently assaulted Baha Mousa, punching and possibly kicking him. This ended with Baha Mousa lying inert on the floor of the TDF. The Regimental Medical Officer was summoned but despite attempts to resuscitate him, Baha Mousa was pronounced dead at 22.05hrs.

A subsequent post mortem found that in the course of his detention in the TDF Baha Mousa had sustained 93 separate external injuries as well as internal injuries. He was also found to have internal injuries including fractured ribs. I find the cause of the death to be twofold. Firstly, Baha Mousa had been made vulnerable by a range of factors, namely, lack of food and water, the heat, rhabdomyolysis, acute renal failure, exertion, exhaustion, fear and multiple injuries. Both stress positions, which are a form of exertion, and hooding, which obviously must have increased Baha Mousa's body temperature, contributed to these factors. Secondly, against the background of this vulnerability, the trigger for his death was a violent assault, consisting of punches, being thrown across the room and possibly of kicks. It also involved an unsafe method of restraint, in particular being held to the ground in an attempt to re-apply plasticuffs. Neither cause alone was sufficient to kill him, but the combination of both did.

On the morning after Baha Mousa's death, the nine Detainees were transferred to the Theatre Internment Facility, the TIF. Subsequently they were examined and most were found to be suffering from a number of injuries, some more serious than others and some very serious, namely those sustained by D003 and Kifah Matairi. Some physical injuries were comparatively minor, namely those sustained by D005. All of the Detainees, other than Kifah Matairi, who was not examined by a psychiatrist because of his death much later in a wholly unrelated accident, were subsequently found to be suffering from

psychiatric injury, including, in most cases, post traumatic stress disorder of varying degrees of seriousness."²⁴⁷

²⁴⁷ http://www.bahamousainquiry.org/linkedfiles/baha_mousa/report/2011-09-08-chairmansstatement.pdf



ANNEX B

The Baha Mousa Public Inquiry Inquiry Chairman: The Right Honourable Sir William Gage

Protocol for the Production of Documents and Other Evidence to the Inquiry by the Ministry of Defence

This protocol addresses:

- the production of documents to the Inquiry by the Ministry of Defence (“MoD”); and
- the procedures for redaction of such documents.

Although this protocol concerns production of evidence to the Inquiry by MoD, the Inquiry would ordinarily expect to adopt the same approach with other government departments, to the extent that they may be involved with the Inquiry.

Background and Aims

1. This protocol is designed to ensure:
 - (a) that all Core Participants and the public know how the Inquiry approaches the provision of documents to the Inquiry by MoD, and the procedure for applications to redact documents. Practical and transparent procedures in this regard will be an important part of the effective running of the Inquiry;
 - (b) that the Inquiry promptly receives documents from MoD;
 - (c) that the provision of these documents to the Inquiry is not delayed by the need for prior applications to be made in respect of the documents;
 - (d) that the distribution of documents to other Core Participants is achieved expeditiously even if, initially, the documents are redacted. In particular, the Inquiry wishes to avoid a backlog in the distribution of documents to other Core Participants pending decisions under section 19 of the Inquiries Act 2005;
 - (e) that appropriate provision is made for MoD to make applications for a restriction order from the Chairman;
 - (f) that other Core Participants are able to raise concerns about the extent of redaction of documents.

2. Section 18(1) of the Inquiries Act 2005 ("the 2005 Act") provides as follows:
 - "(1) Subject to any restrictions imposed by a notice or order under section 19, the chairman must take such steps as he considers reasonable to secure that members of the public (including reporters) are able—
 - (a) to attend the inquiry or to see and hear a simultaneous transmission of proceedings at the inquiry;
 - (b) to obtain or to view a record of evidence and documents given, produced or provided to the inquiry or inquiry panel."

3. Section 19 of the 2005 Act provides as follows:
 - "(1) Restrictions may, in accordance with this section, be imposed on—
 - (a) attendance at an inquiry, or at any particular part of an inquiry;
 - (b) disclosure or publication of any evidence or documents given, produced or provided to an inquiry.
 - (2) Restrictions may be imposed in either or both of the following ways—
 - (a) by being specified in a notice (a "restriction notice") given by the Minister to the chairman at any time before the end of the inquiry;
 - (b) by being specified in an order (a "restriction order") made by the chairman during the course of the inquiry.
 - (3) A restriction notice or restriction order must specify only such restrictions—
 - (a) as are required by any statutory provision, enforceable Community obligation or rule of law, or
 - (b) as the Minister or chairman considers to be conducive to the inquiry fulfilling its terms of reference or to be necessary in the public interest, having regard in particular to the matters mentioned in subsection (4).
 - (4) Those matters are—
 - (a) the extent to which any restriction on attendance, disclosure or publication might inhibit the allaying of public concern;
 - (b) any risk of harm or damage that could be avoided or reduced by any such restriction;
 - (c) any conditions as to confidentiality subject to which a person acquired information that he is to give, or has given, to the inquiry;
 - (d) the extent to which not imposing any particular restriction would be likely—
 - (i) to cause delay or to impair the efficiency or effectiveness of the inquiry, or
 - (ii) otherwise to result in additional cost (whether to public funds or to witnesses or others).
 - (5) In subsection (4)(b) "harm or damage" includes in particular—
 - (a) death or injury;
 - (b) damage to national security or international relations;
 - (c) damage to the economic interests of the United Kingdom or of any part of the United Kingdom;

(d) damage caused by disclosure of commercially sensitive information."

4. Sections 20 and 22 of the 2005 Act provide as follows:

"20 Further provisions about restriction notices and orders

- (1) Restrictions specified in a restriction notice have effect in addition to any already specified, whether in an earlier restriction notice or in a restriction order.
- (2) Restrictions specified in a restriction order have effect in addition to any already specified, whether in an earlier restriction order or in a restriction notice.
- (3) The Minister may vary or revoke a restriction notice by giving a further notice to the chairman at any time before the end of the inquiry.
- (4) The chairman may vary or revoke a restriction order by making a further order during the course of the inquiry.
- (5) Restrictions imposed under section 19 on disclosure or publication of evidence or documents ("disclosure restrictions") continue in force indefinitely, unless—
 - (a) under the terms of the relevant notice or order the restrictions expire at the end of the inquiry, or at some other time, or
 - (b) the relevant notice or order is varied or revoked under subsection (3), (4) or (7).This is subject to subsection (6).
- (6) After the end of the inquiry, disclosure restrictions do not apply to a public authority, or a Scottish public authority, in relation to information held by the authority otherwise than as a result of the breach of any such restrictions.
- (7) After the end of an inquiry the Minister may, by a notice published in a way that he considers suitable—
 - (a) revoke a restriction order or restriction notice containing disclosure restrictions that are still in force, or
 - (b) vary it so as to remove or relax any of the restrictions.
- (8) In this section "restriction notice" and "restriction order" have the meaning given by section 19(2).

...

22 Privileged information etc

- (1) A person may not under section 21 be required to give, produce or provide any evidence or document if—
 - (a) he could not be required to do so if the proceedings of the inquiry were civil proceedings in a court in the relevant part of the United Kingdom, or
 - (b) the requirement would be incompatible with a Community obligation.
- (2) The rules of law under which evidence or documents are permitted or required to be withheld on grounds of public interest immunity apply in relation to an inquiry as they apply in relation to civil proceedings in a court in the relevant part of the United Kingdom."

5. Rule 12(1) of the Inquiry Rules 2006 provides as follows:
 - "(1) In this rule—
 - (a) "potentially restricted evidence" means any evidence which is in the possession of the inquiry panel, or any member of the inquiry panel, and which is the subject of a relevant application which has not been determined or withdrawn;
 - (b) "relevant application" means an application which is
 - (i) made by any person that evidence or documents are the subject of a restriction notice made by the Minister pursuant to section 19(2)(a) of the Act;
 - (ii) made by any person that the chairman exercise his discretion under section 19(2)(b) of the Act; or
 - (iii) made by any person that evidence or documents be withheld on grounds of public interest immunity, and which entails the withholding of evidence from the public.
 - (2) Subject to paragraph (3), potentially restricted evidence is subject to the same restrictions as it would be subject to if the order sought in the relevant application had been made.
 - (3) Where the conditions in paragraph (4) are satisfied, the chairman may disclose the potentially restricted evidence to a person who would not otherwise be permitted to see it.
 - (4) The conditions are that—
 - (a) the chairman considers that disclosure to an individual is necessary for the determination of the application; and
 - (b) the chairman has afforded the opportunity to—
 - (i) the person providing or producing the evidence to the inquiry panel; or
 - (ii) any other person making the relevant application, to make representations regarding whether disclosure to that individual should be permitted.
 - (5) Any person who is shown potentially restricted evidence pursuant to paragraph (3) shall owe an obligation of confidence to the person who provided or produced the evidence to the inquiry.
 - (6) A breach of the obligation referred to in paragraph (5) is actionable at the suit of the person to whom the obligation is owed, subject to the defences applying to actions for breach of confidence."

Procedures

Schedule of categories of reasons for seeking redactions

6. MoD should provide to the Inquiry a sequentially numbered schedule of the broad categories of reasons why its documents (or parts of them), relevant to the matters being investigated by the Inquiry, may not be capable of being put into the public domain.
7. The schedule should be drafted in such a form that the schedule itself can be made public.

8. From time to time, the schedule may need to be expanded or updated.

Provision of all documents in unredacted format to the Inquiry

9. In this protocol, "document" means anything in which information of any description is recorded. The Inquiry's request for copies of documents is broad-ranging. It may (depending on context) include copies of plans, photographs, video footage, policy statements, meeting notes and minutes, manuscript notes, memoranda, correspondence (post and / or fax) and internal and external email communications. The Inquiry may also request physical evidence and where it does, references in this Protocol to "documents" should be taken to include reference to physical evidence.
10. MoD should provide the Inquiry with all documents requested by the Inquiry and documents it possesses which it considers to be relevant as soon as possible in unredacted form (save only that it may make redactions where it intends to claim legal professional privilege).
11. In light of the procedural protections provided for in paragraph 16 below, provision of documents to the Inquiry must not be delayed on the grounds that MoD may seek the redaction of the document or some part of it before it is published or provided to other Core Participants.
12. MoD should ensure that it retains original versions of all documents and physical evidence relevant to the Inquiry and that relevant evidence is not destroyed.

Indication of redactions sought by MoD

13. MoD documents will be scanned into the Inquiry's document management system and given a unique reference number ("URN"). Electronic copies of the scanned in documents bearing the URN will be provided to MoD and the URN should be used in correspondence to identify the document.
14. As soon as reasonably possible after production of the unredacted document to the Inquiry¹ (or at the same time if this does not cause delay in the provision of the unredacted document) MoD must either:
 - (a) provide a copy of the document to the Inquiry with provisional redactions marked legibly on it; or
 - (b) indicate that no redactions in respect of that document are sought.

¹ Since different quantities of documents will be disclosed at different times, the Inquiry does not seek to put a time limit on this stage of the process but the Inquiry expects appropriate priority to be given to communicating to the Inquiry whether there is any objection to the publication of MoD documents.

15. The Inquiry expects MoD to adopt a restrained and measured approach to the provisional redaction of its documents. Documents must be provisionally redacted only where MoD considers that the redaction can properly be justified under s19(3) or s.22 of the 2005 Act. Regard should be had to the need for other Core Participants to understand the context of relevant passages within documents.
16. In any case where MoD has sought provisional redactions to a document, the Inquiry will treat the document as being “potentially restricted evidence” and evidence “which is the subject of a relevant application which has not been determined” under rule 12 of the 2006 Rules. Accordingly, the Inquiry will not publish the provisionally redacted parts of the document or reveal the provisionally redacted parts of the document to other Core Participants or to any witness unless:
 - (a) the conditions in rule 12(4) of the Inquiry Rules are met; or
 - (b) an individual witness or Core Participant was the author or recipient of the unredacted document and is thus entitled to see the document in its unredacted form; or
 - (c) MoD has subsequently agreed to the removal or amendment of the redactions; or
 - (d) a written application by MoD for a restriction order has been refused, but in this case, only 14 days after promulgation of the Chairman's Ruling.

Initial distribution and publication of documents in provisionally redacted form

17. To prevent delay in the distribution of documents, the Inquiry may (and often will) distribute the document to Core Participants, in the first instance, with the provisional redactions sought by MoD.
18. The Inquiry may also publish documents to the public via its website in this provisionally redacted form.

Consideration of provisional redactions by the Inquiry team

19. The Inquiry Team will consider MoD's proposed redactions.

Redactions which appear to the Inquiry Team to be prima facie justified

20. There will be some cases where the proposed redactions appear to the Inquiry Team to be prima facie justified. For example, the redacted material may be both irrelevant and sensitive; or it may be relevant material where there is an apparent clear and strong public interest in, and / or article 2 ECHR positive duty to ensure, that the material is not published or circulated to other Core Participants.
21. In such cases, the Chairman will usually make a restriction order under s.19(2)(b) of the 2005 Act without requiring any further written application from MoD.
22. Unless there is a particular reason not to do so, such a restriction order will refer to the document and indicate the reasons why the redactions have been permitted by reference to the relevant number within the published schedule of reasons for seeking redactions.
23. Where a restriction order has been made by the Chairman under s.19(2)(b) without a written application having been made, it will be open to a Core Participant who may be dissatisfied with the extent of the redaction specified in the restriction order, to apply in writing to the Chairman to exercise his power under s.20(4) of the 2005 Act to vary the restriction order. In such a case, the Chairman may require MoD to respond in writing to the application, setting out the reasons for seeking the continuance of the restriction order and may then proceed as set out in paragraphs 27-28 below.

Other cases

24. Having considered the proposed redactions, the Inquiry team may seek written reasons for the redactions from MoD and/or seek less extensive redactions than those proposed by MoD.
25. If the Inquiry Team is still not content with the nature of the proposed redactions, it will require MoD to make an application in writing to the chairman for a restriction order.
26. Such an application should be in two parts, an open and a closed part. The closed part must set out in full the reasons and argument as to why it is said that the restriction is necessary, having regard to s19(3) of the 2005 Act. The closed part will be considered only by the Solicitor to the Inquiry, Counsel to the Inquiry and the Chairman. The open part shall be drafted in such a way that it can be provided to the other Core Participants and published. It must contain as much of the reasons and argument from the closed part as is possible without defeating the purpose of the application.
27. On receipt of such an application, the open part of the application will be provided to the other Core Participants and an opportunity will be given to them to make representations in writing. The Chairman may

determine such applications on the basis of the written submissions or hear further argument as he sees appropriate.

28. If the Chairman declines to make a restriction order or declines to make a restriction order as extensive as sought by the applicant then, subject to any notice or application made in accordance with s.19(2)(a) or s.38 of the 2005 Act, the document will be circulated to other Core Participants and may be published on the website within 14 days of promulgation of the Chairman's Ruling.
29. Where public interest issues or other s19(3) issues arise, the Inquiry expects the above procedures to be used for seeking a restriction order from the Chairman rather than a restriction notice being issued under s.19(2)(a) by the relevant minister.

Legal professional privilege

30. If and to the extent that MoD wishes to rely on legal professional privilege as a ground for not producing evidence (or parts of evidence) to the Inquiry, it must notify the Inquiry in writing of the material (or parts of material) that it seeks to withhold on those grounds together with a summary of why it is said that the material attracts legal professional privilege.

General considerations

31. The Inquiry team will generally regard as irrelevant information within documents comprising personal information such as telephone numbers, dates of birth and home addresses. Unless particular circumstances exist which make such information of relevance to the Inquiry, the Inquiry is unlikely to object to the provisional redaction of such material from documents supplied to the Inquiry. The Inquiry will redact such material from documents supplied to it prior to disclosure to Core Participants and the public. Such redactions will not require a restriction order but will instead be made on the basis of irrelevance.
32. The Inquiry may from time to time need to amend this protocol or adopt different procedures to meet specific problems.

Gerard Elias QC
Nicholas Moss
Patrick Halliday

Issued under the authority of the Chairman on 26 November 2008

The Baha Mousa Public Inquiry
Inquiry Chairman: The Right Honourable Sir William Gage

Issues list

The list is intended as a guide to the issues on which the Inquiry's investigations will focus. It is not a pleading or statement of case. The Inquiry's investigations may uncover the need to address further issues which are within its terms of reference but which are not contained in this list. Accordingly, the issues in this list may be subject to revision during the course of the Inquiry.

Module 1: The history of what has been labelled 'conditioning techniques'

This will entail consideration of the Government, Ministry of Defence and Army approaches to such techniques from the time of internment in Northern Ireland in the early 1970s up to and including March 2003 – the date of the invasion of Iraq.

1. To examine the Government, MoD and Army reaction to the use of the five techniques following the introduction of internment (including the Compton reports, and Parker report, the Government's statements that followed, and the approach to the decision in Ireland v UK). To consider the nature and extent of the Government statements on 'conditioning techniques', and what considerations about the five techniques led to those statements being made.
2. To consider whether and to what extent the Government's statements about the use of 'conditioning techniques' were subsequently incorporated into (a) orders for the Armed Forces and (b) other MoD publications.
3. To examine what was contained in written and other training materials (up to and including pre-deployment training for Iraq) concerning the appropriate handling of detainees and internees, and the use of 'conditioning techniques'.

[Note: the extent (if any) to which actual training may have differed from written training materials will be addressed in module 3.]

Module 2: Baha Mousa and the other detainees

To examine the circumstances of their arrest and subsequent detention and seek to ascertain what happened to them and who was involved on 14 – 16 September 2003

4. What types of 'conditioning techniques' were used on the detainees, for how long, and by whom were such 'conditioning techniques' applied and to whom?
5. What injuries were suffered by the detainees, and when and where were the injuries sustained?
6. Who inflicted those injuries and in what circumstances?
7. Was other ill-treatment or abuse suffered by the detainees, apart from physical injury and the application of 'conditioning techniques'? This will include consideration of the arrests.
8. If so, who was responsible for such ill-treatment or abuse?
9. Of those who were in or entered the detention facility at the Battle Group Main Headquarters ('BG Main') of 1st Battalion, The Queen's Lancashire Regiment ('1QLR') on 14 – 16 September 2003, or were in its general vicinity:
 - a) what treatment did they see or hear?
 - b) what was their reaction to the treatment they saw or heard?
 - c) to the extent that the treatment they witnessed was suggestive of ill-treatment did they report it and, if not, why not?
 - d) If they did report it, to whom did they report it?
10. Medical examinations of the detainees:
 - a) what medical examinations were carried out?
 - b) when did they occur?
 - c) what injuries had the detainees suffered at the time of those medical examinations?
 - d) what did those medical examinations record?
 - e) to whom, when and how were the results of the examinations communicated?
 - f) was the response of those involved in the medical care of the detainees at the BG Main appropriate?
 - g) did those who received reports of the medical examinations carried out at BG Main, and those who were made aware of those examinations, respond appropriately?
11. What other checks, if any, were carried out on the condition and welfare of the detainees and by whom were they carried out? What did such checks record, and to whom were they communicated.
12. Why were the detainees:
 - a) not taken to the Theatre Internment Facility ('TIF') within 14 hours of their detention?
 - b) not taken to the TIF until Tuesday 16 September 2003?

In particular in relation to Baha Mousa's death:

13. What were the immediate circumstances of his death?

14. What was the medical cause of his death?
15. Who was responsible for the cause or causes of his death?

Module 3: Training and the chain of command

To examine what training and guidance was given and what orders were issued to those in 1 QLR involved in the detention, and to follow the chain of command upwards in relation to these matters.

16. What training had in fact been provided to those who were responsible for holding and questioning these detainees, and those in the chain of command, in relation to the humane and proper treatment of detainees?
17. To what extent were training, orders and guidance concerning detention supplemented in the pre-deployment phase and, if to any extent, why?
18. To what extent were such orders and guidance supplemented or amended during OP Telic prior to the arrest of the detainees, including during changes in the system for the filtering and handling of detainees, and if to any extent, why and how were they disseminated?
19. Specifically, what, if any, instruction was given as to the use or otherwise of 'conditioning techniques'?
20. Apart from the treatment of these detainees, how extensive had been the use of 'conditioning techniques' by 1 QLR and when had it begun?
21. How had a practice of the use of 'conditioning techniques' come to start in 1 QLR?
22. Who, within the chain of command of 1 QLR, knew that 'conditioning techniques' were being used?
23. Within the wider and higher Army chain of command and MoD, who knew that 'conditioning techniques' were being used by 1 QLR?
24. Of those who knew that such 'conditioning techniques' were being used, what, if any action did they take in relation to it and was such action appropriate? What advice, if any, (including legal advice) was sought and/or obtained about the use of 'conditioning techniques'.
25. Should others in the Army chain of command or MoD have appreciated that 'conditioning techniques' were being used by 1 QLR, and if so, who?
26. What assurances were given by the Government, MoD and Army about the use of 'conditioning techniques'? When, by whom, and on what basis were any such assurances given?

27. To the extent, if any, that the training and/or orders and/or communication of those orders was inadequate, where does the responsibility for such failures lie within the Army chain of command and MoD?
28. Was sufficient emphasis given to the maintenance and supervision of discipline within 1 QLR and, if not, who was responsible for the failures (if any) in this regard?

[Note: within this Module the Inquiry will not consider allegations regarding any specific incidents other than the arrest and detention of Baha Mousa and the other detainees. However, strictly limited to the extent necessary properly to examine issues 23 and 24, the Inquiry will obtain evidence from 1 Black Watch (the predecessor Battalion to 1 QLR) and from those at the TIF concerning the use (if any) of the five techniques prior to 14 September 2003.]

Module 4: The future

To consider what has happened since 2003 in relation to 'conditioning techniques' and to examine any appropriate recommendations for the future.

29. What changes have been introduced by the Armed Forces in particular in relation to training, orders, and supervision of the detention of civilians to ensure that detainees are treated humanely?
30. Specifically, what, if any, instruction is now given in relation to the use or otherwise of 'conditioning techniques'?
31. Are any changes made adequate to minimise the risks of future mistreatment of civilian detainees by the Armed Forces, with particular reference to
 - a) the training of all servicemen;
 - b) additional training for those directly involved in, and those responsible for the detention and/or questioning of civilians;
 - c) orders and guidance (and the communication of those orders and guidance) to all appropriate ranks regarding the humane treatment of civilian detainees;
 - d) the supervision of civilian detainees;
 - e) the allocation of resources and personnel to ensure so far as is practicable the humane treatment of civilian detainees;
 - f) the separation and allocation of responsibilities for those involved in questioning and detaining civilians.

Gerard Elias QC
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17 November 2008