

REDRESS

Seeking Reparation for Torture Survivors

REDRESS SUBMISSION TO BAHÀ MOUSA PUBLIC INQUIRY: MAY 2009

I. INTRODUCTION

1) As part of the Chairman's Opening Statement on 15 October 2008, Sir William Gage said that anyone with information or evidence relevant to the terms of the Inquiry should communicate it to the Inquiry.¹ While REDRESS has no direct knowledge of the events in Iraq at the relevant time we have carried out considerable research and analysis into the areas which the Inquiry is exploring, including making a number of freedom of information requests. This led to our publishing a Report in October 2007 entitled **UK Army in Iraq: Time to Come Clean on Civilian Torture**, and we enclose a hardcopy herewith.² We shall refer to this hereafter as "the REDRESS Report."

2) We wish to submit comments on the Issues as set out in the four published Modules for the Inquiry, with the intention that this submission can usefully highlight certain reference points and lines of questioning of whomsoever gives evidence to the Inquiry in terms of the proposed Issues; the submission is also intended for the Inquiry to consider developing some of these Issues. We therefore, firstly, set out some general comments on the Issues; secondly, we comment on some of the specific Issues under the four Modules.

II. ISSUES: GENERAL COMMENTS

3) It is the view of REDRESS that the published list of Issues could be supplemented by two important aspects which contributed to the death of Baha Mousa and the torture of the other detainees: i) the **planning** of the Iraq invasion and post-conflict reconstruction; ii) the development of an **ad hoc detention system**. An exploration of these areas would place the circumstances surrounding the detention and treatment of the detainees in a proper context; further, and looking towards Module 4, clearer lessons could be learned.

Planning

4) It is difficult to understand the circumstances surrounding the death of Baha Mousa and the torture of the other detainees without examining the context of the ad hoc detention system in place in Iraq at the relevant time; this in turn first requires looking at some pre-invasion realities. In these regards matters surrounding the *planning* of the occupation were seen by a number of witnesses at the Court Martial, from various levels

¹ Chairman's Opening Statement, 15 October 2008, para 14

² Available at http://www.redress.org/publications/UK_ARMY_IN IRAQ - TIME_TO_COME_CLEAN_ON CIVILIAN TORTURE_Oct%2007.pdf If the Inquiry could use more hard copies these can be supplied.

in the military, as being an important contributing factor leading to the abuse. If these matters are not explored the proper lessons will not be learned and further similar failures are likely.

5) Thus Brigadier Aitken told the Court Martial:

"...some of the conditions in Iraq which exacerbated the likelihood of acts of abuse being committed could have been avoided if there had been more thorough joined up planning for what would happen after the war fighting phase...the failure by the UK to plan for what would happen after the war had a significant impact on the manner in which British troops conducted themselves...difficult to avoid concluding that they were insufficiently prepared for the challenge represented by the insurgency..."³

6) The issue of the role of what were referred to as 'other Government Departments'⁴ was also seen as a factor that left the Army over-burdened and contributed to the environment in which the abuse took place. Brigadier Moore, Commander 19 Mechanised Brigade, told the Court Martial:

"The Foreign Office was there but was largely inactive. DfID were the first organisation to pull out of the UN even before the UN decided to leave. The Home Office had two advisers, police advisers, in the country. There was nobody from the Department of Trade and Industry. So the Brigade ended up having to provide -- to do all the reconstruction work, to pay public service workers, to get the judiciary running, to try to regenerate the economy as well as doing its normal stability and security tasks. Simply put we were the only show in town and there was a lack of support across the rest of Whitehall."⁵

7) This is reinforced by an Army Report "STABILITY OPERATIONS IN IRAQ (OP TELIC 2-5) AN ANALYSIS FROM A LAND PERSPECTIVE":⁶

"In [the] UK the political and planning realities coupled with the restrictive OPSEC [Operational Security] regime meant that few people in MOD, and very few in other Government Departments (OGD) were planning the overall operations, including Phase IV [post-combat operations]. Departments had very different views of the crisis. The Foreign and Commonwealth Office (FCO) and Treasury were involved in Phase IV planning, as were the Departments for International Development (DfID) Trade and Industry, and Constitutional Affairs (ex-Lord Chancellor's Department) to a very limited extent. Cabinet Office played a co-ordinating role. OGD (*and some officials in MOD took some persuading that they would have obligations under the Geneva Conventions (1949) if or when the UK became an Occupying Power: the implied tasks or responsibilities were very significant in size, range and complexity.*)⁷

.....

There was a hope among some senior officials in MOD and OGD that the UN, or other countries might take on interim government and reconstruction tasks. The lack

³ Transcript 13/12/06 pp 129-130

⁴ See para 7 below

⁵ Transcript 14/12/06, pp 102-3

⁶ It appears this document was leaked into the public domain. We have seen it at <http://wikileaks.org/leak/uk-stbility-operations-in-iraq-2006.pdf>

⁷ Ibid, para 7, p 3 - emphasis added

of planning ran counter to potential Geneva Convention obligations and to the principle contingency planning: it also failed to take into account the evident reluctance of other countries to support the Coalition intent and further ‘robust language’ UN SCR.³⁸

.....

The transfer of sovereignty to the Iraqi Interim Government on 28 Jun 04 added further potential difficulties regarding the rules on detention, which were relevant to the UK role in debriefing some of the High Value Detainees. Strong consideration should be given to the assignment of a legal adviser to any UK commander or group in a coalition operation when sensitive issues, including debriefing and detention are likely to arise. A formal review and promulgation of UK interrogation, debriefing and detention guidance to UK staff embedded with coalition units is essential.”⁹

The ad hoc detention system

8) Once the difficulties and problems surrounding the planning phase are appreciated the Inquiry will be better placed to examine the development of the *ad hoc detention program* set up under Fragmented Order 029 (FRAGO 29) in June 2003, and in place by September 2003. This Order extended the time limit detainees could be held at the arresting Battle Group before being sent to the Theatre Internment Facility (TIF). The previous limit was 6 hours until FRAGO 029 allowed for Tactical Questioning to take place at the Battle Groups, and allowed for 14 hours before transfer.

9) Two main aspects are known regarding the need to develop the ad hoc system: firstly, there were problems regarding the passing of intelligence from the Joint Forward Intelligence Teams (JFIT) operating at the TIF; secondly, too many detainees were being passed to the TIF and the Battle Groups were asked to determine the status of detainees and to decide whether further internment was necessary. It is worth mentioning the importance in the change from 6 to 14 hours: Colonel Mercer had set the previous limit of 6 hours because a known “danger point” existed beyond this time if detainees continued to be held by the arresting units. Lack of resources made both limits difficult to keep.

10) The first aspect (passing of intelligence) could relate to a possible failure to integrate planning between the UK and US forces, including problems over communication equipment as the US ran the TIF. This issue could also be connected to the problem with the UK’s own computer system which apparently led to a ban on hooding being ‘lost’ during the change to TELIC 2, which should also be explored.

11) The second aspect (numbers and status of detainees) includes the role of the Battle Group Internment Review Officer, such as what training was provided to him and how clear was his role in relation to the welfare/treatment of detainees. Further, at 1 QLR there was a separate chain of command between the detainee-handling role carried out by military police within 1 QLR and the interrogation/ Tactical Questioning role carried out by members of the JFIT who were part of the Intelligence Corps. It emerged from the Court Martial that the Intelligence Corps Tactical Questioners (TQs) could instruct

⁸ Ibid, para 9, p 3-4

⁹ Ibid, para h, Annex C-5

ordinary/untrained military police to use conditioning techniques without the TQs being responsible for their implementation.

12) The issue of the integration of intelligence units with ordinary soldiers without the specialist training should therefore be investigated, including advice given to ordinary soldiers regarding requests from Intelligence Corps personnel. The significance of some Battle Groups using their own members as TQs should also be considered; the Inquiry too should look beyond events at 1 QLR and 1 Black Watch to other Battlegroups which used conditioning techniques. This might be necessary in order to make broader recommendations.

13) The issue of whether the US military put any pressure on UK forces to use harsher conditioning methods, and if so what effect if any this had on the actions on the ground and in policy, should also be explored.

III. MODULE 1: The history of what has been labelled ‘conditioning techniques’

14) The three published Issues listed under Module 1, numbered 1-3, essentially revolve around the reaction of the Government, the MOD and the Army to the use of the five techniques before and after their banning in the early 1970s; the manner in which these conditioning techniques were banned in 1972; whether a legally binding directive was issued to the Armed Forces; how any directive was implemented by the Army, especially the Intelligence Corps; whether it just covered Northern Ireland; whether the position of the Government or the implementation of any ban had changed by the time of the invasion of Iraq in March 2003; training, both pre and post-deployment.

15) In these regards the Inquiry should include exploring the status of doctrine documents on conditioning techniques. The main doctrine, as far as we are aware, is contained in documents called Joint Doctrine Notes (JDNs) including JDN 3/05 “Tactical Questioning, Debriefing and Interrogation” and JDN 3/06 “Human Intelligence.” JDNs are described as a ‘short-term urgent requirements for doctrine... JDNs do not represent an agreed or fully staffed position.¹⁰ It is our view that the treatment of the detainees by 1 QLR and the resulting confusion highlights the need for a fully approved ‘long-term’ doctrine on conditioning techniques, which conforms to the UK’s international obligations. The Inquiry should look into whether it is being drawn up.

16) As part of questions regarding pre-deployment training, the choice and nature of OPTAG (Operational Training and Advisory Group) training and other training for Operations TELIC 1 and TELIC 2 should be included. The Court Martial highlighted a number of problems with the pre-deployment training of 1 QLR:

“QLR were given only five weeks to deploy, compounded by their involvement in Operation Fresco, the taking over of civilian fire fighting duties during the 2002-03 strikes, something many of the other Battle Groups in TELIC 2 were also involved with. The delay in formal warning and Operation Fresco, said Colonel Mendonca, prevented them from conducting proper resource training, which was conducted without the Operational Training and Advisory Group (OPTAG). Also, despite

¹⁰ Joint Warfare Publication 3-48 “Legal Support to Joint Operations,” available at http://www.mod.uk/NR/rdonlyres/32F31626-A428-4B9B-B762-39FDB5E8A35F/0/20071218_jwp3_46_U_DCDCIMAPPS.pdf p vi

Colonel Mendonca's wishes, there was not time for 1 QLR to train any tactical questioners; thus during the relevant period no staff in 1 QLR had completed the tactical questioning course, and there had been no training in this area, which meant that they were beholden to Brigade for tactical questioners who would set the rules for conditioning.”¹¹

IV. MODULE 2: Baha Mousa and the other detainees

17) The published Issues under this Module, numbered 4 -15, cover what happened to Baha Mousa and the other detainees, and who was involved. We would like to make comments on some of these Issues and for ease of reference refer to the particular number(s) when doing so.

18) Issues 4- 7.

a) We respectfully agree that it is essential that the Inquiry looks at the use of the five banned ‘conditioning’ techniques and at ‘conditioning’ generally, as well as looking beyond these areas both in terms of *where* the abuses happened and precisely *what* abuses occurred.

b) In regard to *where* the abuses took place, it is again respectfully essential to ascertain what happened during the arrests as well as during transportation to the place of detention: these events were not effectively considered either at the Court Martial or in the civil litigation culminating in the House of Lords decision.¹² There *is* evidence of earlier abuse, including during the arrests.¹³

c) In regard to *what* abuses took place, the attention of the Inquiry is drawn to developments concerning ‘conditioning’ since the legal and political events in the 1970s, including Lord Bingham’s comments in the 2005 case of *A (FC) v Secretary of State for the Home Department (No 2)*.¹⁴ In that case he said that that the five techniques, which the ECtHR had ruled in 1978 do not constitute torture but inhuman and degrading treatment, might well “now be held to fall within the definition [of torture] in article 1 of the Torture Convention.”¹⁵ We wish to emphasise, therefore, that a body of jurisprudence on torture and other cruel, inhuman or degrading treatment or punishment has developed in the last 25 years since the UN Torture Convention (UNCAT) was finalised, ratified and to some extent domesticated, whose significance should be considered for the Inquiry to determine how the abuses found to have taken place, including but not restricted to ‘conditioning’, should be characterised.

d) The Inquiry should therefore specifically include a finding as to whether Mr Mousa was *tortured* to death and whether other detainees were *tortured*, or whether the

¹¹ REDRESS Report p 36 based on Col. Mendonca’s letter to Brig. Aitken

¹² *Al-Skeini and others v Secretary of State for Defence [2007] UKHL 26*. This case and the court martial both concentrated on abuses in the military detention centre after the detainees had been arrested at the hotel and transported to the detention facility

¹³ See REDRESS Report p 5 for references to such evidence which emerged in the court martial

¹⁴ [2005] UKHL 71

¹⁵ Loc. cit. para 59. The UN Committee against Torture has also said that such techniques, particularly when applied in combination, constitute torture - see “Consideration of a Special Report by Israel,” (CAT/C/SR.297/Add.1) para 5.

evidence points to the infliction of (only) *other cruel, inhuman or degrading treatment or punishment*. Torture is a specific crime under UK law which arises separately from the types of offences charged at the court martial under the International Criminal Court Act 2001 and/or military law. One of the things at stake in the Inquiry is to determine the appropriate level of seriousness with which the tragic events should be viewed, and a finding of torture having taken place would be significantly different to finding that 'only' other ill-treatment was inflicted. It is submitted that this aspect needs to be tackled irrespective of whether there is any likelihood or not of further prosecutions.

19) Issue 8.

The question of *responsibility* for ill-treatment/abuses should go beyond those immediately or even legally responsible, and should extend to those morally and politically responsible, including those in the military, the MOD and the Government. While to some extent this could arise under Module 3's "chain of command Issues" as well as from the "history Issues" under Module 1, it is significant that no Minister (or former Minister), civil servant or senior officer has to date accepted any degree of responsibility for the actual events which took place in September 2003. **Issue 8** should therefore not be limited to who was responsible for *causing* the ill-treatment/abuse. Again, this question of responsibility for the ill-treatment/abuse (including but not restricted to 'conditioning') should be conceived of differently from and more widely than who was responsible for *causing* Mr Mousa's death (**Issue 15**).

20) Issue 10.

a) The medical examination of the detainees and the role of the medical personnel involved is analysed in some detail in the REDRESS Report,¹⁶ and the Inquiry is respectfully invited to make use of the information gathered therein. It will be seen that criticism is levelled at the conduct of those involved in events immediately *after* Mr Mousa's death as well as later; while **Issue 14** will examine the medical cause of his death it is submitted that the examination of the several aspects listed under **Issue 10** needs to include a close scrutiny of post-death events in a wider sense than a post-mortem. Thus while the medical cause of death is obviously important so too is the need for a thorough examination of the professional and ethical behaviour and conduct of medical personnel both before *and after* the death. This too is raised in the REDRESS Report.¹⁷

b) Further, the Inquiry's attention is drawn to the international standards, especially those contained in what is known as the Istanbul Protocol,¹⁸ and current UK military policy and doctrine,¹⁹ as well as Annex 5D to the 2006 Joint Doctrine Publication (JDP) known as *JDP 1-10 "Prisoners of War, Internees and Detainees"* - Annex 5D being "Medical Support to Persons Captured or Detained by UK Forces on Operations." It is submitted that when making findings on all the medical aspects of the Inquiry what should be included is a finding on how the behaviour and conduct of medical personnel measured up to, or failed to measure up to these international standards and the current UK military policy and doctrine. Such a finding is important in itself to determine the degree to which what happened deviated from what is acceptable and also to be able to make any necessary recommendations for the future.

¹⁶ Section VII pp 42-48

¹⁷ Ibid, at pp 44-45

¹⁸ *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Istanbul Protocol)* available at <http://www.unhchr.ch/pdf/8istprot.pdf>

¹⁹ Ibid, at pp 45-47

V. MODULE 3: Training and the chain of command

21) Issue 16.

As to training in relation to humane treatment of detainees, this was to some extent examined by the Joint Committee on Human Rights (JCHR) in its 2006 Nineteenth Report on UNCAT.²⁰ The JCHR was shown some training materials and documentation in confidence, which in some cases were partially redacted. It noted “with concern that training and guidance documents do not refer to the Convention Against Torture, or to the Convention rights contained in the Human Rights Act...”²¹ The JCHR also regretted that some of the material in the documents was not declassified “so as to inform the debate and provide some reassurance on a matter of significant public interest.”²² It is to be hoped that the Inquiry can illicit more information as to what training had in fact been provided.

22) Issue 17.

On pre-deployment training, the same JCHR report touched on this too, being told by Mr Ingram and Lt Gen Brims that it took place in relation to Iraq, but few details appear to have been given as to what the relevant pre-deployment human rights training consisted of.²³ Again it is to be hoped that the Inquiry can obtain more information from such witnesses and others.

23) Issues 18-19.

a) In April 2003 a UK newspaper carried a story under the headline “UK troops ‘break law’ by hooding Iraqi prisoners”.²⁴ In it a legal academic specifically referred to the 1970s “inhuman treatment” findings on the five banned techniques and how in Iraq therefore the UK was now at risk of breaching its international obligations.²⁵ Thus five months before September 2003 it was prominently in the public domain that hooding was not permitted, certainly as an aspect of interrogation.

b) Hooding was of concern to Lieutenant Colonel Mercer, the senior UK military lawyer in Iraq at the time of the invasion, who in March 2003 saw approximately forty Iraqi prisoners kneeling in the sand, cuffed behind their backs, in the sun with bags over their heads next to an interrogation tent.²⁶ He was “extremely surprised” to see conduct he viewed to be in conflict with the law of armed conflict, which he drew to the attention of

²⁰ <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/185/185-i.pdf>, para 74-82

²¹ Para 80

²² Para 82

²³ Paras 80-81

²⁴ The Guardian, 11 April 2003: <http://www.guardian.co.uk/Iraq/Story/0,,934550,00.html>. This press report pre-dates by some seven weeks what Parliament’s Intelligence and Security Committee found in 2005 to be “the first public suggestion that Iraqis detained by the UK had been abused [which] occurred on 30 May 2003 when *The Sun* newspaper published photographs of British soldiers allegedly abusing Iraqi prisoners earlier that month” - Intelligence and Security Committee “The Handling of Detainees by UK Intelligence Personnel in Afghanistan, Guantanamo Bay and Iraq” at para 85, p 22; see <http://www.swyddfa-cabinet.gov.uk/publications/reports/intelligence/treatdetainees.pdf>. These soldiers were prosecuted in the Camp Breadbasket case.

²⁵ Ibid. The report was by Matthew Happold of Nottingham University who said “The last time British security forces hooded suspects, was as one of the so-called “five techniques” used in Northern Ireland in the early 1970s. The four other techniques were wall-standing, subjection to white noise, and deprivation of sleep and of food and drink. These “five techniques” were found by the European Court of Human Rights to constitute inhuman treatment, in breach of the UK’s obligations under the European Convention on Human Rights. British forces’ present conduct similarly risks being in breach of our international obligations.”

²⁶ Transcript 8 December 2006, p 11

the General Officer Commanding. Lt. Col. Mercer found that the Military Intelligence Branch regarded it as part of their doctrine, and, as he put it in his evidence to the Court Martial “we got into a staffing fight over the legality of hooding, for want of a better word.”²⁷ 1 (UK) Armoured Division resolved to make its own ‘theatre policy’ on hooding, which was to ban it; the Chief of Staff accordingly ordered²⁸ that hooding was not to be practised during 1 (UK) Armoured Division’s period of tenure in theatre which ended in July 2003.

c) This order was “lost” in the process of 3 (UK) Armoured Division’s takeover from 1 (UK) Armoured Division for TELIC 2. The Intelligence and Security Committee in 2005 found as follows:

“The use of hooding during interrogation or tactical questioning is regarded as unacceptable and contrary to the Geneva Conventions and the Laws of Armed Conflict. The hooding of detainees during capture/arrest or transit was permitted if there was a clearly justifiable military reason. However, the Chief of Joint Operations issued a formal direction in September 2003 that hooding was to cease. We were also told that a similar order had been given by the General Officer Commanding 1 (UK) Armoured Division in Iraq during April 2003 but that this direction was lost when responsibility was handed over to 3 (UK) Armoured Division in July 2003.”²⁹

d) Furthermore, even after the death of Baha Mousa there remained confusion in the Army on the policy of hooding, and there is little reason to conclude that in practice hooding ceased virtually immediately after mid-September 2003.³⁰

24) Issues 20-22.

a) It emerged in the Court Martial that 1 QLR had a deliberate policy and practice of ‘conditioning’ as part of maintaining what was termed ‘the shock of capture.’ One use of hooding was as a method to disorient a detainee.³¹ Prior to the death of Baha Mousa hoods, handcuffs and stress positions featured in this ‘conditioning’ process³² as did sleep deprivation.³³ Some detainees also spoke of food deprivation for up to 24 hours, or when they asked for water it was poured over their hoods.³⁴ ‘Conditioning’ appeared to stem from Intelligence Corps doctrine for Tactical Questioning and interrogation.

b) In the Court Martial the Crown did not allege that the Colonel Mendonca was negligent in sanctioning or permitting ‘conditioning’ nor that he had improperly delegated the responsibility for the processing and treatment of detainees to either Major Royce or

²⁷ Ibid, p 12. Lt. Col. Mercer later learned that the International Committee of the Red Cross (ICRC) had also raised the issue of hooding and the duration of hooding with the UK Government. He noted that this came to light independently of his complaint, so obviously the ICRC had observed it themselves - p 13

²⁸ FRAGO 152 – 1 (UK) ARMD DIV issued by general Brims on 20 May 2003 was the order banning hooding during TELIC 1.

²⁹ Loc. cit. para 30, pg 9

³⁰ This is made clear in the debate in Permanent Joint Headquarters (PJHQ) which continued until as late as May 2004 – see Transcript 16 January 2007, pp 45-47. REDRESS was also informed of an Iraqi who has complained of being hooded in 2006 - telephone conversation between REDRESS and solicitor Phil Shiner on 18 September 2007.

³¹ Transcript 13 December 2006, pg 75

³² Ibid, p 119.

³³ Transcript, 17 October 2006, p 30.

³⁴ Transcript 10 October pp.34-35

Major Peebles. The former was appointed 1 QLR's Battle Group Internment Review Officer (BGIRO) in July 2003, and the latter took over this role the following month.³⁵ The Crown accepted evidence that "as far as Major Royce was concerned, he had cleared this process of conditioning as it was called including the use of hooding and stress positions both with Brigade Intelligence and Brigade Legal."³⁶

- c) In reviewing Major Royce's evidence of his discussions with Colonel Mendonca as well as his (Major Royce's) handover to Major Peebles, the Judge Advocate recorded that "the Crown accepts that Major Royce told Colonel Mendonca of this sanctioning, and, critically, that Colonel Mendonca was entitled to rely on it."³⁷ The case against Colonel Mendonca ended up depending entirely upon the evidence of Major Royce,³⁸ who believed 'conditioning' was sanctioned from above and who had informed Colonel Mendonca accordingly.
- d) Baha Mousa and others detained with him were severely assaulted - hooding, sleep deprivation and stressing were only part of their ill-treatment. It has never been suggested that the use of the banned techniques in themselves led to Baha Mousa's death or the injuries sustained by the others, but the fact that they were used and sanctioned was one of the most disconcerting revelations from the Court Martial.
- e) It is respectfully submitted (and as is effectively listed in **Issues 23-28**) that how and why Brigade Intelligence and Brigade Legal, as well as any others in the Army chain of command and/or the MOD who possibly came to sanction the use of these banned techniques did so, are matters of central importance to the Inquiry.

25) Issue 24.

- a) The matter of legal advice sought and/or obtained about the use of 'conditioning techniques' – including the five banned techniques – needs to be examined from two separate but linked angles: firstly and narrowly, in regard to 'conditioning' per se; secondly and more broadly, in regard to the applicability of the Human Rights Act (HRA) and the European Convention on Human Rights (ECHR). Information already in the public domain shows various degrees of conflicting, contradictory and confused accounts in respect of both of these.³⁹
- b) Regarding advice on 'conditioning' itself, Lt Col Mercer's role has already been referred to above,⁴⁰ while the evidence of Colonel Barnet to the Court Martial appeared to indicate different opinions between these two legal officers, for example, on the legality of stress positions.⁴¹ Furthermore, General Brims believed that ordinary soldiers, if the content of the five banned techniques were put to them, and they were asked for

³⁵ Major Royce, who gave evidence, was not one of the accused, while Major Peebles was.

³⁶ Ibid, pg 32

³⁷ Ibid, pg 36

³⁸ Ibid, pp 46-47. The Crown appears to have been largely unprepared for the evidence of the "Brigade sanction" although it was effectively referred to in a statement made by Colonel Mendonca in 2005. Further, the Crown decided not to call Major Royce as a witness although he was originally listed to be called; this entitled the defence lawyers to call him, but they also declined. The Judge Advocate then decided to call him to give evidence.

³⁹ See REDRESS Report, VIII pgs 49-55

⁴⁰ Para 23 (b)

⁴¹ See REDRESS Report, p 51

their view, would reply “You should not do them.”⁴² These three perspectives indicate that at the top there appeared to be no need for any legal advice as it was believed that those ‘at the bottom’ knew what was not permissible, while senior legal officers in Theatre had different views as to what was or was not legal. It is submitted that the Inquiry should seek not only to ascertain the details of all legal advice sought/given concerning ‘conditioning’ generally and the banned techniques in particular, but how and why it came about that, to put it bluntly, the left hand didn’t appear to know what the right hand was doing, even on such a narrow, specific issue as to what ‘conditioning’ techniques could legally be used.

c) It is possible that the lack of clarity of the broad human rights law applicable to UK troops in Iraq also contributed to the failure to deal properly with the narrow issue of ‘conditioning’ and the banned techniques. An important issue which has not been clarified to date is exactly what, when, by whom specifically and from whom specifically advice was sought by the military on the applicability of the ECHR and the HRA, and whether this was only regarding a particular issue such as the status review procedures, or in a more general context, or indeed concerning any other specific issue such as ‘conditioning’ itself. Equally important of course is what advice was then given, by whom and to whom, and how was it dealt with down the chain of command. It is submitted that the role of the former Attorney General Lord Goldsmith is crucial to this line of inquiry, as what did emerge from his evidence to the JCHR was his emphatic assertion that the emails concerning his advice which were discussed in the Court Martial had nothing at all to do with the standards of treatment.⁴³

d) Irrespective of the reasons for any confusion as to what advice was being asked for and what was given, a cautionary approach could have been adopted, with procedures and training in place as if the ECHR and HRA *did* apply, certainly regarding detention procedures and facilities. It should therefore be investigated whether the Attorney General’s advice indicated that it would be appropriate for such a cautionary approach to be adopted. Significantly, Colonel Mercer told the Court Martial that “it seemed to me that if there is a moot point over a point of law, then the default -- obvious default setting is to go for the highest standard.”⁴⁴

VI. Module 4: The future

26) Issues 29-31.

a) In order to be sure that the current position covered by these issues is acceptable, the decision in *Al Skeini v. SSD*,⁴⁵ in which the extraterritorial applicability of the ECHR and HRA was recognised at least in respect of UK-controlled places of detention, must be fully followed through: the UK should specifically incorporate the ECHR and HRA standards into all relevant policy documents, doctrine and standing orders. In addition, the UK should formally recognise that in addition to the ECHR and HRA, other human rights obligations, including those arising under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also have extraterritorial effect.

⁴² Joint Committee on Human Rights, The UNCAT Nineteenth Report of session 2005-06 Vol II Oral and Written Evidence, Ev 60, Q 239, at <http://www.publications.parliament.uk/pa/it200506/itselect/itrights/185/185-ii.pdf>

⁴³ REDRESS Report, p 54

⁴⁴ Transcript, 08/12/07, pg 18

⁴⁵ See fn 12

- b) All UK troops must be properly trained in human rights and humanitarian law. A further independent review, beyond this Inquiry, may be necessary of all existing training materials, curricula and guides in circulation throughout the military to assess whether they comply with international standards, and to prompt amendments as appropriate. New recruits as well as all existing servicemen and women should receive regular training on international standards at frequent intervals.
- c) Safeguards and procedures must also be specifically put in place to ensure that where violations do occur, all victims of UK military abuse and/or their families are treated with respect for their dignity, safety and privacy. Those that have filed complaints with the military must at a minimum be provided with regular updates on the progress of their complaints and given the opportunity to participate in proceedings, including by expressing their views and concerns. Effective measures of reparation should be instituted including restitution, compensation and rehabilitation as well as satisfaction and guarantees of non-repetition.

Dated 26 May 2009

Kevin Laue
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