



**SUBMISSION TO THE BAHA MOUSA PUBLIC INQUIRY ON  
RECOMMENDATIONS FOR THE FUTURE (Module 4)  
13 September 2010**

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## I. Introduction

(1) Under cover of a letter dated 26 May 2009, REDRESS made a previous written submission to the Inquiry entitled *REDRESS SUBMISSION TO BAHAMOUSA PUBLIC INQUIRY: MAY 2009*,<sup>1</sup> with which we sent a copy of our October 2007 published report entitled *UK ARMY IN IRAQ: Time to Come Clean on Civilian Torture*.<sup>2</sup>

(2) As stated in our previous submission<sup>3</sup> while REDRESS has no direct knowledge of the events in Iraq we carried out considerable research and analysis into the areas which the Inquiry has explored, including making a number of freedom of information requests. Subsequently, we have followed the Inquiry although we have not attended the hearings nor have we read every document and transcript of evidence on the Inquiry's website. We have seen the revised approach to Module 4 and guidance to NGOs, and the recent witness statements and exhibits from the Ministry of Defence (MOD).

(3) In his concluding oral evidence to the Inquiry on 10 June 2010 General R.V. Brims answered a question from the Chairman as follows:

*"THE CHAIRMAN: Just the one thing I want to ask you, General, is this: around about the time that you were going into Iraq, if anybody had said to you, "Is there a danger of soldiers beating up people whom they have captured?" what would you have said?"*

*Answer: I'd have said "No, because they know it's wrong". There will always be some people who break the law, but the vast majority of soldiers know the law and they also know what the right thing to do is, and that we have a system of a rank structure and supervision, particularly with the NCOs, and where things go wrong and people start operating improperly, that should be corrected on the spot."<sup>4</sup>*

Speaking in parliament on the release of the Saville Inquiry (Bloody Sunday) report on 15 June 2010 Prime Minister David Cameron said:<sup>5</sup>

*"This report and the inquiry itself demonstrate how a state should hold itself to account and how we should be determined at all times - no matter how difficult – to judge ourselves against the highest standards."<sup>6</sup>*

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<sup>1</sup> Available at [www.redress.org/downloads/publications/REDRESS\\_Submission\\_To\\_Baha\\_Mousa\\_Public\\_Inquiry\\_MAY\\_2009.pdf](http://www.redress.org/downloads/publications/REDRESS_Submission_To_Baha_Mousa_Public_Inquiry_MAY_2009.pdf).

<sup>2</sup> Available at [www.redress.org/downloads/publications/UK\\_ARMY\\_IN\\_IRAQ\\_-\\_TIME\\_TO\\_COME\\_CLEAN\\_ON\\_CIVILIAN\\_TORTURE\\_Oct%2007.pdf](http://www.redress.org/downloads/publications/UK_ARMY_IN_IRAQ_-_TIME_TO_COME_CLEAN_ON_CIVILIAN_TORTURE_Oct%2007.pdf).

<sup>3</sup> At para (1).

<sup>4</sup> Day 103, transcript, p 69, available at [www.bahamousainquiry.org/linkedfiles/baha\\_mousa/hearings/transcripts/20101006day103fulldayws.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/transcripts/20101006day103fulldayws.pdf). This can be contrasted, for example, with Sergeant P.E. Smith's evidence to the Inquiry in which he suggested it was difficult to complain up the chain of command about detainees being kept in the sun and the heat of the day by the generator, and effectively being told to "butt out" and that he was a "fucking social worker": see day 44, transcript, p 138-142, available at [www.bahamousainquiry.org/linkedfiles/baha\\_mousa/hearings/transcripts/2009-12-14-day44fullday.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/transcripts/2009-12-14-day44fullday.pdf).

<sup>5</sup> *Hansard, House of Commons*, 15 June 2010, Column 739, available at [www.publications.parliament.uk/pa/cm201011/cmhansrd/cm100615/debtext/100615-0004.htm](http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm100615/debtext/100615-0004.htm).

<sup>6</sup> *Ibid*, Column 741.

(4) The letter and the spirit of these remarks by General Brims and Mr Cameron is the basis on which REDRESS makes these submissions. There are key international human rights standards concerning states' anti-torture obligations to which the United Kingdom is bound and against which **training** on the treatment of "Captured Personnel of all categories"<sup>7</sup> (CPERS) should be measured in order for UK soldiers to know the law and, in the words of General Brims, to "*know what the right thing to do is.*"

(5) Articles most pertinent to anti-torture training are contained in the United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (UNCAT)<sup>8</sup>; our submission is that training must clearly be based on the obligations contained in UNCAT; these obligations must be fully reflected in the doctrines, policies and practices pertaining to training, with the view to meeting the highest standards and principles relating to the absolute prohibition against torture.

(6) The emphasis of the Inquiry has been on matters concerning the treatment of civilians. In both war-fighting and post-war fighting (occupation) stages there are a range of international law norms operating, including international humanitarian law or the Laws of Armed Conflict (LOAC), particularly those contained in the Geneva Conventions as well as standards of human rights law. This submission concentrates on applicable standards of human rights law and in particular UNCAT because the absolute prohibition of torture and other cruel, inhuman and degrading treatment and punishment is applicable at all times (during war and peace, states of emergency, periods of occupation) and to all captured persons and detainees including civilians, prisoners of war, combatants, insurgents, 'terrorists', alleged 'terrorists' or criminals. The focus in Module 4 on CPERS as defined is therefore respectfully welcomed.

(7) Our submissions are therefore intended to cover the standards against which **all** of the 32 identified topics should be examined: there should be an unequivocal commitment on the part of the MOD and the Government to at all times contextualise its anti-torture training squarely within its UNCAT obligations. The clear recognition and acceptance of what these obligations are must be built into "*Doctrine and Policy Generally*", "*Prisoner handling in practice on operations*" must be examined from this perspective, as must "*Defence Intelligence: tactical questioning and interrogation*", "*Other Training*" and "*Record Management.*" Unless there is this pro-active approach made in good faith at all times and at all levels the UK will fall short of the "*highest standards*" of which the Prime Minister has spoken. **When it comes to torture**, any attempts to underplay the relevance of UNCAT is unhelpful in avoiding future abuses.

(8) In addition, our submission also surveys obligations relating to **investigations** where allegations of torture or other prohibited ill-treatment have arisen, and the importance of proper **complaints** procedures being in place. We also draw the Inquiry's attention to the UK's obligations to afford **reparations** to torture victims and survivors in accordance with the international law standards to which the UK must comply. Finally, we summarise our main **recommendations**.

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<sup>7</sup> Module 4 Topics Sent to MOD, para (1), available at [www.bahamousainquiry.org/linkedfiles/baha\\_mousa/news/webannouncementpt2.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/news/webannouncementpt2.pdf).

<sup>8</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984. It is available at [www2.ohchr.org/english/law/cat.htm](http://www2.ohchr.org/english/law/cat.htm). The UK ratified the Convention on 8 December 1988.

## II. Training

### II.1 The obligation to train

(9) Article 10 of UNCAT states:

*“1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials, and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.  
2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.”*

This Article is one of the most important provisions in UNCAT aimed at the **prevention** of torture. Furthermore, training measures to prevent torture will also contribute to the prevention of other forms of cruel, inhuman or degrading treatment or punishment (CIDP); both torture and CIDTP are absolutely prohibited.<sup>9</sup>

(10) The issue of specific anti-torture training should “*not be treated with brevity or as a formality,*”<sup>10</sup> and on the contrary it is a clear and ongoing responsibility of State Parties to UNCAT.<sup>11</sup> The leading authority on UNCAT has commented as follows, and what is said regarding professional police and prison services applies *mutatis mutandis* to the professional British Army:

*“...[E]xperience unfortunately tells us that anti-torture training, if included at all in the education curricula of relevant personnel, is still treated in many States parties as a mere formality or as a ‘soft issue’ requiring less attention than the ‘real police skills’, such as the use of fire-arms or self-defence techniques. Much more effort is, therefore, needed to convey the message that torture and ill-treatment have no place in a professional police or prison system. Such training should include more extensive information about the international efforts to combat torture and to professionalise the respective staff...”*<sup>12</sup>

(11) In this context, it is noted that a senior military legal officer told the Inquiry in terms of the inherent failure which perhaps lies at the heart of the tragic events in Basra of September 2003:

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<sup>9</sup> See article 16 of UNCAT dealt with at p 18 below.

<sup>10</sup> Burgers and Danelius, *The United Nations Convention Against Torture: Handbook on the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht, 1998), p 142.

<sup>11</sup> REDRESS, *Bringing the International Prohibition of Torture Home: National Implementation guide for the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (The Redress Trust, 2006), p 53: “Training is an ongoing responsibility, and the effective prevention of torture requires consistent and long-term approaches to education targeting the range of organs and departments that may come into contact with persons at risk of torture and ill treatment, including the wide dissemination of training materials, specialised and continuing training courses, and on the job mentoring and positive reinforcement.” The publication is available at [www.redress.org/downloads/publications/CAT%20Implementation%20paper%2013%20Feb%202006%203.pdf](http://www.redress.org/downloads/publications/CAT%20Implementation%20paper%2013%20Feb%202006%203.pdf).

<sup>12</sup> Nowak and McArthur, *The Convention Against United Nations Torture: A Commentary* (OUP, 2008), p 398.

*"In my view, the issue of prisoners had very low priority and was treated more as an inconvenience than an obligation under International Law."<sup>13</sup>*

Thus despite the clear existence of the obligation to train which is being examined in this submission, the evidence to the Inquiry has indeed revealed gaps and shortfalls. On this basic point, therefore, we submit that a recommendation be made that anti-torture training is given the high priority it deserves.

(12) Taking into account the MOD witness statements of August 2010, reference is made in some of them to UNCAT.<sup>14</sup> However, there is no acknowledgment of the central importance of the obligations arising under it, or direct reference to any of its articles; while the absolute prohibition against torture is recognised<sup>15</sup> there is no emphasis on UNCAT as the loadstar to be followed in approaching the issues arising.

## **II.2 The meaning of personnel**

(13) The formulation of Article 10 and the *travaux préparatoires* indicate that the obligation to ensure proper anti-torture training applies to **all** persons who might come into contact with detainees.<sup>16</sup> Further, the list of persons mentioned in article 10 is clearly illustrative and not exhaustive,<sup>17</sup> and the reference to "*any forms of arrest, detention and imprisonment*" shows that all persons responsible in whatever manner or function for persons deprived of their liberty shall be covered.<sup>18</sup>

(14) The obligation to give and receive proper anti-torture training, therefore, applies to all personnel authorised to use force – police, security, intelligence and other law enforcement personnel – whether civil or military, public or private, uniformed or without uniforms, and to all persons responsible for persons deprived of their liberty. This includes "*any civil, military, police, intelligence, medical officer and other staff working in prisons, pre-trial detention centres, police lock-ups, psychiatric hospitals, detention centres for minors, drug addicts, aliens pending deportation, refugees etc*".<sup>19</sup> It is clear, therefore, that with respect to the UK's Armed Forces the obligation stretches across all ranks and includes not only those who specialise in interrogation (such as Tactical

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<sup>13</sup> Lt Col N.J. Mercer, day 68, witness statement, para 23, BM101064, available at [www.bahamousainquiry.org/linkedfiles/baha\\_mousa/hearings/transcripts/2010-16-03day68fullday-redacted.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/transcripts/2010-16-03day68fullday-redacted.pdf).

<sup>14</sup> For example, exhibits for Lt Col Michael C Bestwick, JSP 898 Part 3 –Ch 8 Armed forces law, para 4, MIV002027, available at [www.bahamousainquiry.org/linkedfiles/baha\\_mousa/module\\_4/mod\\_4\\_witness\\_statem/exhibit\\_mcb/miv002027.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/module_4/mod_4_witness_statem/exhibit_mcb/miv002027.pdf).

<sup>15</sup> For example, exhibits for Capt ain Rupert P Hollins (RN), Ch 2- Standards of treatment, para 207, MIV002549: "Acts which are and shall remain prohibited at any time and in any place whatsoever with respect to all classes of captured or detained persons are: a) ...cruel treatment such as torture, ...", available at [www.bahamousainquiry.org/linkedfiles/baha\\_mousa/module\\_4/mod\\_4\\_witness\\_statem/exhibit\\_rph/miv002547.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/module_4/mod_4_witness_statem/exhibit_rph/miv002547.pdf).

<sup>16</sup> Nowak and McArthur, p 396. The 9 December 1975 Declaration against Torture (GA Res.3452 (XXXX)), which foreshadowed UNCAT, speaks in article 5 of law enforcement personnel and 'other public officials who may be responsible for persons deprived of their liberty,' while revised drafts leading to UNCAT's article 10 added medical personnel and then further included the reference to 'civil or military' personnel as well as to persons involved in the interrogation of detainees.

<sup>17</sup> Burgers and Danelius, p 142.

<sup>18</sup> Nowak and McArthur, p 396.

<sup>19</sup> Ibid, p 397.

Questioners and other intelligence-gathering operatives) but any and every soldier who may come into contact with a detainee.<sup>20</sup>

(15) A non-exhaustive survey of evidence to the Inquiry, therefore, includes the following soldiers in 1 QLR obliged to have had anti-torture training as they came under the chain of command responsible for prisoner handling in September 2003:

- The Commanding Officer: he had responsibility for everything under his command *“including prisoner handling”*<sup>21</sup>
- The Second-in-Command: prisoner handling was within his sphere *“only in as much as any other routine process could be checked on, looked into or questioned”*<sup>22</sup>
- The Adjutant: in terms of prisoner handling *“his checks would have been similar to all other routine checks as the CO’s right hand man;”* however, after the appointment of the BGIRO (Battle Group Internment Review Officer) he didn’t have any specific requirements to check prisoners<sup>23</sup>
- The BGIRO: this post was created by FRAGO 29 on 26 June 2003<sup>24</sup> and became *“the person within the battalion responsible for the processing and treatment of detainees”*<sup>25</sup>
- The Regimental Sergeant Major (RSM): his chain of command included the Provost Staff (Regimental Police); the RSM’s general remit was similar to the Adjutant (the RSM was *“the CO’s left hand man...[with] general responsibility to check any area of the Battle Group to ensure standards were maintained”*); this general responsibility continued after the appointment of the BGIRO; however, *“in respect of specific responsibility for prisoner handling, the appointment of the BGIRO took the process away from the RSM”*; he also had his unofficial chain of command through to the Company Sergeant Majors (CSMs)<sup>26</sup>
- The Company Sergeant Majors (CSMs): they had specific responsibilities for prisoner handling within their companies at the time of deployment; the *“appointment of the BGIRO simply reinforced this as [he] briefed them on their responsibilities”*<sup>27</sup>

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<sup>20</sup> “...[A]ll respective personnel shall be provided with relevant information, education and practical training on how to prevent torture and ill-treatment”: Nowak and McArthur, p 397.

<sup>21</sup> Col J.E. Mendonca, day 59, witness statement, para 41.1, BM101101, available at [www.bahamousainquiry.org/linkedfiles/baha\\_mousa/hearings/transcripts/2010-15-02-day59fullday.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/transcripts/2010-15-02-day59fullday.pdf).

<sup>22</sup> Ibid, para 41.2, BM101101-2.

<sup>23</sup> Ibid, para 41.3, BM101102.

<sup>24</sup> Ibid, paras 65-66, BM101106-7.

<sup>25</sup> Ibid, para 41.6, BM101103.

<sup>26</sup> Ibid, para 41.13, BM101103-4.

<sup>27</sup> Ibid, para 42.1, BM101105.

- The Provost Sergeant (ProvSgt): normally directly responsible to the RSM, but on the appointment of the BGIRO *“the Provost Sergeant remained responsible for prisoner handling but was tasked by the BGIRO rather than the RSM”*<sup>28</sup>
- The Provost Corporal (ProvCpl): he was responsible for prisoners as directed by the ProvSgt or by the BGIRO if the ProvSgt was absent;<sup>29</sup> at least one of them, that is the ProvSgt or the ProvCpl, had to remain at the Temporary Detention Facility (TDF) at all times to supervise any detainees present in the TDF<sup>30</sup>
- The guard force: these would be the individual soldiers physically guarding the detainees; these soldiers would be supervised by the Provost Staff; they would be changed regularly on a rotation basis to ensure that the detainees did not escape or assault any individual guard; the guard force normally came from the Arresting multiple<sup>31</sup>
- Tactical Questioners (TQs): these would also be included as it was their job to question detainees; they would usually give specific orders to the guard force commanders or the guard force themselves on what to do with detainees; however, their precise place in the chain of command could vary<sup>32</sup>

(16) It has therefore clearly emerged that there were a large number of command levels and personnel involved in prisoner handling within 1 QLR; many of these individuals were not part of any specialist units such as the RMP, Provost Staff, or TQ’s. This experience illustrates the breadth of personnel within the military who need the training concerned. (The role of medical personnel is examined in section 11.3 below.)

(17) Regarding the MOD witness statements relating to Module 4, it is said that when it comes to some of the specialist units, such as the Military Provost Staff (MPS), the Military Provost Guard Service (MPGS) and the Royal Military Police (RMP), there is now improved training on detainee handling:<sup>33</sup>

*“I believe training and process have improved considerably since 2003. However, the focus has been on ensuring that all personnel have an understanding of the regulations governing operational detention and are trained in, and have a good awareness of, detainee handling. This is logical because the nature of military operations dictates that detainee handling is the responsibility of the military chain of command as it could fall to any member of an operational unit. Limited specialist training in operational detention is available to some non-MPS/RMP personnel...Ideally, I believe we should have more MPS personnel to be*

<sup>28</sup> Ibid, para 42.2, BM101105; see also paragraph 41.6 which confirms that below the BGIRO in the chain of command came the Provost Staff who in turn would have issued orders to those guarding the detainees.

<sup>29</sup> Ibid, para 42.3, BM101105.

<sup>30</sup> Sergeant P.E. Smith, day 44, transcript, p 182-183, available at [www.bahamousainquiry.org/linkedfiles/baha\\_mousa/hearings/transcripts/2009-12-14-day44fullday.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/transcripts/2009-12-14-day44fullday.pdf).

<sup>31</sup> Sergeant P.E. Smith, day 44, witness statement, para 61, BM105005\_R.

<sup>32</sup> Sergeant P.E. Smith, day 44, transcript, p 92.

<sup>33</sup> Brigadier Edward Oliver Forster-Knight, witness statement, available at [www.bahamousainquiry.org/linkedfiles/baha\\_mousa/module\\_4/mod\\_4\\_witness\\_statem/exhibit\\_fk/miv005283.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/module_4/mod_4_witness_statem/exhibit_fk/miv005283.pdf).

*deployed at all levels. MPS under resourcing is now recognized as a problem within the highest levels of the Army.*<sup>34</sup>

It is not clear whether the reference to “all” (emphasis in the original) relates to all personnel within the specialised units (MPS, RMP), or to all ranks within the military. At the same time there is a clear recognition that “*detainee handling...could fall to any member of an operational unit*” and that there is also a shortage of those specially trained in detainee handling.

(18) We therefore emphasise that not only is it an obligation for the MOD to ensure that all those who may come into contact with a detainee are properly trained on anti-torture issues, but that there is a real likelihood that in addition to those who are specially trained (such as MPS and RMP personnel) other non-specialists will indeed at some point also be involved in detainee handling. The 1 QLR experience was the norm, not an exception. It is not obvious from the witness statements as a whole that the MOD is paying sufficient attention to this, and the implications arising from it.

### ***II.3 The role and training of medical personnel***

(19) In the UNCAT reporting procedure, the United Nations Committee Against Torture (the Committee) attaches particular importance to the proper training of doctors and other medical personnel working in interrogation or detention centres.<sup>35</sup> Such training needs to be torture specific: the Committee has thus also recommended that physicians receive training on the Istanbul Protocol of 1999 (Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).<sup>36</sup>

(20) The positive role which doctors can and actually should play has also been emphasised in detecting cases of torture “*by means of thorough medical examinations of every person entering or leaving any place of detention.*”<sup>37</sup> Included in this special role is

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<sup>34</sup> Ibid, paras 23-24, 27, MIV005290-1.

<sup>35</sup> See the *Conclusions and recommendations of the Committee against Torture: PERU*, CAT/C/PER/CO/4, 25 July 2006, at para 17: “[The Committee] is... concerned that justice officials and medical staff are still not sufficiently trained to detect cases of torture and cruel, inhuman and degrading treatment, particularly in the context of pretrial detention. The State party should extend training programmes dealing with the obligations imposed by the Convention for police, army and prison officials and for prosecutors, particularly as regards the correct classification of cases of torture. It is also recommended that it should develop training programmes for medical personnel assigned to the detection of cases of torture...,” available at: [www.unhchr.ch/tbs/doc.nsf/385c2add1632f4a8c12565a9004dc311/5ffe189c6ee40f89c12571e700279022/\\$FILE/G0643246.pdf](http://www.unhchr.ch/tbs/doc.nsf/385c2add1632f4a8c12565a9004dc311/5ffe189c6ee40f89c12571e700279022/$FILE/G0643246.pdf).

<sup>36</sup> See the *Conclusions and recommendations of the Committee against Torture: ITALY*, CAT/C/ITA/CO/4, 16 July 2007, at para 15: “... the Committee recommends that all relevant personnel receive specific training on how to identify signs of torture and ill-treatment and that the Istanbul Protocol of 1999 (Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) become an integral part of the training provided to physicians. In addition, the State party should develop and implement a methodology to assess the effectiveness and impact of its training/educational programmes on the reduction of cases of torture and ill-treatment;”

Available at <http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf>. See also, the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted by General Assembly resolution 37/194 of 18 December 1982, available at: <http://www2.ohchr.org/english/law/medicalethics.htm>.

<sup>37</sup> Nowak and McArthur, p 397.

the duty of all medical staff to “report every case of torture and ill-treatment, whether committed by a person of equal, higher or lower rank or function...”<sup>38</sup>

(21) In this context the following points arising from the evidence of the 1 QLR Regimental Medical Officer (RMO), Dr D.A. Keilloh, and his role at the Regimental Aid Post (RAP) and that of his medical staff, are pertinent:<sup>39</sup>

- He had no understanding prior to his deployment to Iraq that he might be involved in the examination of prisoners and/or civilian detainees<sup>40</sup>
- Until about a month after being in post as the RMO with 1 QLR in Basra he didn't know that there was any requirement for him (and those under him) at the RAP to be involved in anything surrounding detainees<sup>41</sup>
- He only became aware of this role from a conversation with the Provost Sergeant, Sergeant P.E. Smith<sup>42</sup>
- During that month none of his staff at the RAP indicated that they were treating detainees and he didn't know there were detainees being held at the TDF<sup>43</sup>
- He was unaware of the office of the BGIRO during his entire period in Iraq<sup>44</sup>
- After about a month the Sergeant asked him to screen them to see there were no injuries requiring immediate attention, but no documentation was required to be completed either then or later unless something was elicited which required attention<sup>45</sup>
- He didn't know detainees might be questioned at the TDF and believed they would be held for no more than 48 hours and then transferred to the US forces,<sup>46</sup> nor was he informed that conditioning would be undertaken<sup>47</sup> nor had he ever heard of the 'Shock of Capture'<sup>48</sup>

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<sup>38</sup> Ibid.

<sup>39</sup> Day 36, transcript, pp 83-178 , available at [www.bahamousainquiry.org/linkedfiles/baha\\_mousa/hearings/transcripts/20091123day36fullday.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/transcripts/20091123day36fullday.pdf).

<sup>40</sup> Ibid, p 93. See also day 36, witness statement, para 20, BMI00491-2: “At no stage [after I was called up for deployment in Iraq] did I receive training, guidance, orders or instructions in relation to the detention or treatment of prisoners in any category.” In 1999 Dr Keilloh received training “covering Law of Armed Conflict, weapons handling, the Geneva Convention. I did not have any other information other than my recollection of that previous training. I had no written notes, or aide memoirs” – *ibid*.

<sup>41</sup> Ibid, transcript, pp 94-95.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid, p 101.

<sup>45</sup> Ibid, pp 107-8.

<sup>46</sup> Ibid, p 112. See also Dr Keilloh's witness statement, para 76, BM100512.

<sup>47</sup> Ibid, witness statement, para 77, BM100514.

<sup>48</sup> Ibid, para 99, BM10520. In his witness statement (dated 13 May 2009) Dr Keilloh also said: “In fact I remain unclear as to what “tactical questioning” constitutes, and have only read about this issue in relation to preparing for this statement” – *ibid*, para 186, BMI00550.

- At the handover when he arrived at 1 QLR there were no Standard Operating Procedures (SOPs) for the medical department and no explanation of what had been done or what had to be done<sup>49</sup>

(22) The evidence of General L.P. Lilywhite, the former Surgeon General (the highest ranking medical officer in the Armed Forces), dealt with how training, learning, policies and doctrines established in the 1970s in Northern Ireland were not followed in Iraq at the relevant time. Thus from the General's witness statement the following was read to him:<sup>50</sup>

*"On my visit [to theatre] in December 2004, I found examples where medical officers were not carrying out medical examinations on detainees immediately on entry and also on exit from detention ..."*

It was then said to him that this was "Clearly contrary to that which would have been taught in 1972" to which the General answered "Yes."

(23) A further exchange with the General followed, bringing out the manifest gaps which had arisen:<sup>51</sup>

*"You go on to say: 'Failing to examine a detainee as soon as possible after admission and just before discharge or transfer removes an important safeguard for both the detainee and for those responsible for their custody by making it more difficult to pinpoint where any injury had been sustained.'*

*A. If I might also add, it also acts as a deterrent, of course, to ill-treatment because knowing that it can be pinpointed hopefully would deter somebody from acting illegally.*

*Q. Now paragraph 33, you head the paragraph 'Routine medical checks on entering and/or leaving detention by a particular unit in September 2003'. You say this: 'If a similar policy to the Northern Ireland policy had been in existence in September 2003 ...' this is what you would have expected. You would have expected documented medical checks.*

*A. Yes.*

*Q. So it is the medical check and it's the record of it?*

*A. Yes.*

*Q. 'I would expect any medical officer [you say] who is aware of this requirement to ensure that the checks took place. However, given the gap in learning since the Northern Ireland policy, a junior medical officer would not know of this requirement.' Because there was nothing in the training or in writing so to direct him or her?*

*A. Correct, or in the doctrine."*

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<sup>49</sup> Ibid, para 32, BMI00496.

<sup>50</sup> Day 95, transcript, pp 146-147, available at [www.bahamoussainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence180510/2010-18-05-day95fullday.pdf](http://www.bahamoussainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence180510/2010-18-05-day95fullday.pdf).

<sup>51</sup> Ibid, pp 147-148.

(24) The General's evidence, along with the other aspects raised above, illustrates how important this aspect of anti-torture training is, and how the role of medical personnel needs careful and specific attention.

(25) The MOD has provided a witness statement<sup>52</sup> and some exhibits<sup>53</sup> concerning the proper role of medical personnel in regard to detainees; it is recorded that *"there has been a clear policy on medical support requirements for detainees since 2005 when the first Surgeon General's Policy Letter on the subject was produced."*<sup>54</sup> This confirms the lacuna which previously existed and constitutes recognition of the importance of this issue, reflected in the current Operational Policy Letter's reference to the UN's ethical principles:

*"The United Nations has issued a set of ethical principles<sup>55</sup> that relate to the involvement of healthcare personnel when treating detainees. These standards of professional conduct apply at all times."*<sup>56</sup>

Further, these principles are annexed to the current Operational Policy Letter as well as being *"expanded upon...to give guidance and direction."*<sup>57</sup>

(26) This is an example of how the MOD can base its training, policies and practices on well-developed international standards - so-called soft-law principles. What is done in the context of medical personnel, therefore, can and should also be done in all other relevant spheres. This is examined in section **II.4** below.

## **II.4 The scope of training**

(27) The Committee has stated that information, education and training must be conducted and evaluated regularly; in its *Recommendations* to the USA regarding, amongst others, military personnel, the following is highly relevant to the present exercise:<sup>58</sup>

*"The Committee is concerned that information, education and training provided to the State party's law-enforcement or military personnel are not adequate and do not focus on all provisions of the Convention, in particular on the non-derogable nature of the prohibition of torture and the prevention of cruel, inhuman and*

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<sup>52</sup> By Air Commodore Anthony Charles Wilcock, available at [www.bahamousainquiry.org/linkedfiles/baha\\_mousa/module\\_4/mod\\_4\\_witness\\_statem/exhibit\\_acw/miv004672.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/module_4/mod_4_witness_statem/exhibit_acw/miv004672.pdf).

<sup>53</sup> For example, *Surgeon General's Operational Policy Letter (9/09)*, available at [www.bahamousainquiry.org/linkedfiles/baha\\_mousa/module\\_4/mod\\_4\\_witness\\_statem/exhibit\\_acw/miv002683.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/module_4/mod_4_witness_statem/exhibit_acw/miv002683.pdf).

<sup>54</sup> Air Commodore Wilcock, witness statement, para 4, MIV004672.

<sup>55</sup> United Nations (1982) '*Principles of Medical Ethics in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment*', General Assembly Resolution 37/94 – footnote 3 in the document cited.

<sup>56</sup> *Surgeon General's Operational Policy Letter (9/09)*, p 2, para 5, MIV002684.

<sup>57</sup> Ibid.

<sup>58</sup> *Conclusions and recommendations of the Committee against Torture: USA*, CAT/C/USA/CO/2, 25 July 2006, para 23, available at [www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/e2d4f5b2dccc0a4cc12571ee00290ce0/\\$FILE/G0643225.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/e2d4f5b2dccc0a4cc12571ee00290ce0/$FILE/G0643225.pdf).

*degrading treatment or punishment (arts. 10 and 11). The State party should ensure that education and training of all law-enforcement or military personnel, are conducted on a regular basis, in particular for personnel involved in the interrogation of suspects...The State party should also regularly evaluate the training and education provided to its law-enforcement and military personnel as well as ensure regular and independent monitoring of their conduct.”*

(28) To achieve these kinds of results the Committee has also said that State Parties should develop and implement methodologies “to assess the effectiveness and impact of these training programmes on the incidence of cases of torture, violence and ill-treatment.”<sup>59</sup> Although this was said regarding police and prison officers, the principle applies to soldiers too who are in any way involved with the detention and/or questioning of civilians; the Committee has also recommended that States should ensure regular and independent monitoring of their personnel’s’ conduct.<sup>60</sup>

(29) It has been said that “In general, training courses should not only be provided by governmental agencies and police academics, but also by relevant NGOs.”<sup>61</sup> For personnel involved in the interrogation of suspects, this should include training on interrogation rules, instructions and methods of interrogation, and there are well-established international guidelines (‘soft-law’) which are pertinent for security personnel as well as medical experts. In his General Recommendations in 2003 the Special Rapporteur on Torture referred to such training and guidelines as follows:<sup>62</sup>

*“Training courses and training manuals should be provided for police and security personnel...Security and law enforcement personnel should be instructed on the pertinent provisions of the Standard Minimum Rules for the Treatment of Prisoners, the Code of Conduct for Law Enforcement Officials, the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the Basic Principles on the Treatment of Prisoners... In particular, due attention should be paid to the Standard Minimum Rules for the Treatment of Prisoners and other international standards in resorting to methods and equipment of restraints, as well as to punishment measures...Health-sector personnel should be instructed on the Principles of Medical Ethics relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Detainees and Prisoners against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Governments and professional medical associations should take strict measures against medical personnel that play a role, direct or indirect, in*

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<sup>59</sup> See *Conclusions and recommendations of the Committee against Torture: The Netherlands*, CAT/C/NET/CO/4, 3 August 2007, at para 14: “While noting the different training programmes for police and prison officers in the three constituent parts of the Kingdom, which cover human rights and rights of detainees including the prohibition of torture, the Committee regrets that there is no available information on the impact of the training or its efficacy in reducing incidents of torture, violence and ill-treatment. The State party should ensure that through educational programmes, law enforcement personnel and justice officials are fully aware of the provisions of the Convention. Furthermore, the State party should develop and implement a methodology to assess the effectiveness and impact of these training programmes on the incidence of cases of torture, violence and ill-treatment.”

<sup>60</sup> See para 27 above and the quotation from the *Recommendations: USA*, CAT/C/USA/CO/2.

<sup>61</sup> Burgers and Danelius, p 142.

<sup>62</sup> *General Recommendations of the Special Rapporteur on Torture* E/CN.4/2003/68, para 26 (m) and (n), available at [www.google.co.uk/search?hl=en&source=hp&q=General+Recommendations+of+the+Special+Rapporteur+on+Torture+E%2FCN.4%2F2003%2F68&btnG=Google+Search&meta=&aq=f&aqi=&aq=&og=&gs\\_rfai=](http://www.google.co.uk/search?hl=en&source=hp&q=General+Recommendations+of+the+Special+Rapporteur+on+Torture+E%2FCN.4%2F2003%2F68&btnG=Google+Search&meta=&aq=f&aqi=&aq=&og=&gs_rfai=)

*torture. Such prohibition should extend to such practices as examining detainees to determine their “fitness for interrogation” and procedures involving ill-treatment or torture, as well as providing medical treatment to ill-treated detainees so as to enable them to withstand further abuse...”*

(30) What is therefore necessary to emphasise is not only that the norms relating to the absolute prohibition of torture and other ill-treatment are contained in teaching materials in a general way for soldiers who may not be familiar with them, but they “*should also form part of the specific rules and instructions given to those directly involved in the treatment of prisoners and detainees.*”<sup>63</sup> The importance of both the general and the specific also links the anti-torture training provisions of article 10 of the UNCAT with the duty to systematically review interrogation rules as set out in article 11, examined below.<sup>64</sup>

(31) Personnel should also receive training on how to identify signs of torture and cruel, inhuman or degrading treatment and be instructed to report such incidents; the duty of medical personnel to report has been dealt with above<sup>65</sup> but it applies to all State officials and therefore all military staff involved in the custody of persons “*shall be reminded of their duty to report every case of torture and ill-treatment, whether committed by a person of equal, higher or lower rank.*”<sup>66</sup> The Committee has recommended States should “*ensure that all persons reporting acts of torture or ill-treatment are accorded adequate protection and that the allegations are promptly investigated.*”<sup>67</sup>

(32) The prohibition of an individual accused of torture raising the ‘defence’ that he was following an order from a superior officer is so well established that it need hardly be emphasised that it should form a fundamental plank of any anti-training programme for soldiers,<sup>68</sup> what needs to be noted is that it is also explicitly contained in Article 2(3) of UNCAT: “*An order from a superior officer or a public authority may not be invoked as a justification for torture.*” Training should therefore inculcate in soldiers that they are under a duty to disobey orders from a superior to commit torture or other prohibited ill-treatment. REDRESS has stated in its *Guide to implementing UNCAT* that there is a need for this to be given specific attention within institutions such as the military with strict hierarchical structures.<sup>69</sup>

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<sup>63</sup> Nowak and McArthur, p 399.

<sup>64</sup> Para 41 et seq.

<sup>65</sup> Para 20.

<sup>66</sup> Nowak and McArthur, p 397.

<sup>67</sup> *Conclusions and recommendations: GREECE*, CAT/C/CR/33/2, 10 December 2004, para 6 (g).

<sup>68</sup> Going back to 1946 and Article 8 of the *Charter of the International Military Tribunal of Nuremberg*: “The fact that the Defendant acted pursuant to an order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.” The prohibition of the defence is also contained in Article 33 of the *Rome Statute of the International Criminal Court*.

<sup>69</sup> REDRESS, *Bringing the International Prohibition of Torture Home: National Implementation guide for the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (The Redress Trust, 2006), p 42: “In many instances, this duty to refrain from torture despite an order to the contrary may be inconsistent with the general duty of officials, particularly those within strict hierarchical structures such as the police or the military, and will be most difficult to implement in protectionist, insular command structures. The implementation of this provision will...usually also require clear general directives to be issued coupled with effective independent oversight mechanisms so that junior officials have places to go when faced with this dilemma;” available at [www.redress.org/downloads/publications/CAT%20Implementation%20paper%2013%20Feb%202006%203.pdf](http://www.redress.org/downloads/publications/CAT%20Implementation%20paper%2013%20Feb%202006%203.pdf).

(33) It must not be overlooked that the obligation to provide education on how to avoid torture also applies to other forms of ill-treatment<sup>70</sup> and also applies outside of detention: training needs to cover the recognition of these obligations when a person is in the process of being detained or arrested, when a public gathering is being dispersed or a riot is being quelled; thus all soldiers who might be involved in those activities need the training, not just those who will ultimately be responsible for guarding detainees.<sup>71</sup>

(34) What is needed, therefore, is pro-active anti-torture training which is included as an integral and integrated part of the “regular education curricula” of all relevant soldiers “as well as in regular in-service training curricula.”<sup>72</sup>

(35) As has been pointed out above when looking at medical aspects<sup>73</sup> the MOD has recognised the central importance, when it comes to the proper treatment of detainees, of the UN’s *Principles of Medical Ethics in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment*. However, outside of the training and role of healthcare personnel, the MOD’s witness statements and exhibits do not make reference to other relevant ‘soft law’ i.e. the numerous other UN codes of conduct, standard minimum rules and basic principles, some of which the Special Rapporteur on Torture, for example, has specifically highlighted for provision in training manuals and training guidelines.<sup>74</sup>

(36) The MOD should give sufficient consideration to these international standards, which should be included and incorporated into training policies and practices, and in some instances, could form the backbone of training materials. Provision for this approach could be made, for example, in “*JDP 1-10 Chapter 2-Standards of treatment*.”<sup>75</sup> However, more important than where and precisely how these international standards should be taught, is for the MOD to genuinely take on board the fundamental need for a comprehensive, over-all anti-torture policy at every level. Once this is done a considerable amount of what has been neglected can receive proper attention.

## ***II.5 Some practice failures revealed***

(37) In general terms, the Inquiry reveals multiple failures in training, policy and implementation. Below, we highlight some instances which illustrate the breakdown of the system when “*judg[ing] ourselves against the highest standards*”.<sup>76</sup>

- **Use of hooding:** it was apparently standard operating procedure for detainees to be hooded;<sup>77</sup> detainees were brought into BG Main with sandbags on if they were

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<sup>70</sup> See below p 18.

<sup>71</sup> Nowak and McArthur, p 396.

<sup>72</sup> Ibid, p 397.

<sup>73</sup> At para 26.

<sup>74</sup> See above, para 29.

<sup>75</sup> See above, footnote 15.

<sup>76</sup> See the Prime Minister’s statement, p 2 above, footnotes 5 and 6.

deemed to be a threat to security;<sup>78</sup> there was also the thought that the use of hoods may protect the detainees from the mob i.e. it would hide their identities;<sup>79</sup> whatever the true position, there was no clear policy or practice based on acceptable human rights norms, standards and obligations;

- **Use of stress positions:** again, it was apparently standard operating procedure for detainees to be subjected to stress positions,<sup>80</sup> which were seen as part of the conditioning process in order to maintain the shock of capture prior to tactical questioning,<sup>81</sup> this process involved preventing the prisoner from talking to anyone else he was brought in with and not having the chance to make a cover story in order to throw off the questioner,<sup>82</sup> stress positions were maintained how the tactical questioner or person questioning wanted them to be maintained,<sup>83</sup> as a result, even where there was no suggestion of a security aspect involved (compared to say the hooding issue), soldiers appear to have had no hesitation subjecting detainees to stress positions;
- **Extent or degree of stress imposed:** it appears the understanding of the term “stress position” mainly covers positions which were seen as “uncomfortable” rather than the more painful positions (such as the “ski” position) – thus Col. Mendonca said that he visited the TDF several times and that he did not see anyone in stress positions that would have caused pain or cause him ( Col. Mendonca) to be alarmed;<sup>84</sup> it was usually the tactical questioner who gave direct instruction to the guard force about how to treat detainees using stress positions;<sup>85</sup>
- **The length of use of hooding and/or stress positions:** it appears that no-one who was responsible for detainees gave any thought to the question as to how long hooding or stressing should be used;<sup>86</sup>
- **Knowledge of the Heath Government ruling on the five techniques:** nobody in 1 QLR appeared to be aware of the Heath Government ruling, for example, Col Mendonca stated that although it is recorded as having been covered on one of his courses in 1994-1995 he could not recall it from that training.<sup>87</sup>

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<sup>77</sup> Mr D. Payne, day 32, transcript, p 29, available at [www.bahamousainquiry.org/linkedfiles/baha\\_mousa/hearings/transcripts/20091116day32fullday.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/transcripts/20091116day32fullday.pdf).

<sup>78</sup> Sgt Smith, day 44, witness statement, paragraph 34, BM104998\_R, available at [www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_141209/bmi04990.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_141209/bmi04990.pdf).

<sup>79</sup> Col Mendonca, day 59, witness statement, para 78, BM101121, available at [www.bahamousainquiry.org/linkedfiles/baha\\_mousa/hearings/transcripts/2010-15-02-day59fullday.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/transcripts/2010-15-02-day59fullday.pdf).

<sup>80</sup> Mr Payne, *ibid.*

<sup>81</sup> Col Mendonca, *ibid.*, para 80.

<sup>82</sup> Sgt Smith, day 44, transcript, p 63, available at [www.bahamousainquiry.org/linkedfiles/baha\\_mousa/hearings/transcripts/2009-12-14-day44fullday.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/transcripts/2009-12-14-day44fullday.pdf).

<sup>83</sup> *Ibid.*

<sup>84</sup> Day 59, transcript, pp 212-213.

<sup>85</sup> Day 44, *ibid.*, pp 83-84.

<sup>86</sup> Col Mendonca, day 59, transcript, p 213; Sgt Smith, day 44, p 84.

<sup>87</sup> *Ibid.*, p 105-106.

(38) Regarding the current position as set out in some of the MOD witness statements and exhibits, it is noted that the five prohibited techniques are now given specific attention in Armed Forces' training:

*"The five prohibited techniques are explicitly explained together with the background to their prohibition – Geneva Conventions and the Ted Heath Declaration of 1972 – and a detailed explanation of what is meant by each technique."*<sup>88</sup>

It is significant that in the House of Lords (Appellate Committee) decision in *A (FC) v Secretary of State for the Home Department (No 2)*,<sup>89</sup> which ruled that under no circumstances could evidence obtained under torture be admissible in UK courts, Lord Bingham held that that the five techniques which the ECtHR had ruled do not constitute torture but inhuman and degrading treatment might well "now be held to fall within the definition [of torture] in article 1 of the Torture Convention."<sup>90</sup>

(39) It is also significant that the Committee against Torture has taken a similar position in a case concerning Israel, particularly when such techniques (and others) are used in combination:<sup>91</sup>

*"... [T]he methods of interrogation...were neither confirmed nor denied by Israel. The Committee, therefore, must assume them to be accurate. These methods include: (1) restraining in very painful conditions, (2) hooding under special conditions, (3) sounding of loud music for prolonged periods, (4) sleep deprivation for prolonged periods, (5) threats, including death threats, (6) violent shaking, and (7) using cold air to chill; and are in the Committee's view breaches of article 16 and also constitute torture as defined in article 1 of the Convention. This conclusion is particularly evident where such methods of interrogation are used in combination, which appears to be the standard case."*<sup>92</sup>

(40) While the MOD's policy on the five techniques is now clear it is also important that the issues surrounding them are not seen or taught in isolation from the wider concerns relating to torture and CIDTP. A comprehensive anti-torture policy and practice is needed: while it can and no doubt should highlight the historical importance of some specific problems, it must consistently stress the total prohibition at *all* times and in *all* places of *all* torture and CIDTP. We have sought to emphasise that the obligations under UNCAT should constitute the backbone of this policy; what must be avoided is any suggestion that some 'techniques' or abuse may not be as bad, or as unlawful, as others.

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<sup>88</sup> Lieutenant Colonel Mark Jonathan Edkins, witness statement, p 2, para 7, MIV004623, available at [www.bahamousainquiry.org/linkedfiles/baha\\_mousa/module\\_4/mod\\_4\\_witness\\_statem/exhibit\\_mje/miv004622.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/module_4/mod_4_witness_statem/exhibit_mje/miv004622.pdf).

<sup>89</sup> [2005] UKHL 71, available at [www.bailii.org/uk/cases/UKHL/2005/71.html](http://www.bailii.org/uk/cases/UKHL/2005/71.html). The only exception is evidence given in the trial of a person accused of committing the torture.

<sup>90</sup> *Ibid*, para 53.

<sup>91</sup> *Summary record of the public part of the 297<sup>th</sup> meeting: Israel; 4 September 1997*:CAT/C/SR.297/Add.1, available at [www.unhchr.ch/tbs/doc.nsf/0/b51bae20771d616a80256513005275ab?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/0/b51bae20771d616a80256513005275ab?Opendocument).

<sup>92</sup> *Ibid*, para 5.

### III. The obligation to review interrogation rules

(41) Article 11 of UNCAT states:

*“Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.”*

This article is closely linked to article 10. It constitutes one of the most important safeguards for the prevention of torture and ill treatment, and re-enforces the general obligations under article 2(1) (to take effective measures to prevent torture) and article 16 (to do the same in respect of preventing ill treatment) by the specific requirement to regularly review the conditions of detention, methods of interrogation and treatment of detainees in general.<sup>93</sup>

(42) The importance of the obligations under this article (as read with the others mentioned) emerges from the Committee’s *Recommendations* to the USA where it stated with reference to stress positions and deaths during interrogation that:<sup>94</sup>

*“The Committee is concerned that in 2002 the State party authorized the use of certain interrogation techniques that have resulted in the death of some detainees during interrogation. The Committee also regrets that “confusing interrogation rules” and techniques defined in vague and general terms, such as “stress positions”, have led to serious abuses of detainees (arts. 11, 1, 2 and 16).”*

Using this as an illustrative example, it follows that where such shortcomings are revealed then necessary changes, including changes in and to anti-torture training programmes, would be required. Thus not only would the interrogation rules need to be changed and clarified, but those doing the interrogation would need to be aware of these changes so that the abuses which arose previously are prevented; the whole purpose of doing such reviews is, as article 11 states, *“with a view to preventing any cases of torture.”*

(43) This ongoing UNCAT obligation to review interrogation rules under article 11 must therefore include the systematic review of anti-torture training as has already been examined above under article 10 obligations. There is clearly a dynamic relationship between the obligation to review *“rules, instructions, methods and practices”* and the obligation to train (in this case soldiers) in regard to these rules, instructions, methods and practices. If such a proper review discloses any shortcomings then ways of dealing

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<sup>93</sup> Nowak and McArthur, p 401.

<sup>94</sup> *Conclusions and recommendations of the Committee against Torture: USA*, CAT/C/USA/CO/2, 25 July 2006, para 24, available at [www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/e2d4f5b2dccc0a4cc12571ee00290ce0/\\$FILE/G0643225.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/e2d4f5b2dccc0a4cc12571ee00290ce0/$FILE/G0643225.pdf). The Committee went on to say: “The State party should rescind any interrogation technique, including methods involving sexual humiliation, “waterboarding”, “short shackling” and using dogs to induce fear, that constitutes torture or cruel, inhuman or degrading treatment or punishment, in all places of detention under its de facto effective control, in order to comply with its obligations under the Convention.”

with these must be factored into comprehensively adjusting the substantive content of anti-torture training:

*“...[T]he obligation of State parties covers both the general conditions of detention and the specific treatment of detainees in all places in any territory under its jurisdiction, where persons may be deprived of their liberty.”<sup>95</sup>*

(44) Furthermore, article 11 applies to all places of detention of a State party “*in any territory under its jurisdiction.*” In the Committee’s *Recommendations* to the USA and with reference to inhuman interrogation techniques used at the US detention facility in Guantanamo Bay, Cuba, it urged the US Government to rescind such interrogation techniques “*in all places of detention under its de facto effective control.*”<sup>96</sup> It is clear this obligation extends to places such as those in Iraq with which the Inquiry is especially concerned and, with respect to the MOD’s other operations, to places such as Afghanistan and elsewhere where UK troops are deployed.

(45) The MOD has indicated in general how it reviews doctrine.<sup>97</sup> There is also reference to how a review has “*partly been generated by numerous claims of abuse (some well-founded) by persons interned/detained on Op TELIC.*”<sup>98</sup> This recognition of the need for a review, although it could hardly be avoided given the history of the September 2003 events, is to be welcomed. What is important is that such reviews are regular and ongoing and based on proper monitoring and evaluation of what happens and is happening in all places where CPERS are held. Clearly, while such reviews should fully take into account known occurrences of abuse, they should not wait for such occurrences or even be based mainly on them.

(46) What is needed is a systematic and principled approach based on the obligations, international standards and experiences which have been developed and are outline above. Further, the obligation to review cannot be divorced from the other obligations under UNCAT, such as the obligation to investigate and to have in place appropriate complaints procedures, which are examined in sections **V - VI** below. Each obligation should re-enforce and inform the other, and an over-all, ‘joined-up’ anti-torture policy is imperative.

## **IV. The prevention of cruel, human or degrading treatment or punishment**

(47) Article 16(1) of UNCAT states:

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<sup>95</sup> Nowak and McArthur, pp 408-409.

<sup>96</sup> See footnote 94 above.

<sup>97</sup> Captain Rupert Patrick Hollins (RN), witness statement, para10- 16, MIV004654 – 56, available at [www.bahamousainquiry.org/linkedfiles/baha\\_mousa/module\\_4/mod\\_4\\_witness\\_statem/exhibit\\_rph/miv004652.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/module_4/mod_4_witness_statem/exhibit_rph/miv004652.pdf).

<sup>98</sup> Exhibit for Capt Hollins (RN), Project proposal – JPP 1-10 prisoners of war, internees and detainees, para 3, MIV004812, available at [www.bahamousainquiry.org/linkedfiles/baha\\_mousa/module\\_4/mod\\_4\\_witness\\_statem/exhibit\\_rph/miv004812.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/module_4/mod_4_witness_statem/exhibit_rph/miv004812.pdf).

*“Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.”*

(48) Thus other forms of cruel, inhuman or degrading treatment or punishment (CIDTP) are, like torture, absolutely prohibited at all times. What is of particular importance, therefore, in the context of issues concerning training is the specific reference in article 16(1) to articles 10 and 11. It follows that everything which has been said under sections II - III above concerning anti-torture training applies *mutatis mutandis* to CIDTP.

(49) In its closing submissions on Modules 3-4 the MOD refers to article 16(1) without comment.<sup>99</sup> Interestingly, in the MOD’s cursory reference to UNCAT there is no mention at all of article 10, although article 11 is also referred to, again without comment.<sup>100</sup> The essence of the MOD’s position is that UNCAT does not apply to Iraq because the reference to “*in any territory under its jurisdiction*” in article (2)1 precludes its application there.<sup>101</sup> However, as has been shown, the UK is obliged to train its soldiers within and to the international anti-torture obligations and standards contained in UNCAT; it is absurd to argue that such training becomes irrelevant the moment a soldier sets foot outside out of the UK. Irrespective of what is meant by “jurisdiction” (though it is to be noted that REDRESS’ view as well as the view of the UN Committee Against Torture, the official interpretive body of the UNCAT was and is that the UK’s obligations necessarily extend extraterritorially to Iraq<sup>102</sup>) UNCAT obligations under articles 10 and 11 are directly relevant everywhere the UK armed forces operate, and apply to torture as well as CIDTP. Soldiers should be trained properly not to breach UNCAT, and should absorb that training and apply it wherever they are stationed. The alternative is to postulate two standards: anti-torture training which soldiers should follow when within UK territory and something different when they are not. This flies directly in the face of the total prohibition at all times and in all places.<sup>103</sup>

(50) This total prohibition is against torture and CIDTP. Although article 2(2)<sup>104</sup> does not refer to CIDTP it is inaccurate to argue that because there is no explicit provision in

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<sup>99</sup> 22 July 2010, SUB001005, p 60-61, available at [www.bahamousainquiry.org/linkedfiles/baha\\_mousa/hearings/oral\\_submission/sub000947.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/oral_submission/sub000947.pdf).

<sup>100</sup> Ibid, p 60.

<sup>101</sup> Ibid, p 59.

<sup>102</sup> See, e.g., UN Committee Against Torture, Conclusions and recommendations of the Committee against Torture, United Kingdom of Great Britain and Northern Ireland, Crown Dependencies and Overseas Territories, CAT/C/CR/33/3 of 10 December 2004, in which it is noted as a subject of concern “the State party’s limited acceptance of the applicability of the Convention to the actions of its forces abroad, in particular its explanation that “those parts of the Convention which are applicable only in respect of territory under the jurisdiction of a State party cannot be applicable in relation to actions of the United Kingdom in Afghanistan and Iraq”; the Committee observes that the Convention protections extend to all territories under the jurisdiction of a State party and considers that this principle includes all areas under the de facto effective control of the State party’s authorities.”

<sup>103</sup> See UNCAT article 2(2): “No exceptional circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”

<sup>104</sup> Ibid.

UNCAT that prohibits any derogation from the prohibition of CIDTP that there can be such derogation:<sup>105</sup>

*“... [T]he Preamble of the Convention clearly refers to the existing standards under the [I]CCPR and the 1975 Declaration and firmly affirms the desire of the drafters to make more effective (and not less effective) the struggle against torture and cruel, inhuman or degrading treatment...In addition, Article 16(2) CAT contains an explicit savings clause in relation to other treaty provisions prohibiting cruel, inhuman or degrading treatment.”*

(51) Thus article 16(2) states:

*“The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibit cruel, inhuman or degrading treatment or punishment or which relate to extradition or expulsion.”*

The preceding paragraph above refers to the International Covenant on Civil and Political Rights (ICCPR), which specifically contains a non-derogation provision which includes CIDTP.<sup>106</sup> Furthermore, although the MOD appears to indicate that the jurisdictional reach of the ICCPR does not extend to Iraq (the argument is the same as its view of UNCAT’s ‘non-applicability’ outside of the UK), it accepts that it can “in principle” apply to persons held in custody by the UK abroad.<sup>107</sup> There is thus no reasonable interpretation of the UK’s obligations which suggests that training to prevent CIDTP should be any less rigorous than to prevent torture.

(52) This is re-enforced when examining what distinguishes torture from CIDTP:<sup>108</sup>

*“...A thorough analysis of the **travaux préparatoires** of articles 1 and 16 of CAT as well as a systematic interpretation of both provisions in light of the practice of the Committee against Torture leads one to conclude that the decisive criteria for distinguishing torture from CIDT may best be understood to be the purpose of the conduct and the powerlessness of the victim, rather than the intensity of the pain or suffering inflicted...”*

(53) Cruel and inhuman treatment or punishment is the infliction of severe pain or suffering, whether physical or mental, by a public official (or other person acting in an official capacity); it can be intentional or negligent, and with or without a particular purpose. What is characteristic of torture – the direct control (“powerlessness”) of the

<sup>105</sup> Nowak and McArthur, pp 118-119.

<sup>106</sup> Article 4(1) and 4(2) as read with article 7 of the ICCPR. Article 4 states: “1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. 2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.” Article 7 states: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.” It came into force on 23 March 1976 and was ratified by the UK on 20 May 1976; available at <http://www2.ohchr.org/english/law/ccpr.htm>.

<sup>107</sup> 22 July 2010, SUB001005, p 61.

<sup>108</sup> CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTIONS OF TORTURE AND DETENTION; *Torture and other cruel, inhuman or degrading treatment; Report of the Special Rapporteur on the question of torture, Manfred Nowak* : E/CN.4/2006/6, 23 December 2005, para 39, available at [www.unhcr.org/refworld/docid/441181ed6.html](http://www.unhcr.org/refworld/docid/441181ed6.html).

victim – is not a requirement for cruel and inhuman treatment or punishment.<sup>109</sup> Degrading treatment or punishment is the infliction of physical or mental pain or suffering aimed at humiliating the victim and even if it “does not reach the threshold of ‘severe’ must be regarded as degrading treatment or punishment if it contains a particularly humiliating element.”<sup>110</sup>

(54) The Inquiry has concentrated on what happened to the detainees while they were in custody, and to this extent the distinction between torture and CIDTP doesn’t arise. Thus cruel and inhuman treatment is subject to the proportionality principle only in so far as the person is not under the de facto control of the official, such as while an official is effecting a lawful arrest or preventing an escape from lawful custody, quelling a riot or dissolving a demonstration:<sup>111</sup>

*“Outside a situation where one person is under the de facto control of another, the prohibition of CIDT is subject to the proportionality principle, which is a precondition for assessing its scope of application. However, if a person is detained or otherwise under the de facto control of another person, i.e. powerless, the proportionality test is no longer applicable and the prohibition of torture and CIDT is absolute. **This absolute prohibition of the use of any form of physical force or mental coercion applies, first of all, to situations of interrogation by any public official, whether working for the police forces, the military or the intelligence services.**”* [Emphasis added]

(55) The MOD describes what the 1 QLR detainees were subjected to as follows:<sup>112</sup>

*“...the primary cause of Baha Mousa’s death and the severe suffering of his fellow detainees was the inhumanity shown by Cpl Payne and others. This is exemplified by the scale and intensity of the violence. It is reinforced by the cruel severity with which the unlawful conditioning techniques were applied.”*

(56) A proper application of articles 10 and 11, as read with the other relevant articles, is a prerequisite for the prevention of further breaches of the UNCAT: to avoid the occurrence of another “stain on the character of the British Army.”<sup>113</sup>

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<sup>109</sup> Nowak and McArthur, p 558.

<sup>110</sup> Ibid.

<sup>111</sup> CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTIONS OF TORTURE AND DETENTION; *Torture and other cruel, inhuman or degrading treatment; Report of the Special Rapporteur on the question of torture, Manfred Nowak* : E/CN.4/2006/6, 23 December 2005, para 41.

<sup>112</sup> 22 July 2010, SUB001025, p 79, para 30, available at [www.bahamousainquiry.org/linkedfiles/baha\\_mousa/hearings/oral\\_submission/sub000947.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/oral_submission/sub000947.pdf).

<sup>113</sup> General Sir Michael Jackson, day 100, transcript, p 147, available at [www.bahamousainquiry.org/linkedfiles/baha\\_mousa/hearings/transcripts/2010-07-06-day100fulldayredacted.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/transcripts/2010-07-06-day100fulldayredacted.pdf).

## V. Investigations

### V.1 *The obligation to investigate*

(57) The very fact that the current Inquiry was set up illustrates the insufficiency of all previous investigations into the death of Baha Mousa and the abuse suffered by the other detainees. These include the initial investigation by the RMP's Special Investigative Branch (SIB), the court martial prosecution and an internal army investigation by Brigadier Aitken. None of these previous efforts satisfactorily determined the identity and actions of those involved in the mistreatment, and hence the recognition of the need to learn lessons for future investigations.<sup>114</sup>

(58) Article 12 of UNCAT states:

*"Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction."*

Article 14 of UNCAT states:

*"Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given."*

These obligations represent two of the most crucial provisions for the prevention of torture and CIDTP,<sup>115</sup> and equally, are prerequisites for the fulfilment of other obligations under the Convention, to prosecute and ensure an effective remedy.

(59) The European Court of Human Rights (ECtHR) has similarly interpreted the prohibition of torture and other cruel, inhuman and degrading treatment and punishment in article 3, together with the general duty to guarantee Convention rights in article 1 of the European Convention on Human Rights (ECHR), as obliging states to investigate all cases of torture and other prohibited ill-treatment thoroughly and effectively. Together

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<sup>114</sup> Issue 20 of the Module 4 Topics provides: "Where deaths, serious injury or injuries suggestive of abuse occur in military custody on operations, is adequate provision made to ensure the retention of evidence and prompt investigation in theatre?"

<sup>115</sup> Nowak and McArthur, p 413: "Articles 12 and 13 contain two of the most important provisions for the prevention of torture and ill-treatment: the obligation of States parties to investigate every potential case of torture and ill-treatment, either on the basis of an allegation by the victim (Article 13) or *ex officio* on the basis of any reasonable ground to believe that an act of torture or ill-treatment has been committed (Article 12)."

with Article 13 of the ECHR (the right to an effective remedy), this includes the right of a victim to lodge a complaint to the competent authorities.

(60) As the wording of Issue 20 recognises, investigations must be *prompt*. However it is established under UNCAT and the ECHR jurisprudence that states are obliged to investigate allegations “thoroughly” and “effectively”. These notions relate to the **substance** of the investigation. Any investigation must also be impartial and the independence of investigating bodies must be examined. It is respectfully submitted, therefore, that the Inquiry must also consider these aspects in exploring the issue of investigations of ill-treatment in cases of military custody.

(61) The right of victims to complain<sup>116</sup> about torture is an important right in and of itself as it provides them with the chance to positively express dissatisfaction and disapproval of their treatment. It is also a means to an end, in that it gives notice to the competent authorities of the alleged commission of a crime. In this respect, the complaint is also a trigger for the competent authorities to begin an investigation into the alleged acts with a view to holding the perpetrators accountable as part of criminal and administrative proceedings.<sup>117</sup>

(62) The Inquiry has shown that the detainees did not have an adequate opportunity to complain of their treatment. The establishment of this right in places of military detention must also be considered as part of the UK’s duties to initiate an investigation in accordance with article 12 of UNCAT.

(63) The MOD has said that all RMP personnel are trained to deal with scenes of crime in operational areas and to preserve and recover evidence.<sup>118</sup> A “*full review of operational investigation practice, policy and procedures*”<sup>119</sup> is currently being conducted, aimed at producing a single-source investigation manual. It is to be hoped that this exercise will take into account the lessons which have emerged from the failures in the Baha Mousa case.

(64) It is imperative, therefore, that the UK Armed Forces properly absorb the principles and obligations regarding investigations which have been developed, particularly at the European level but also elsewhere, as set out above and below, and that this learning is reflected in detail in policy and practice. Provided this is done international standards ought to be met.

## ***V.2 The obligation to investigate allegations promptly***

(65) Articles 12 and 13 UNCAT both expressly require *prompt* investigations where there are either reasonable grounds to believe torture has been committed or where an individual has alleged that torture has taken place. “Prompt” should be given its full

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<sup>116</sup> Aspects relating to complaints are dealt with hereunder at page 29 et seq.

<sup>117</sup> REDRESS, *Taking Complaints of Torture Seriously*, (The Redress Trust, 2004), p 7, available at [www.redress.org/downloads/publications/PoliceComplaints.pdf](http://www.redress.org/downloads/publications/PoliceComplaints.pdf).

<sup>118</sup> Brigadier Edward Oliver Forster-Knight, witness statement, para 31, MIV005293 available at [www.bahamousainquiry.org/linkedfiles/baha\\_mousa/module\\_4/mod\\_4\\_witness\\_statem/exhibit\\_fk/miv005283.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/module_4/mod_4_witness_statem/exhibit_fk/miv005283.pdf).

<sup>119</sup> Ibid, para 33, MIV005294.

literal meaning and whether an investigation was carried out promptly will depend on the circumstances of the case. This obligation relates not only to the time taken to commence the investigation, but also the speed with which it is conducted.<sup>120</sup>

(66) No particular time period is referred to, but the case of *Encarnación Blanco Abad v Spain*<sup>121</sup> before the Committee against Torture is illustrative. The complainant alleged that she had been tortured on her first arraignment on anti-terrorism charges, but the complaint was not taken up by a judge until fifteen days had passed and it was another four days before an inquiry was commenced; the inquiry then took ten months, with gaps of one to three months waiting for forensic reports. The Committee held that these delays were unacceptable.<sup>122</sup>

(67) The ECtHR has in several cases found a failure by the authorities to investigate on the basis of the lack of prompt and timely investigations. In cases such as *Çiçek v. Turkey*<sup>123</sup> and *Timurtas v. Turkey*,<sup>124</sup> the reasoning indicates that there should be no unnecessary delay in beginning the investigation, which should be carried out within reasonably short succession after receiving the complaint. In *Assenov v. Bulgaria*,<sup>125</sup> the Court observed that “no attempt appears to have been made to ascertain the truth through contacting and questioning witnesses in the immediate aftermath of the incident, when memories would have been fresh.”<sup>126</sup>

(68) Baha Mousa died at around 10 p.m. on 15 September 2003, after which the following sequence emerged:

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<sup>120</sup> See REDRESS, *Bringing the International Prohibition of Torture Home: National Implementation guide for the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (The Redress Trust, 2006), p. 67 available at [www.redress.org/downloads/publications/CAT%20Implementation%20paper%2013%20Feb%202006%203.pdf](http://www.redress.org/downloads/publications/CAT%20Implementation%20paper%2013%20Feb%202006%203.pdf). See also Amnesty International: *Combating Torture: A Manual for Action*, Amnesty International publication, AI Index: ACT 40/001/2003, June 2003, section 7.3.

<sup>121</sup> *Communication No 59/1996*, CAT/C/20/D/59/1996, 14 May 1998, at para 8.2: “Article 12 also requires that the investigation should be prompt and impartial. The Committee observes that promptness is essential both to ensure that the victim cannot continue to be subjected to such acts and also because in general, unless the methods employed have permanent or serious effects, the physical traces of torture, and especially of cruel, inhuman or degrading treatment, soon disappear” - available at [www.unhchr.ch/tbs/doc.nsf/0/5db5775f6e58892e802566f200409a77?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/0/5db5775f6e58892e802566f200409a77?Opendocument).

<sup>122</sup> *Ibid*, paras 8.7 and 8.8. See also the case of *Halimi-Nedzibi v Austria*, *Communication No. 8/1991*, CAT/C/11/D/8/1991, 30 November 1993, at para 13.5: “The Committee considers that a delay of 15 months before an investigation of allegations of torture is initiated, is unreasonably long and not in compliance with the requirement of article 12 of the Convention” - available at [www.unhchr.ch/tbs/doc.nsf/MasterFrameView/5504470e56e8d104802567a5004f807a?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/5504470e56e8d104802567a5004f807a?Opendocument). See also *Khaled M'Barek v Tunisia*, *Communication No 60/1996*, CAT/C/23/D/60/1996, 24 January 2000, paras 11.5 and 11.7: “[...] Only on 22 September 1992 was an inquiry ordered into these allegations of torture - over 10 months after the foreign non-governmental organizations had raised the alarm and over 2 months after the Driss Commission's report... The Committee is of the view that the State party did not comply with its obligation under article 12 of the Convention to proceed to a prompt ... investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction and that there was consequently a violation of the Convention” - available at [www.unhchr.ch/tbs/doc.nsf/0/00c2952fe36f0b46802568b8004e05de?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/0/00c2952fe36f0b46802568b8004e05de?Opendocument).

<sup>123</sup> *Çiçek v. Turkey*, *Application No 25704/94*, 5 September 2001, para 149.

<sup>124</sup> *Timurtas v. Turkey*, *Application No 23531/94*, 13 June 2000, para 89; see also *Tekin v. Turkey*, *52/1997/836/1042*, 9 June 1998, para 67.

<sup>125</sup> *Application No 24760/94*, 28 October 1998.

<sup>126</sup> *Ibid*, at para 103.

- The SIB was present at BG Main by 10 a.m. on 16 September to open a case-file diary and commence an investigation<sup>127</sup>
- The Theatre Internment Facility (TIF) was visited on 17 September 2003 to photograph the injuries to detainees<sup>128</sup>
- The detainees hospitalised because of their injuries were visited on 17 and 18 September<sup>129</sup>
- However the majority of the guard force was not interviewed until the 10-12 October 2003, four weeks after the death of Baha Mousa<sup>130</sup>
- An example of a person who by November had not yet had an opportunity to make a formal statement to the SIB was Major Peebles<sup>131</sup>
- The detainees were not asked to participate in an identification parade until late January 2004 and even then this only involved three detainees<sup>132</sup>

(69) Thus despite the investigation commencing the day after death, the delays in interviewing others created an opportunity for 'collusion' and/or intimidation, for example:

- One of the soldiers who had witnessed certain aspects was approached by Corporal Payne who said "*just don't say anything*" and "*we need to stick together on this*",<sup>133</sup> the same witness also implicated Lt Rodgers:

*"Q. Did Mr Rodgers ever say anything to you or you with the multiple --*

*A. Yes, he did.*

*Q. -- about what had happened or what should happen? What did he say?*

*A. It was before we went into the SIB interview and it was put to us that Don Payne wasn't part of the multiple and that we should stick together as a multiple.*

*Q. Forgive me, I just need to be clear about it. You say it was put to you, put to you by whom?*

*A. Lieutenant Rodgers.*

*Q. What did he say? Payne wasn't part of the multiple --*

<sup>127</sup> Staff Sergeant Sherrie Cooper, day 27, witness statement, para 25 (BMI00045-6), available at [www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_221009/bmi00039.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_221009/bmi00039.pdf).

<sup>128</sup> Staff Sergeant Daren Edward Jay, day 37, witness statement, para 13 (BMI00192), available at [www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_241109/bmi00189.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_241109/bmi00189.pdf).

<sup>129</sup> Ibid.

<sup>130</sup> Victims' written opening statement, day 9, p 188, para 339 (PIL000864), available at [www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/openings/opening\\_pil.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/openings/opening_pil.pdf).

See also Staff Sergeant Jay, day 37, transcript, p 19, available at [www.bahamousainquiry.org/linkedfiles/baha\\_mousa/hearings/transcripts/20091124day37fullday.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/transcripts/20091124day37fullday.pdf).

<sup>131</sup> Major Michael Edwin Peebles, day 40, witness statement, para 83 (BM102731), available at [www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_071209/bmi02707.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_071209/bmi02707.pdf).

<sup>132</sup> Victims' written opening statement, day 9, p 188, para 339 (PIL000864).

<sup>133</sup> Gary Paul Reader, day 28, witness statement, para 60 (BM103398), available at [www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_091109/bmi03384.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_091109/bmi03384.pdf).

A. And that he was responsible for the death and that the multiple should stick together.

Q. What did that mean to you, the multiple should stick together?

A. I.e. that we shouldn't say anything against each other.<sup>134</sup>

(70) It is to be hoped that the lessons have been learned and that the failures will not be repeated, but this can only be achieved on the basis of an understanding and acceptance of what is required for compliance with international standards, and clear protocols and procedures to ensure prompt investigations entered into the relevant protocols and practice guidelines.

### **V.3 The obligation to investigate allegations impartially**

(71) Articles 12 and 13 of UNCAT expressly require investigations to be impartial, which has been described as a key, if not the most important, requirement of the investigation process.<sup>135</sup> The term *impartiality* means free from undue bias. It is conceptually different from 'independence' which denotes that the investigation is not in the hands of bodies or persons who have close personal or professional links with the alleged perpetrators; the two notions are, however, closely interlinked, as the lack of independence is commonly seen as an indicator of partiality: for example, the former UN Special Rapporteur on Torture believes it is advisable not to entrust the investigation solely to persons who have close personal links with individuals under suspicion.<sup>136</sup> The ECtHR has thus said it is generally regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events.<sup>137</sup>

(72) Impartiality may relate to the proceedings or deliberations of the investigating body,<sup>138</sup> or it may relate to any suspicion of, or apparent bias, that may arise from conflicts of interest. In *Encarnación Blanco Abad v Spain*, the Committee concluded that the particular investigation was not impartial because the court failed to take steps to identify the alleged perpetrators, and because it refused to allow the complainant to adduce further evidence to support the forensic doctor's report.<sup>139</sup> In *Khaled Ben*

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<sup>134</sup> Ibid, transcript, p 178, available at [www.bahamousainquiry.org/linkedfiles/baha\\_mousa/hearings/transcripts/20091109day28fullday.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/transcripts/20091109day28fullday.pdf).

<sup>135</sup> David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties* in 24 International Yale Journal of International Law 1999 129, at p 143.

<sup>136</sup> Nowak and McArthur, p 435-436.

<sup>137</sup> *Anguelova v Bulgaria*, Application No 38361/97, 13 September 2002, para 138

See also *Assenov & Others v Bulgaria*, Application No 24760/94, 28 October 1998

<sup>138</sup> It would appear that impartiality would follow standard principles of natural justice of *nemo iudex in sua causa*.

<sup>139</sup> *Communication No 59/1996*, CAT/C/20/D/59/1996, 14 May 1998, at para 8.8: "The Committee also observes that during the preliminary proceedings, up to the time when they were discontinued on 12 February 1993, the court took no steps to identify and question any of the Guardia Civil officers who might have taken part in the acts complained of by the author. The Committee finds this omission inexcusable...Furthermore, the Committee observes that, when the proceedings resumed as of October 1994, the author requested the judge on at least two occasions to allow the submission of evidence additional to that of the medical experts...but these hearings were not ordered. The Committee nevertheless believes that such evidence was entirely pertinent ...The Committee has found no justification in this case for the refusal of the judicial authorities to allow other evidence and, in particular, that proposed by the author. The Committee considers these omissions to be incompatible with the obligation to proceed to an impartial investigation, as provided for in article 13 of the Convention" - available at [www.unhcr.ch/tbs/doc.nsf/0/5db5775f6e58892e802566f200409a77?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/0/5db5775f6e58892e802566f200409a77?Opendocument).

*M'Barek v Tunisia*,<sup>140</sup> the Committee found that the magistrate who led the inquiry was partial because of his failure to give equal weight to evidence from both sides.<sup>141</sup>

(73) In its consideration of State party reports, the Committee has criticised the absence of independent bodies to investigate torture, particularly in respect of torture by the police, the institution that ordinarily would be tasked with investigating torture.<sup>142</sup> These same principles should apply to investigations relating to the armed forces.

(74) The ECtHR has often held that investigations lacked independence, for example where members of the same division or detachment as those implicated in the allegations were undertaking the investigation, such as in the cases of *Aktas v Turkey*,<sup>143</sup> *Ilhan v Turkey*<sup>144</sup> and *Gulec v. Turkey*.<sup>145</sup> In determining whether a remedy is effective, the ECtHR applies institutional effectiveness as one of the relevant criteria by requiring that the responsible authority be sufficiently independent from the one responsible for the violation of the Convention right, and that independence means not only a lack of hierarchical or institutional connection, but also practical independence.<sup>146</sup>

(75) When the SIB of the RMP investigates a case, a series of reports are produced to keep the chain of command informed of the process, allowing them to take any

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<sup>140</sup> *Communication No 60/1996*, CAT/C/23/D/60/1996, 24 January 2000, available at [www.unhcr.ch/tbs/doc.nsf/0/00c2952fe36f0b46802568b8004e05de?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/0/00c2952fe36f0b46802568b8004e05de?OpenDocument).

<sup>141</sup> *Ibid*, para 11.10: "The Committee considers that the magistrate, by failing to investigate more thoroughly, committed a breach of the duty of impartiality imposed on him by his obligation to give equal weight to both accusation and defence during his investigation..."

<sup>142</sup> See *Conclusions and recommendations of the Committee against Torture: Latvia*, CAT/C/CR/31/3 (2004), para 6(b), available at [www1.umn.edu/humanrts/cat/observations/latvia2004.html](http://www1.umn.edu/humanrts/cat/observations/latvia2004.html); *Conclusions and recommendations of the Committee against Torture: Lithuania*, CAT/C/CR/31/5 (2004), para 5 (e), available at [www1.umn.edu/humanrts/cat/observations/lithuania2004.html](http://www1.umn.edu/humanrts/cat/observations/lithuania2004.html); *Conclusions and recommendations of the Committee against Torture: Cambodia*, CAT/C/CR/31/7, 5 February 2004, para 6(f), available at [www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.CR.31.7.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CAT.C.CR.31.7.En?OpenDocument); *Conclusions and recommendations of the Committee against Torture: Republic of Moldova*, CAT/C/CR/30/7, 27 May 2003, para 6 (e). Similarly, in a number of its concluding observations on State party reports, the Human Rights Committee has expressed concern about the lack of impartial investigations of complaints about torture, including the absence of an independent oversight mechanism, and urged States Parties to establish independent bodies competent to receive, investigate and adjudicate on all complaints of torture and ill-treatment - see REDRESS, *Taking Complaints of Torture Seriously*, (The Redress Trust, 2004), p 18, and the *Concluding Observations* there cited, available at [www.redress.org/downloads/publications/PoliceComplaints.pdf](http://www.redress.org/downloads/publications/PoliceComplaints.pdf).

<sup>143</sup> *Application No 24351/94*, 24 April 2003, para 301: "...[A]n inspection of the premises used by the interrogation centre of the Mardin gendarmerie was carried out almost straightaway... It has not been disputed, however, that the persons who carried out the inspection were members of the gendarmerie itself..The Court agrees with the Commission and the applicant that that inspection cannot therefore be considered part of an "effective investigation" for the purposes of Article 2 of the Convention"

<sup>144</sup> *Application No 222774/93*, 27 June 2000, paras 101-103: "... [T]he public prosecutor took no independent investigative step... The medical report issued... was deficient in that it made no reference to the cause of the injuries as explained by the victim and did not refer to the other injuries and marks on his body..[I]t highlights the importance of an adequate follow-up by the public prosecutor in ascertaining the cause and extent of...injuries. For these reasons, no effective criminal investigation can be considered to have been conducted in accordance with Article 13. The Court finds, therefore, that no effective remedy has been provided ..."

<sup>145</sup> *Application No 21593/93*, 27 July 1998, para 82: "...[T]he Court...concludes that the investigation was not thorough nor was it conducted by independent authorities..."

<sup>146</sup> See *Anguelova v Bulgaria*, *Application No 38361/97*, 13 September 2002, para 138: "For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events...This means not only a lack of hierarchical or institutional connection but also a practical independence"; also *Ergi v Turkey*, *Application No 23818/94*, 28 July 1998, at para 85: "... [N]either the prevalence of violent armed clashes nor the high incidence of fatalities can displace the obligation under Article 2 to ensure that an effective, independent investigation is conducted into the deaths arising out of clashes involving the security forces, more so in cases such as the present where the circumstances are in many respects unclear"; also *Finucane v United Kingdom*, *Application No 29178/95*, 1 October 2003, para 68.

necessary action.<sup>147</sup> This approach was criticised by Brook LJ in the Court of Appeal decision of *Al-Skeini*,<sup>148</sup> who stated that for the UK to “*comply with well-established international human rights standards on investigations would require, among other things, a far greater investment in the resources available to the Royal Military Police than was available to them in Iraq, and a complete severance of their investigations from the military chain of command.*”<sup>149</sup>

(76) The procedure when investigations are carried out must also be impartial. It must be free from real and perceived bias in the way it searches for, receives and evaluates evidence of torture.<sup>150</sup> In this regard it is significant:

- Staff Sergeant Cooper was initially in charge of the Baha Mousa investigation.<sup>151</sup> She states that in addition to briefing her officer commanding she also briefed Lt Col Mendonca.<sup>152</sup> The CO in charge of 1 QLR should not have been in this loop once it was established that the death of Baha Mousa was not by natural causes. He was ultimately responsible for the actions of those below him and later faced a court martial.

#### ***V.4 The obligation to investigate effectively***

(77) That it must be effective goes to the heart of the substance of the investigation, and this is developed in the Committee’s jurisprudence on the obligations under UNCAT. In *Radivoje v Yugoslavia*<sup>153</sup> the Committee observed that investigations must be effective and thorough; in *Encarnacion Blanco Abad v Spain*<sup>154</sup> the Committee specified that investigations must seek to ascertain the facts and establish the identity of any alleged perpetrators, a principle reiterated in *Hajrizi Dzemajl v Yugoslavia*.<sup>155</sup>

<sup>147</sup> See *Role of the RMP*, para 4, available at [www.army.mod.uk/agc/provost/13315.aspx](http://www.army.mod.uk/agc/provost/13315.aspx).

<sup>148</sup> *The Queen (on the application of Mazin Mumaa Galteh Al-Skeini and Others) v The Secretary of state for Defence*, [2005] EWCA Civ 1609, available at [www.bailii.org/ew/cases/EWCA/Civ/2005/1609.html](http://www.bailii.org/ew/cases/EWCA/Civ/2005/1609.html).

<sup>149</sup> *Ibid*, at para 139. At para 140 the learned judge went on: “In other words, if international standards are to be observed, the task of investigating incidents in which a human life is taken by British forces must be completely taken away from the military chain of command and vested in the RMP. It contains the requisite independence so long as it is free to decide for itself when to start and when to cease an investigation, and so long as it reports in the first instance to the APA and not to the military chain of command. It must then conduct an effective investigation, and it will be helped in this regard by the passages from ECHR case-law I have quoted. Many of the deficiencies highlighted by the evidence in this case will be remedied if the RMP perform this role, and if they are also properly trained and properly resourced to conduct their investigations with the requisite degree of thoroughness.”

<sup>150</sup> See REDRESS, *Bringing the International Prohibition of Torture Home: National Implementation guide for the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (The Redress Trust, 2006), p 68 available at [www.redress.org/downloads/publications/CAT%20Implementation%20paper%2013%20Feb%202006%203.pdf](http://www.redress.org/downloads/publications/CAT%20Implementation%20paper%2013%20Feb%202006%203.pdf).

<sup>151</sup> Staff Sergeant Sherrie Cooper, day 27, witness statement, para 23 (BMI00045), available at [www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_221009/bmi00039.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_221009/bmi00039.pdf).

<sup>152</sup> *Ibid*, para 29 (BMI00046).

<sup>153</sup> *Communication No. 113/1998*, CAT/C/26/D/113/1998, 22 July 1998, at para 9.6: “[T]he Committee considers that the investigation that was conducted by the State party’s authorities was neither effective nor thorough”; available at [www1.umn.edu/humanrts/cat/decisions/yugoslavia1998.html](http://www1.umn.edu/humanrts/cat/decisions/yugoslavia1998.html).

<sup>154</sup> *Communication No 59/1996*, CAT/C/20/D/59/1996, 14 May 1998, at para 8.8, available at [www.unhcr.ch/tbs/doc.nsf/0/5db5775f6e58892e802566f200409a77?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/0/5db5775f6e58892e802566f200409a77?Opendocument).

<sup>155</sup> *Communication 161/2000*, CAT/C/29/D/161/2000, 21 November 2002, available at [www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/b5238fc275369719c1256c95002fca4f?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/b5238fc275369719c1256c95002fca4f?Opendocument).

“... [A] criminal investigation must seek both to determine the nature and circumstances of the alleged acts and to establish the identity of any person who might have been involved therein.”<sup>156</sup>

(78) It is well-established in the jurisprudence of the ECtHR that in addition to the ‘negative obligation’ which requires state parties not to commit torture there is also a ‘positive obligation’ to conduct effective investigations into torture allegations. These investigations must be capable of leading to the identification and punishment of those responsible.<sup>157</sup>

(79) In the case of *Assenov v. Bulgaria*<sup>158</sup> the ECtHR dealt as follows with these issues of investigation and punishment arising from allegations of violations of Article 3 of the ECHR:

“...[W]here an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State’s general duty under Article 1 of the Convention to ‘secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention’, requires by implication that there should be an effective official investigation. This investigation, as with that under Article 2, should be capable of leading to the identification and punishment of those responsible... If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance... would be ineffective in practice...”<sup>159</sup>

In broad terms the ECtHR has thus developed the following minimum standards:

- The authorities must act as soon as an official complaint has been lodged; even when no complaint has been officially an investigation should be initiated whenever there are sufficiently clear indications that torture or ill-treatment has occurred
- The investigation must be effective in practice as well as in law, and not be unjustifiably hindered by the acts or omissions of the authorities of the respondent state. It should be capable of leading to the identification and punishment of those responsible

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<sup>156</sup> Ibid, para 9.4.

<sup>157</sup> Furthermore, there is also a separate positive obligation to take effective measures to prevent torture, and this includes effective criminal law provisions being in force. See generally on this topic the World Organisation Against Torture (OMCT), *Article 3 of the European Convention of Human Rights, Handbook Series Vol. 1*, available at: [www.omct.org/?&articleSet=Publication&lang=eng&PHPSESSID=c3d3891ea51788c97920036284de030e](http://www.omct.org/?&articleSet=Publication&lang=eng&PHPSESSID=c3d3891ea51788c97920036284de030e).

<sup>158</sup> *Application No 24760/94*, 28 October 1998.

<sup>159</sup> Ibid, at para 102. See also *Aksoy v. Turkey, Application No 21987/93*, 18 December 1996, para 98: “The nature of the right safeguarded under Article 3 of the Convention has implications for Article 13. Given the fundamental importance of the prohibition of torture and the especially vulnerable position of torture victims, Article 13 imposes, without prejudice to any other remedy available under the domestic system, an obligation on States to carry out a thorough and effective investigation of incidents of torture. Accordingly, as regards Article 13, where an individual has an arguable claim that he has been tortured by agents of the State, the notion of an ‘effective remedy’ entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure...”

- The authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including a detailed statement from the victim, eyewitness testimony, and forensic evidence. Any deficiency in the investigation which undermines its ability to establish the cause of injury or the person responsible will risk falling short of this standard
- The general rule is that the persons responsible for the inquiries and those conducting the investigation should be independent of anyone implicated in the events .This means not only that there should be no hierarchical or institutional connection but also that the investigators should be independent in practice
- A prompt response by the authorities in investigating allegations of torture or ill-treatment is essential in maintaining public confidence in the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts
- 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. The degree of public scrutiny required may well vary from case to case. In all cases, however, the complainant must be afforded effective access to the investigatory procedure

(80) This obligation to investigate “*is not an obligation of result, but of means*”<sup>160</sup> and doesn’t necessitate every criminal investigation resulting in a conviction. As was said in *Mikheyev v. Russia*.<sup>161</sup>

“Not every investigation should necessarily be successful or come to a conclusion which coincides with the claimant’s account of events; however, it should in principle be capable of leading to the establishment of the facts of the case and, if the facts prove to be true, to the identification and punishment of those responsible...”<sup>162</sup>

(81) The ECtHR has analysed what steps authorities must take when gathering evidence, and has made reference in its jurisprudence to seeking evidence at the scene. In *Ilyasova v Russia*<sup>163</sup> failures were highlighted relating to a proper examination of evidence at the scene:

*“It appears that... a number of crucial steps were delayed or not taken at all. In particular, it appears that the investigating authorities did not question other witnesses until August 2003, that is, eight months after the events... The failure to examine, over a period of five years, this vehicle, which obviously constituted a significant element of the crime scene, casts doubt as to the diligence with which the inspection was carried out. It is obvious that these investigative measures, if they were to produce any meaningful results, should have been taken immediately after the crime was reported to the authorities, and as soon as the investigation commenced. Such delays, for which there has been no explanation in the instant case, not only demonstrate the authorities’ failure to act of their own motion but also constitute a breach of the obligation to exercise exemplary diligence and promptness in dealing with such a serious crime.”*<sup>164</sup>

<sup>160</sup> *Paul Edwards v. the United Kingdom, Application No. 46477/99*, 14 March 2002, para 71.

<sup>161</sup> *Application No. 77617/01*, 26 January 2006.

<sup>162</sup> *Ibid*, para 107.

<sup>163</sup> *Application No 1895/04*, 4 December 2008.

<sup>164</sup> *Ibid*, paras 75-76.

(82) Other recent ECtHR cases have dealt with failure to collect evidence from the crime scene and unjustifiable, lengthy periods of inactivity;<sup>165</sup> not visiting the crime scene, not tracking down key suspects, waiting a year to interview key suspects;<sup>166</sup> failure to begin an investigation for nearly three weeks and to secure the evidence and to visit the crime scene;<sup>167</sup> failure to examine the crime scene until five years later.<sup>168</sup>

(83) Regarding what happened after the death of Baha Mousa the Inquiry heard:

- Staff Sergeant Cooper “*during the days that followed*” conducted interviews and made a sketch plan of the detainee holding area at BG Main,<sup>169</sup> but it is clear that there had been no attempt the night before to secure the crime scene, nor did she proceed do so at any stage or attempt to gather any forensic evidence.
- On the contrary, not only was the crime scene not secured but numerous persons frequently entered and left the scene after Baha Mousa’s death, and one detainee, for example, described how after his injuries were examined that same night (after the death) he was returned to the TDF where he slept.<sup>170</sup>
- Dr Keilloh confirmed that he was content to return other detainees to the TDF,<sup>171</sup> as late as 22 September 2003 detainees were being held there.<sup>172</sup>
- As it happened on 22 September 2003 sandbags stained with Baha Mousa’s blood were found in the middle room of the TDF, indicating the earlier lack of seriousness in the search for evidence, as was the failure to secure the clothing, prints and DNA of all the soldiers who had visited the scene;<sup>173</sup> counsel for the detainees said that the failure to secure and forensically examine the TDF was a deliberate decision and not a resource issue.<sup>174</sup>

(84) These manifest and multiple failures to meet the necessary standards speak clearly on what must be avoided in future investigations.

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<sup>165</sup> *Akhmatkhanov v. Russia*, Application No 20147/07, 22 July 2010, at paras 47, 129 and 131.

<sup>166</sup> *Aliyeva v Russia*, Application No 1901/0, 18 February 2010, at paras 67-77.

<sup>167</sup> *Vasilyev v Russia*, Application No32704/04, 17 December 2009, paras 101-104.

<sup>168</sup> *Dolsayev v Russia*, Application No 10700/04, 22 January 2009, paras 65-67.

<sup>169</sup> Day 27, witness statement, para 29 (BMI00046), available at [www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_221009/bmi00039.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_221009/bmi00039.pdf).

<sup>170</sup> Ahmad Matairi, day 12, witness statement, paras 56-57 (BM1022272-3), available at [www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence280909/bmi02254.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence280909/bmi02254.pdf).

See also Victims’ written opening statement, day 9, page 187, para 337 (PIL000863), available at [www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/openings/opening\\_pil.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/openings/opening_pil.pdf).

<sup>171</sup> Day 36, witness statement, paras 166-167 (BMI00539-540), available at [www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_231109/bmi00484.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_231109/bmi00484.pdf).

<sup>172</sup> Victims’ written opening statement, day 9, p 187, para 337 (PIL000863), available at [www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/openings/opening\\_pil.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/openings/opening_pil.pdf).

<sup>173</sup> *Ibid*, para 388 (PIL000864).

<sup>174</sup> *Ibid*, para 387 (PIL000863).

## VI. Complaints

### VI.1 The right to complain

(85) Article 13 of UNCAT states:

*“Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.”*

(86) States are required to carry out investigations into torture and ill-treatment in response to a complaint by the victim. This duty presupposes that every victim of torture and other prohibited ill-treatment enjoys an effective right to complain to a competent body without fear of reprisals. This is an important right for victims in and of itself, providing them with the chance to positively express dissatisfaction and disapproval of their treatment. This may contribute substantially to the reestablishment of their sense of control and dignity. It is also a means to an end, in that it gives notice to the competent authorities of the alleged commission of a crime.

(87) The complaint is also a trigger for the competent authorities to begin an investigation into the alleged acts with a view to holding the perpetrators accountable as part of criminal or administrative proceedings. A complaint may also be a first step for the victim to obtain other forms of reparation; without the evidence generated by the official investigation of the complaint, it is often difficult for the victim to pursue non-criminal legal remedies such as restitution or compensation. Consequently, the availability of effective complaint mechanisms will have wide implications for the prevention and punishment of torture as well as for remedies and reparation.

(88) The Committee noted in the case of *Parot v Spain*<sup>175</sup> that Article 13 does not require a formal submission of a complaint of torture; it is sufficient for torture only to have been alleged by the victim for the State to be under an obligation promptly and impartially to examine the allegation.<sup>176</sup> Additionally the Committee has observed that there is no need for an express statement of intent to institute and sustain a criminal action arising from the offence:

*“...[I]t is enough for the victim simply to bring the facts to the attention of an authority of the State for the latter to be obliged to consider it as a tacit but unequivocal expression of the victim's wish that the facts should be promptly and impartially investigated, as prescribed by this provision of the Convention.”<sup>177</sup>*

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<sup>175</sup> *Communication No 6/1990*, CAT/C/14/D/6/1990, 9 June 1995, available at [www.unhcr.ch/tbs/doc.nsf/0/840ede75fe21fe40802567a50053a632?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/0/840ede75fe21fe40802567a50053a632?Opendocument).

<sup>176</sup> *Ibid*, para 10.4

<sup>177</sup> *Communication No 59/1996*, CAT/C/20/D/59/1996, 14 May 1998, at para 8.6, available at [www.unhcr.ch/tbs/doc.nsf/0/5db5775f6e58892e802566f200409a77?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/0/5db5775f6e58892e802566f200409a77?Opendocument).

(89) States must provide the necessary procedures for victims of torture and ill-treatment to exercise their right to complain in a non-bureaucratic manner without fear of reprisals<sup>178</sup>. Further, every person working in a detention facility has the obligation to forward a complaint to a competent authority<sup>179</sup>. Detainees should also be informed about their right to complain about torture and ill-treatment and about the respective procedures available to them.<sup>180</sup>

(90) The requirement under article 13 to have allegations “*promptly and impartially examined*” is closely linked to the obligations of a “*prompt and impartial investigation*” under article 12 and the findings and conclusions under the inquiry procedure in article 12 may also apply similarly in interpreting the requirements of promptness and impartiality under article 13.<sup>181</sup>

## VII. Reparations

### VII.1 The right to a remedy and reparation

(91) Article 14 of UNCAT states:

*“1. Each State party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.”*

*2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.”*

(92) This right to reparation for victims of serious human rights violations such as torture is well established: it is a fundamental principle of general international law that the breach of an international obligation entails the duty to afford reparation.<sup>182</sup> As a matter of general international law, all states are obliged to refrain from conduct that constitutes a crime under international law, such as torture, genocide, slavery or enforced disappearances.

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<sup>178</sup> Nowak and McArthur, p 449, para 30.

<sup>179</sup> Ibid.

<sup>180</sup> Ibid, at para 31.

<sup>181</sup> Nowak and McArthur, p 447 para 26.

<sup>182</sup> See: Permanent Court of Arbitration, *Chorzow Factory Case* (Ger. V. Pol.), (1928) P.C.I.J., Sr. A, No.17, at 47 (September 13); International Court of Justice: *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. U.S.), Merits 1986 ICJ Report, 14, 114 (June 27); *Corfu Channel Case*; (UK v. Albania); *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 184 ; *Interpretation des traites de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, deuxième phase, avis consultatif*, C.I.J., Recueil, 1950, p. 228. See also Article 1 of the draft Articles on State Responsibility adopted by the International Law Commission in 2001: “Every internationally wrongful act of a State entails the international responsibility of that State”. (UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001 (“ILC draft Articles on State Responsibility”)).

(93) Under international law “reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed”.<sup>183</sup> Thus reparation must be adequate and appropriate, that is, proportional to the harm suffered and should as far as possible restore the life and dignity of the victim.

(94) According to the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (the *Basic Principles*) the forms of reparation include: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>184</sup>

- Restitution:<sup>185</sup> This consists of re-establishing the *status quo ante*, i.e. the situation that existed prior to the occurrence of the wrongful act. Although it is generally not possible to ‘undo’ the pain and suffering caused by human rights violations, certain aspects of restitution might nonetheless be possible – such as restoring an individual’s liberty, legal rights, social status, family life and citizenship; return to one’s place of residence; restoration of employment; and return of property.
- Compensation:<sup>186</sup> The role of compensation is to fill in any gaps so as to ensure full reparation for the damage suffered (as long as the damage is financially assessable).<sup>187</sup> Awards of compensation encompass material losses (loss of earnings, pension, medical expenses, etc.) and non-material or moral damage (pain and suffering, mental anguish, humiliation, loss of enjoyment of life and loss of companionship or consortium), the latter usually quantified on the basis of an equitable assessment.
- Rehabilitation:<sup>188</sup> Rehabilitation is an important component of reparation and it is a right specifically recognised in international human rights instruments such as article 14 of UNCAT.<sup>189</sup> The Special Rapporteur on the right to reparation has noted that reparation should include medical and psychological care and other services as well as legal and social services.<sup>190</sup> Rehabilitation may be provided ‘in kind’ or the costs may form part of a monetary award. It is important to distinguish between indemnity paid by way

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<sup>183</sup> Permanent Court of Arbitration, *Chorzow Factory Case* (Ger. V. Pol.), (1928) P.C.I.J., Sr. A, No.17.

<sup>184</sup> UN GA Res. 60/147 16 December 2005. See generally REDRESS, *Implementing Victims Rights: A Handbook on the Basic Principles and Guidelines on the Right to a Remedy and Reparation* (The Redress Trust, March 2006), available at [www.redress.org/downloads/publications/Reparation%20Principles.pdf](http://www.redress.org/downloads/publications/Reparation%20Principles.pdf).

<sup>185</sup> *The Basic Principles*, IX. 19. See also, Principles 8 - 10 of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, Adopted by GA Res. 40/34 of 29 November 1985.

<sup>186</sup> *The Basic Principles*, IX. 20.

<sup>187</sup> Commentary to the Draft Articles on State Responsibility for Internationally Wrongful Acts; Report of the International Law Commission on its Fifty-third Session, GA, Supplement No. 10 (A/56/10); cph. IV.E.

<sup>188</sup> *The Basic Principles*, IX. 21.

<sup>189</sup> See above para 75. See also, for example, the UN Convention on the Rights of the Child U.N. Doc. A/44/49 (1989), and its Optional Protocol U.N. Doc. A/54/49, Vol. III (2000).

<sup>190</sup> Principle 24, Final report of the Special Rapporteur, Professor M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33, E/CN.4/2000/62, 18 January 2000.

of compensation (for material and/or moral damage) and money provided for rehabilitation purposes.

- Satisfaction<sup>191</sup> and Guarantees of Non-repetition:<sup>192</sup> These refer to the range of measures that may contribute to the broader and longer-term restorative aims of reparation. A central component is the role of public acknowledgment of the violation, the victims' right to know the truth and to have the perpetrators held accountable. The *Basic Principles* include cessation of continuing violations; judicial sanctions against persons responsible for the violations; an apology, including public acknowledgement of the facts and acceptance of responsibility; commemorations and tributes to the victims; and implementing preventative measures, such as ensuring effective civilian control of military and security forces, protecting human rights defenders and persons in the legal, media and other related professions.

(95) International law requires states to provide effective procedural remedies under domestic law to guarantee adequate reparation to victims of human rights violations. In other words, the right to reparation for torture and other human rights violations includes both the right to substantive reparations (such as compensation) *and* the right to effective procedural remedies to enable victims to access substantive reparations (e.g., access to civil, administrative and criminal remedies). This right is firmly embodied in all major international human rights treaties and declarative instruments.<sup>193</sup>

(96) The right to a remedy for a violation of a human right protected under any of the international instruments is itself a right expressly guaranteed by the same instruments and, in the case of fundamental human rights, it has been recognised as non-derogable.<sup>194</sup> Accordingly, there is an independent and continuing obligation to provide effective domestic remedies to protect human rights - during peace or war, and irrespective of states of emergency. Human rights instruments guarantee both the procedural right to an effective access to a fair hearing (through judicial and/or non-judicial remedies) and the substantive right to reparations (such as restitution, compensation and rehabilitation).<sup>195</sup> As the ECtHR has said:

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<sup>191</sup> *The Basic Principles*, IX. 22.

<sup>192</sup> *The Basic Principles*, IX. 23.

<sup>193</sup> For example, article 8 Universal Declaration of Human Rights, GA Res. 217 A (III) of 10 December 1948; article 2 (3), article 9(5) and 14(6) International Covenant on Civil and Political Rights; article 6 International Convention on the Elimination of All Forms of Racial Discrimination; article 39 Convention of the Rights of the Child; article 14 of UNCAT, and article 75 of the Rome Statute for an International Criminal Court (entry into force 1 July 2002, UN Doc A/CONF.183/9). It has also figures in regional instruments such as the European Convention on Human Rights, articles 5(5), 13 and 41.

<sup>194</sup> See, for example, General Comment 29 on States of Emergency (Art. 4) of the UN Human Rights Committee, CCPR/C/21/Rev.1/Add.11, 31 August 2001, at para 14: "Article 2, paragraph 3, of the Covenant requires a State party to the Covenant to provide remedies for any violation of the provisions of the Covenant. This clause is not mentioned in the list of non-derogable provisions in article 4, paragraph 2, but it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective." The Committee considered further that "It is inherent in the protection of rights explicitly recognized as non-derogable ... that they must be secured by procedural guarantees...The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights..."

<sup>195</sup> See Jeremy McBride, "Access to Justice and Human Rights Treaties" (1998) 17 Civil Justice Q.235.

*“[T]he remedy must be “effective” in practice as well as in law, particularly in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State”.*<sup>196</sup>

(97) The nature of the procedural remedies (judicial, administrative or other) should be in accordance with the substantive rights violated and the effectiveness of the remedy in granting appropriate relief for such violations. In *D v. United Kingdom*<sup>197</sup> the ECtHR said:

*“The Court observes that Article 13 of the Convention (art. 13) guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this Article (art. 13) is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision (art. 13)”*<sup>198</sup>

(98) In other words, in cases of serious human rights violations, non-judicial remedies, such as administrative or other remedies, are not considered sufficient to fulfill states' obligations under international law. This means that even if a torture victim wishes to apply for compensation through an administrative procedure, he/she should also have the right in law and the ability in practice to bring a civil claim against the individual and state in a court of law.<sup>199</sup> Nevertheless, the relevant procedures may take into account compensation already awarded to the victim in order to determine whether the claimant has received full and adequate reparation.

(99) Remedies available at the national level should comply with international standards. In particular, victims should have access to effective means to lodge a complaint about the violation of their rights and the competent authorities should be required to commence prompt and impartial investigations into the allegations. When there is sufficient evidence of the commission of a crime, authorities should be obliged to prosecute the alleged perpetrators and if found guilty, punish them accordingly. Although there are different domestic legal systems, states are obliged to afford within their national procedures effective access to justice and adequate reparation proportional to the harm suffered (including rehabilitation and compensation).

(100) Subsequent to the Inquiry being set-up the civil claims of Baha Mousa's family and the other detainees have been settled, after years of litigation culminating in the House of Lords (Appellate Committee) *Al Skeini* decision of 13 June 2007.<sup>200</sup> The other aspect of that decision, concerning the lack of UK jurisdiction over the killings of civilians outside

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<sup>196</sup> *Aksoy v. Turkey, Application No 21987/93*, 18 December 1996, para 95

<sup>197</sup> *Application No. 30240/96* Judgment of 2 May 1997

<sup>198</sup> *Ibid*, para 69, referring to *Soering v. United Kingdom, Application No 14038/88*, 7 July 1989, and *Vilvarajah v. United Kingdom, Application No 13163/87*, 30 October 1991.

<sup>199</sup> See *Albert Wilson v. Philippines, Communication No 868/1999, CCPR/C/79/D/868/1999* (2003), para 5.14, available at [www1.umn.edu/humanrts/undocs/868-1999.html](http://www1.umn.edu/humanrts/undocs/868-1999.html).

<sup>200</sup> *Al Skeini and others v Secretary of State for Defence* [2007] UKHL 26, available at [www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd070613/skeini-1.pdf](http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd070613/skeini-1.pdf).

of the Army's custody, is still pending before the ECtHR. In addition to the events of September 2003 there have been other incidents of ill-treatment of detainees in UK Army custody in Iraq, such as the Camp Breadbasket case<sup>201</sup> to name but one.

(101) Regarding compensation arising from civilian deaths, injuries and property destroyed at the hand of the UK Army in Iraq, a recent media report summarises the amounts of money which have been paid out and the number of civilian victims involved. The vast majority have been killed or injured outside of UK direct custody in Iraq:<sup>202</sup>

*"The Government has paid off more than 1,000 innocent Iraqis hit by botched British military operations that resulted in deaths, injuries and major damage to property...[T]he payments, many of them as small as a few hundred pounds, leave the Ministry of Defence with compensation bills of £8.3m for the Iraq conflict...The Ministry of Defence has so far had to pay £4.2m as a result of 1,145 claims made by Iraqis who had been injured, had relatives killed or had their property damaged by British military operations. A further £4.1m has been handed to 21 Iraqi victims subjected to unlawful treatment or torture by British troops and the family of a child who was accidentally shot.*

*Attention has focused on cases in which Iraqis were abused by British soldiers, such as that of Baha Mousa, who died in British custody in September 2003. **However, the bulk of the compensation was paid out in small amounts to Iraqi families after being agreed locally, before they ever consider taking their case through the British courts. The average figure paid out was £3,650, way below the £2.8m handed in 2008 to the family of Mr Mousa and others mistreated by British troops in Basra, after their cases were taken to the High Court.** One such case saw the family of Waleed Muzban, alleged to have been shot dead at a British checkpoint on 24 August 2003, handed around £550 by the MoD...The small payments were agreed by the Area Claims Office in Basra, which dealt with over 3,260 claims before shutting its doors in October 2009.*

*A Ministry of Defence spokesman said yesterday: **"When compensation claims are received they are considered on the basis of whether or not the Ministry of Defence has a legal liability to pay compensation. Where there is a proven legal liability, compensation is paid."** The family of Waleed Muzban, killed on 24 August 2003, are among the thousands to have been handed a tiny figure by Britain's Ministry of Defence to compensate them for their loss...In the months following the US-led invasion of Iraq in March 2003, the Ministry of Defence set up the Area Claims Office, in Basra, to deal with the compensation claims it received from Iraqis affected by British*

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<sup>201</sup> This case and some other known incidents up to 2007 were examined in the REDRESS report *UK ARMY IN IRAQ: Time to Come Clean on Civilian Torture* (The Redress Trust, October 2007), available at [www.redress.org/downloads/publications/UK\\_ARMY\\_IN\\_IRAQ\\_-\\_TIME\\_TO\\_COME\\_CLEAN\\_ON\\_CIVILIAN\\_TORTURE\\_Oct%2007.pdf](http://www.redress.org/downloads/publications/UK_ARMY_IN_IRAQ_-_TIME_TO_COME_CLEAN_ON_CIVILIAN_TORTURE_Oct%2007.pdf). It appears compensation has subsequently been paid to some of the Camp Breadbasket victims: see Alice Fordham in *The Times*, 10 May 2010, *Britain faces payout shame as hundreds of detainees claim soldiers abused them*, available at [www.timesonline.co.uk/tol/news/world/iraq/article7114602.ece](http://www.timesonline.co.uk/tol/news/world/iraq/article7114602.ece).

<sup>202</sup> Michael Savage in *The Independent*, 16 June 2010: *£8m: Britain's compensation bill for dead and injured Iraqis*, available at [www.independent.co.uk/news/uk/politics/1638m-britains-compensation-bill-for-dead-and-injured-iraqis-2001609.html](http://www.independent.co.uk/news/uk/politics/1638m-britains-compensation-bill-for-dead-and-injured-iraqis-2001609.html)

operations. It dealt with more than 3,260 claims before closing in 2009. All the claims submitted to the office were dealt with before its closure...**Making the early and informal payments to Iraqis to compensate them for injuries and property damage, and deciding on the sums involved locally, is far cheaper than leaving open the possibility of far bigger figures being paid out should cases arrive at the doors of the British courts.** Those that have ended up at the High Court recently have proved the point. In July 2008, the Ministry of Defence paid £2.8m to a group of Iraqis allegedly mistreated by British troops in Basra...”[Emphasis added]

(102) Irrespective of the on-going litigation regarding the reach of the Human Rights Act and the ECHR for deaths/ill-treatment of civilians outside of UK military custody in Iraq,<sup>203</sup> what this indicates is some compensation payments have been made in extremely small amounts; had it not been for the *Al Skeini* case itself those like Baha Mousa’s family and the other detainees ill-treated in September 2003 would almost undoubtedly have also received, if anything, similarly small payments.

(103) It is submitted, therefore, that victims of torture and other forms of ill-treatment should be accorded full and proper reparations in terms of the UK’s obligations as set out above: any “easy and informal payments” system, particularly in contexts where numerous abuses are alleged, must fully comply with these principles of adequate and effective reparation.

## VIII. Conclusion

### VIII.1 Summary of recommendations

- The UK Government should adopt an over-arching policy to prevent torture and CIDTP being committed by UK soldiers wherever they may operate, encompassing all the obligations contained in UNCAT and other key international human rights instruments
- Such a policy should include a clear recognition of the need for all ranks to receive comprehensive training in the UK’s anti-torture obligations
- Not only new recruits but all members of the military should receive training on international standards at regular intervals, and special attention should be given to those assigned to operations to ensure they fully understand current obligations
- Such training should be based on and should meet the international standards developed by the UN and other international institutions including the Committee against Torture, in addition to any other operative international humanitarian law standards

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<sup>203</sup> This aspect of the *Al Skeini* decision is pending before the ECtHR.

- All military training materials, curricula and guides should be regularly assessed for compliance with international anti-torture standards, and prompt amendments made as appropriate
- Special intensive training in anti-torture obligations should be given to operatives who are most likely to have direct contact with detainees, including healthcare personnel, RMP personnel and Tactical Questioners
- Where abuse has occurred or is suspected investigations compliant with recognized obligations as to promptness, impartiality, thoroughness and effectiveness
- 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
- The UK Government should formally recognise that in addition to the ECHR and HRA, other human rights obligations, including those arising under UNCAT also have extraterritorial effect

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