

**Communication to the Office of the Prosecutor of the  
International Criminal Court**

**The Responsibility of Officials of the United Kingdom  
for War Crimes Involving Systematic Detainee Abuse  
in Iraq from 2003-2008**

**Submitted on 10 January 2014 by the European Center for  
Constitutional and Human Rights (ECCHR) and  
Public Interest Lawyers (PIL)**

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## **European Center for Constitutional and Human Rights (ECCHR), Berlin, Germany**

The ECCHR<sup>1</sup> is an independent, non-profit legal and educational organization based in Berlin, Germany. Lawyers at ECCHR have been litigating against American military and civilian officials for the elaboration, authorization, and implementation of illegal interrogation policies, on behalf of Iraqi and Guantanamo detainees who suffered torture and other crimes while in U.S. detention since the start of the so-called “War on Terror.” These efforts have included the filing of criminal complaints under the principle of universal jurisdiction in Germany and France. In addition, ECCHR is a party to the criminal investigations currently on-going against American officials in Spanish courts.<sup>2</sup> In its work related to the International Criminal Court, the ECCHR filed a communication on the situation in the Republic of Colombia in October 2012.<sup>3</sup>

## **Public Interest Lawyers (PIL), Birmingham, United Kingdom**

PIL<sup>4</sup> is an international and domestic public law firm based in the UK, currently acting for over 1069 former detainees and surviving relatives who allege that they or their family members were unlawfully detained, tortured or ill-treated, or killed by UK Services Personnel in Iraq. PIL’s litigation in the UK has already forced the UK Government to establish two public inquiries into civilian deaths caused by UK soldiers in Iraq – the BMI<sup>5</sup> and the ASI.<sup>6</sup> Its litigation before the ECtHR has resulted in leading decisions in relation to *non-refoulement* and the death penalty (*Al-Saadoon v UK*);<sup>7</sup> the human rights compatibility of UN Security Council Resolution-authorized detention (*Al-Jedda v UK*);<sup>8</sup> and the investigative duty under Articles 2 and 3 of the ECHR and human rights jurisdiction outside the Council of Europe states (*Al-Skeini v UK*).<sup>9</sup>

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<sup>1</sup>See <http://www.ecchr.eu>.

<sup>2</sup> See [http://www.ecchr.de/index.php/us\\_accountability.html](http://www.ecchr.de/index.php/us_accountability.html).

<sup>3</sup> See <http://www.ecchr.de/index.php/colombia.html>.

<sup>4</sup> See <http://www.publicinterestlawyers.co.uk/>.

<sup>5</sup> See generally, Baha Mousa Inquiry, Homepage, available at <http://www.bahamousainquiry.org/>.

<sup>6</sup> See generally, Al-Sweady Inquiry, Homepage, available at <http://www.alsweadyinquiry.org/>.

<sup>7</sup>*Al-Saadoon and Mufdhi v. United Kingdom*, no. 61498/08, ECHR 30 June 2009.

<sup>8</sup>*Al-Jedda v. the United Kingdom* [GC], no. 27021/08, ECHR 7 July 2011..

<sup>9</sup>*Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, ECHR 7 July 2011..

## D) INTRODUCTION

We herewith file a communication to the OTP of the ICC under Article 15 of the ICC Statute<sup>10</sup> requesting that the Prosecutor examine the situation in Iraq from 2003-2008 with regard to the responsibility of UK military and civilian officials for the abuse and killing of detainees in their custody amounting to war crimes. The communication refers to a bundle of supporting documentation, enclosed herewith, that includes, *inter alia*, copies of the witness statements and recorded accounts of the Iraqi victims.

We ask the Prosecutor to, first, conduct a preliminary examination under Article 15(2) of the ICC Statute into these matters and, second, submit a request for authorisation of an investigation to the Pre-Trial Chamber under Article 15(3) of the ICC Statute, in order to initiate a full investigation with all duties and powers provided by Article 54 of the ICC Statute.

This is not the first such communication to the OTP on Iraq. On 9 February 2006, the OTP issued a decision in response to over 240 communications sent to its office relating to the situation in Iraq.<sup>11</sup> The allegations were of conduct amounting to war crimes, including mistreatment of detainees and wilful killing of civilians. The OTP held that:

*[a]fter analyzing all the available information, it was concluded that there was a reasonable basis to believe that crimes within the jurisdiction of the Court had been committed, namely wilful killing and inhuman treatment.*<sup>12</sup>

However, it found that the gravity threshold, whether as contained in war crimes Article 8(1) or in the general gravity requirement of Article 53(1)(b), had not been met, preventing admissibility before the Court. Notably, the Prosecutor decided that “[t]his conclusion can be reconsidered in the light of new facts or evidence.”<sup>13</sup>

The present communication summarises the new facts and evidence which have become available in the supervening period. Principally, these are materials obtained from both Iraqi victims and the UK Government in the context of the legal representation by PIL in the UK of 412 Iraqi victims of severe physical and psychological abuse sustained while in the custody

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<sup>10</sup>Rome Statute of the International Criminal Court. U.N Doc, A/CONF.183/9 [1998]

<sup>11</sup>Office of the Prosecutor, *Letter to Senders Re Iraq*, 9 February 2006, available at [http://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP\\_letter\\_to\\_senders\\_re\\_Iraq\\_9\\_February\\_2006.pdf](http://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf).

<sup>12</sup>*Ibid.*, p. 8.

<sup>13</sup>*Ibid.*, p. 9.

of UK Services Personnel from 2003 to 2008, inclusive. The allegations are serious, involving incidents in military detention facilities and other locations, that include: hooding of detainees; the use of sensory deprivation and isolation; sleep deprivation; food and water deprivation; the use of prolonged stress positions; use of the “harshing” technique (sustained aggressive shouting in close proximity); a wide range of physical assault, including beating, burning and electrocution or electric shocks; both direct and implied threats to the health and safety of the detainee and/or friends and family, including mock executions and threats of rape, death, torture, indefinite detention and further violence; environmental manipulation, such as exposure to extreme temperatures; forced exertion; cultural and religious humiliation; as well as wide-ranging sexual assault and humiliation, including forced nakedness, sexual taunts and attempted seduction, touching of genitalia, forced or simulated sexual acts, as well as forced exposure to pornography and sexual acts between soldiers.

Between them, these victims make thousands of allegations of mistreatment amounting to war crimes of torture, or cruel, inhuman or degrading treatment, as well as wilfully causing great suffering, or serious injury. The scale in numbers of Iraqi victims of war crimes under UK custody and in the geographical and temporal scope of the use of illegal methods of detention and interrogation is significantly larger than had been anticipated in 2006 by the OTP. Clear patterns emerge of the same techniques being used for the same purposes in a variety of different UK facilities, over the whole period that UK Services Personnel were in Iraq, from 2003 to 2008. Available evidence suggests that failures to follow-up on or ensure accountability for ending such practices became a cause of further abuse. The obvious conclusion is that such mistreatment was systematic and had a systemic cause, which further suggests that there are hundreds more such victims.

There are considerable reasons to allege that those who bear the greatest responsibility for the crimes are situated at the highest levels, including all the way up the chain of command of the UK Army, and implicating former Secretaries of State for Defence and Ministers for the Armed Forces Personnel. The information is compelling and, in the authors’ submission, demonstrates without question that the gravity requirement is now fulfilled. As such, we call for the immediate establishment of the preliminary examination and investigation previously sought, pursuant to the indication already given by the OTP in its 2006 decision.

For the last 10 years the UK Government has remained unwilling to genuinely investigate and prosecute low-level perpetrators. Further, there have been no efforts by the UK to investigate

and prosecute high-level perpetrators. In the absence of genuine national proceedings for war crimes committed by UK Service Personnel in Iraq, the OTP must, in accordance with the ICC Statute and the most recent OTP Policy Paper on Preliminary Examinations of November 2013, seek to ensure that justice is delivered for crimes within the jurisdiction of the ICC.

As elaborated in this communication, we conclude that at all levels of the justice system, the UK has failed to reach the standards required to displace the ability of the ICC to act in these matters. Not only have the investigations and prosecutions been few and far between – a quantitative failing – but where action has been taken, the quality and independence of the process has been significantly lacking. Most importantly, these efforts have, without fail, looked only at those at the bottom of the chain of command, and have systematically shielded from prosecution those bearing the greatest responsibility for the crimes, thereby enabling the persistence of impunity instead of securing criminal accountability.

Consequently, the present communication calls for the immediate establishment of the preliminary examination and investigation sought, pursuant to the indication already given by the OTP in its 2006 decision.

In this regard, we note the four phase filtering process established by the OTP.<sup>14</sup> With respect to phase 1, this Communication details matters that are within the jurisdiction of the Court. The conduct alleged was committed by UK Services Personnel in Iraq from 2003 until 2008. The UK ratified the ICC Statute on 4 October 2001. Accordingly, the ICC has jurisdiction over acts amounting to war crimes under the ICC Statute that were committed by UK citizens in Iraq after the entry into force of the ICC Statute in 2002. The situation is not currently under preliminary examination, investigation or prosecution by the ICC. A detailed factual and legal analysis of the conduct amounting to war crimes under the ICC Statute is provided in Chapter IV (Facts: Systemic Abuse) and Chapter V (Legal Analysis of Alleged War Crimes). Further, we note that in 2006 in the *Letter to Senders to Iraq*, the OTP concluded that there was a reasonable basis to believe that crimes within the jurisdiction of the Court had been committed.<sup>15</sup>

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<sup>14</sup>OTP, *Policy Paper on Preliminary Examinations*, November 2013, paras.77-83, available at [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20%202013.pdf](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20%202013.pdf).

<sup>15</sup>Office of the Prosecutor, *Letter to Senders Re Iraq*, *supra* note 11.

With respect to phases 2-4, we provide detailed information relating to jurisdiction (Chapter VII), war crimes (see Chapters IV, V and VI), and admissibility (Chapter VIII) in this Communication. There is no evidence of specific circumstances which provide substantial reasons to believe that the interests of justice are not served by an investigation at this time.<sup>16</sup>

### Number of cases and victims

For the purposes of this communication, we ask the OTP to note the numbers of cases and victims as at 1 November 2013. Updated figures can be provided to the OTP after this complaint proceeds to the relevant stage of the preliminary examination.

There are 3 sets of figures to bear in mind. First, the analysis of PIL of its first 85 Judicial Review cases in the *Ali Zaki Mousa* proceedings involves 109 victims of violations of the prohibition against torture and inhuman and degrading treatment or punishment contained in Article 3 ECHR.<sup>17</sup> Second, during the *Ali Zaki Mousa* proceedings, the High Court was aware of a total of 198<sup>18</sup> PIL victims of violations of the right to life contained in Article 2 ECHR, and violations of Article 3 ECHR.<sup>19</sup> Third, in addition to these 198 victims, PIL now acts for a further 635 victims, making a total of 833 victims represented by PIL. Of these 635 further victims: 206 are relatives of victims of unlawful killings or deaths apparently violating Article 2 ECHR; 214 are surviving victims claiming violations of Article 3 ECHR and Article 5 ECHR, which protects the right to liberty and security of the person, and prohibits arbitrary arrest and detention; and 215 are presently unidentified cases where PIL is at this stage unable to ascertain how many of these cases are Article 2, Article 3 or Article 5 ECHR cases. Throughout the document these victim numbers are grouped variously. There are 412<sup>20</sup> surviving victims represented by PIL who allege ill-treatment in violation of article 3 ECHR. 618<sup>21</sup> of the PIL victims were unlawfully detained in violation of article 5 ECHR.

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<sup>16</sup>OTP, *Policy Paper on Preliminary Examinations*, November 2013, *supra* note 14, paras.67 and 83.

<sup>17</sup>See Chapter IV, Part D.

<sup>18</sup>Including the initial 109 victims.

<sup>19</sup>See Annex A.

<sup>20</sup>198 victims plus 214 surviving victims.

<sup>21</sup>198 victims in *Ali Zaki Mousa*, plus the 206 relatives of victims of unlawful killings or deaths and 214 surviving victims.



In this communication, the term “detainees” will be used in its general sense to refer to persons taken into UK custody. The UK Services Personnel in Iraq often used the term “detainees” to describe persons arrested for criminal misconduct, “Prisoners of War” to refer to detained combatants, and “internees” to refer to civilians detained for security reasons. However, we will refer to “prisoner handling” when referring to UK Services Personnel training, as this is the accepted term used.

The term “victim” will be used to refer to any person detained and subjected to torture or cruel, inhumane or degrading treatment by UK Services Personnel. This term will also be used with respect to relatives of individuals who were killed by UK Services Personnel while in custody, within their home, in the street or in any other circumstance.

The term “UK Services Personnel ”refers to the UK Armed Forces, including intelligence and security personnel who could be civilian members and UK Special Forces.

## II) CONTENTS OF SUBMISSION

This communication follows the structure shown on pages 2–3.

First, we describe the historical context for the use by UK Services Personnel<sup>22</sup> in Iraq of interrogation techniques amounting to mistreatment and torture (Section III).

We then summarise the allegations of systematic abuse and killing of Iraqi civilians in Iraq, with the support of dozens of testimonies and independent corroborative sources (Section IV).

Next, we analyse the allegations in light of the proscription of war crimes under Article 8 of the ICC Statute. We conclude that such crimes have been committed (Section V).

We then examine, on the information currently available, the potential individual criminal responsibility of officers of the UK Services Personnel and former high ranking civil servants and ministers within the UK MoD (Section VI).

Finally, we consider the *in limine* admissibility criteria of the ICC Statute, in particular the gravity threshold and the requirements of complementarity with national proceedings, concluding that such criteria are met (Section VII).

Annexed hereto are the following documents, which assist in the interpretation of what follows:

- A. Tables of Mistreatment
  - B. Witness Testimonies
  - C. Letters before Claim
  - D. Witness Statements of Phil Shinerin Ali Zaki Mousa proceedings
  - E. Skeleton Argument of Claimants in Ali Zaki Mousa proceedings
  - F. Map of Facilities
  - G. Chains of Command Charts
  - H. Acronyms and Vocabulary
  - I. Operation Telic – List of Roulements
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## J. Report of the Baha Mousa Inquiry

### **III) BACKGROUND: HISTORICAL DEVELOPMENT OF THE UK APPROACH TO INTERROGATION**

The allegations detailed in Section IV below must be understood in the context of the recorded history of the approach adopted by the UK Services Personnel to interrogation in counter-insurgency operations prior to the passage of the ICC Statute. We describe this briefly below.

The interrogation techniques deployed by UK Services Personnel in Iraq find their roots in both pre- and post WWII developments in approaches to coercive interrogation, including approaches implemented in a series of post-WWII counter-insurgency campaigns by UK Services Personnel.<sup>23</sup> Such developments are characterised by a move from physical to psychological methods of interrogation. However, as explained further below, the use of physical mistreatment has also remained a constant throughout this period. These techniques themselves require the consideration of the OTP given their continued use in other conflicts and other contexts.

In the UK context, a 1972 parliamentary committee chaired by Lord Parker, the Lord Chief Justice of England, surveyed the relevant history of UK interrogation practices and explained in its Report, that stealth torture techniques:

*have been developed since the War to deal with a number of situations involving internal security. Some or all have played an important part in counter-insurgency operations in Palestine, Malaya, Kenya and Cyprus and more recently in the UK Cameroons (1960-61), Brunei (1963), UK Guiana (1964), Aden (1964-67), Borneo/Malaysia (1965-1966), the Persian Gulf (1970-71) and in Northern Ireland.*<sup>24</sup>

The 1972 Parker Commission received evidence from the UK MoD that these techniques had been used as far back as in Kenya during the military conflict involving UK colonial Service Personnel(1952-1960), and even earlier, and recorded that fact without further observation in the final majority report. Violence against Mau Mau suspects in Kenya was extraordinary by

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<sup>23</sup> For a historical analysis including the WWII years and subsequently, see Ian Cobain, *Cruel Britannia: A Secret History of Torture*, (London, UK: Portobello Books, 2012). See also Darius Rejali, *Torture and Democracy* (Princeton, NJ: Princeton University Press, 2007), pp. 1-63. Rejali coins and analyses the term “stealth torture.”

<sup>24</sup> Lord Parker of Waddington, *Report of the Committee of Privy Counsellors appointed to consider authorised procedures for the interrogation of persons suspected of terrorism*, March 1972, p.3 (hereafter *Parker Report*).

any historical standard and torture was clearly authorised by the Colonial office in London.<sup>25</sup> This violence exceeded stealth torture techniques and extended to collusion and participation in rape and castration, as well as electric shock treatment copied from French colonial practices in Algeria.<sup>26</sup> Civil law claims for damages by Mau Mau victims were brought in UK courts and, in 2012, received permission from the Court of Appeal of England & Wales to extend limitation restrictions to enable the claims to be made. In the course of those proceedings, the UK Government accepted that three claimants had been tortured.<sup>27</sup>

Similarly, complaints by the Greek Government to the European Commission of Human Rights in 1956 arising out of the conduct of UK Services Personnel in Cyprus included deprivation of sleep and continuous knocking on a metal receptacle placed over the victim's head, but went on to include whipping, beating with rifle butts, threatened hanging, "Chinese water torture" ("*whereby the victim is held under a container from which water is allowed to drip upon his skull until he succumbs to nervous exhaustion*"), and placing a young man under a helmet until he lost consciousness.<sup>28</sup>

In the same vein, the report of Amnesty International following an observation trip to Aden and then Egypt in 1966 recorded a number of complaints including:

*(1) Undressing the detainees and making them stand naked during interrogation. (2) Keeping the detainees naked in super-cooled cells with air conditioners and fans running at high speed. (3) Keeping the detainees awake by irritating them until they are exhausted. (4) Offering food to hungry detainees and removing it just as they start eating. (5) Forcing the detainees to sit on poles directed towards their anus. (6) Hitting and twisting their genital organs. (7) Extinguishing cigarettes on their skin. (8) Forcing them to run in circles until they are exhausted. (9) Banning visits to lavatories so that they soil their cells with faeces and urine. (10) Keeping them in filthy toilets with the floor covered with urine and faeces.*<sup>29</sup>

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<sup>25</sup> This is extensively analysed in Caroline Elkins, *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya* (Place: Henry Holt and Co., 2005).

<sup>26</sup> *Ibid.*, chapters 3,9,10 and Epilogue.

<sup>27</sup> *Mutua & ors v Foreign and Commonwealth Office* [2012] EWHC 2678 (QB). See also Ian Cobain, "Mau Mau Veterans Win Torture Case", *The Guardian UK*, 5 October 2012, available at <http://www.guardian.co.uk/world/2012/oct/05/mau-mau-veterans-win-torture-case>.

<sup>28</sup> Alfred Simpson, *Human Rights and the End of Empire*, (Oxford, UK: Oxford University Press, 2004), pp. 1020-1052.

<sup>29</sup> S. Rastgeldi, *The Aden Report*, December 1966, <http://www.amnesty.org/en/library/asset/MDE27/002/1966/en/b88ed2e0-6be4-42d6-baa0-ddacb29bdb82/mde270021966eng.pdf>.

The Baha Mousa Public Inquiry, described in greater detail below, was the most recent opportunity to examine this history in the UK. However, the Inquiry Chairman declined to investigate the historical use of torture techniques, of both a ‘stealth’ and overt variety,<sup>30</sup> instead taking as his starting point the deployment of such techniques in Northern Ireland in the 1970s.

In 1971 in Northern Ireland, the UK security services used coercive, psychological methods of interrogation extensively in counter-insurgency operations against the Irish Republican Army (IRA). The techniques, sometimes referred to as “*interrogation in depth*”, were used pursuant to a 1965 “*Joint Directive on Military Interrogation in Internal Security Operations Overseas*,” which stated that:

*Successful interrogation depends upon careful planning both of the interrogation itself, and of the premises wherein it is conducted. It calls for a psychological attack. Apart from legal and moral considerations, torture and physical cruelty of all kinds are professionally unrewarding since a suspect so treated may be persuaded to talk, but not to tell the truth. Successful interrogation may be a lengthy process.*<sup>31</sup>

The deployed “five techniques” of this “interrogation in depth” were: (1) hooding (including for lengthy periods), (2) submitting the detainee to continuous and monotonous noise at high volume, (3) sleep deprivation, (4) food and water deprivation, and (5) stress positions (particularly wall-standing in which the detainee stands legs apart with hands raised against a wall for prolonged periods).<sup>32</sup>

Alfred McCoy attributes the development of these techniques to US and UK efforts post-WWII which sought “*a new approach to torture that was psychological, not physical.*”<sup>33</sup> He described the significance of this new approach in the following terms:

*For more than two thousand years, interrogators had found that mere physical pain, no matter how extreme, often produced heightened resistance. By contrast, the CIA’s psychological paradigm fused two new methods, “sensory disorientation” and “self-inflicted pain,” whose combination causes victims to feel responsible for their suffering and thus capitulate more readily to their torture [...] Refined through years*

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<sup>30</sup> The Report of the Baha Mousa Inquiry (BMI Report), (UK: The Stationery Office, 2011), para. 4.8, <http://www.bahamousainquiry.org/report/index.htm>.

<sup>31</sup> Parker Report, *supra* note 24, p. 23.

<sup>32</sup> *Ibid.*, p. 11.

<sup>33</sup> Alfred W. McCoy, *A Question of Torture* (New York:Metropolitan Books, 2006) p. 8.

*of practice, the method relies on simple, even banal procedures – isolation, standing, heat and cold, light and dark, noise and silence – for a systematic attack on all human senses.*<sup>34</sup>

The CIA's own interrogation manual, known as *KUBARK Counterintelligence Interrogation*,<sup>35</sup> had explained the rationale for this shift in focus from the physical to the psychological. The manual was predicated on the CIA's realisation that “*resistance is sapped principally by psychological rather than physical pressures.*”<sup>36</sup>

Amnesty International summarised the allegations involving the “five techniques” of “interrogation in depth” against the UK authorities in Northern Ireland in their 1971 Report:

*Before dawn on the 11<sup>th</sup>, the 9 men had their heads covered with heavy sacks fashioned of opaque cloth, no ventilation was provided and breathing was quite difficult. The men were forced into helicopters and made to lie on the floor of the aircraft. All were handcuffed, many too tightly. Aircraft personnel occasionally joked that the men were to have their “graves in the sea”. Upon arrival at the interrogation centre, the men were forced to strip naked and after physical examination were dressed in large coveralls, the hoods in place throughout. The men were then made to stand with their feet spread apart, their fingers pressed against a rough stone wall with their body weight on their finger tips in a “search” position. They were not permitted to move for four to five hours and when they did they were bludgeoned and forced to reassume the tortuous stance. The same happened if they collapsed. The room was filled with a strange noise, likened by some to a hissing of steam, by others to the noise of an operating air compressor. The heat inside the hoods became intolerable and the condition was compounded by the denial of all food but a few crusts of dried bread.*<sup>37</sup>

The Parker Commission, which was asked to report on the extent to which the UK interrogation techniques required amendment, was split. The majority report concluded that, with effective safeguards against excessive use, the techniques could be justified in occasions

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<sup>34</sup>*Ibid.*

<sup>35</sup>Central Intelligence Agency (CIA), *KUBARK Counterintelligence Interrogation*, July 1963, available at <http://www.gwu.edu/~nsarchiv>.

<sup>36</sup>*Ibid.*, p. 92.

<sup>37</sup> Amnesty International, *Report on Allegations of Ill-Treatment Made by Persons Arrested Under the Special Powers Act After 8 August 1971*, 30 October 1971. Here, compare the resonance with the Baha Mousa incident, in particular, the use of the noisy air compressor (see Section IV). The effect of noisy generators should not be underestimated, especially when used in combination with other forms of abuse.

of emergency. The minority report by Lord Gardiner (with whom history has sided) concluded that the techniques were plainly unlawful and must cease. He explained:

*According to our information, interrogation in depth [...] is a form of sensory isolation leading to a mental disorientation which was itself invented by the K.G.B in Russia where they first placed suspects in the dark and in silence.*

*As one group of distinguished medical specialists put it: Sensory isolation is one method of inducing an artificial psychosis or episode of insanity. We know that people who have been through such experience do not forget it quickly and may experience symptoms of mental distress for months and years [...] [A] proportion of persons who have been subjected to these procedures are likely to continue to exhibit anxiety attacks, tremors, insomnia, nightmares and other symptoms of neurosis with which psychiatrists are familiar from their experience of treating ex-prisoners of war and others who have been confined and ill-treated.’’<sup>38</sup>*

Having described the illegality of the techniques, Lord Gardiner’s concluding comment was that:

*The blame for this sorry story, if blame there be, must lie with those who, many years ago, decided that in emergency conditions in Colonial-type situations we should abandon our legal, well-tried and highly successful wartime interrogation methods and replace them by procedures which were secret, illegal, not morally justifiable and alien to the traditions of what I believe still to be the greatest democracy in the world.<sup>39</sup>*

In the UK House of Commons on 2 March 1972, and further to the publication of the Parker Report, the then Prime Minister Ted Heath stated that:

*The Government...have decided that the techniques which the Committee examined will not be used in future as an aid to interrogation.<sup>40</sup>*

When asked about the scope of the government’s decision, the Prime Minister affirmed that his statement will cover all future circumstances.<sup>41</sup>

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<sup>38</sup> Parker Report, *supra* note 24, p.17.

<sup>39</sup> *Ibid.*, p. 22.

<sup>40</sup> The Report of the Baha Mousa Inquiry, Volume I, Part II, Chapter 1.39, available at [http://www.bahamousainquiry.org/f\\_report/vol%20i/Part%20II/ch2/PLT000812.pdf](http://www.bahamousainquiry.org/f_report/vol%20i/Part%20II/ch2/PLT000812.pdf) [hereafter Report of the Baha Mousa Inquiry].



In 1978, the ECtHR gave judgment in an application brought by Ireland against the UK in respect of the use of the five techniques in 1971. Prior to that judgment, the UK Attorney-General stated to the ECtHR on 8 February 1977 that:

*[t]he Government of the UK have considered the question of the use of the 'five techniques' with very great care and with particular regard to Article 3 of the [European Convention for Human Rights]. They now give this unqualified undertaking, that the 'five techniques' will not in any circumstances be reintroduced as an aid to interrogation.*<sup>42</sup>

The ECtHR found that:

*[t]he five techniques were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation.*<sup>43</sup>

It was concluded that the techniques breached the prohibition on inhuman and degrading treatment in Article 3 of the ECHR.<sup>44</sup>

The ECtHR has frequently emphasised that the Convention is a “*living instrument which [...] must be interpreted in the light of present day conditions.*”<sup>45</sup> Acts previously held to fall outside the scope of Article 3 may therefore attain the required level of severity as time passes and standards change. Moreover, acts which in the past have been classified as “*inhuman or degrading treatment*” now fall to be classified as “*torture*”, as indicated by later ECtHR judgements such as *Selmouni v France*.<sup>46</sup> As Lord Bingham held in 2005 in *A v SSHD (No.2)*, it “*would [...] be wrong to regard as immutable the standard of what amounts to*

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<sup>41</sup>*Ibid.*, P. 2.

<sup>42</sup>*Ireland v. UK*, 18 January 1978, Series A no. 25, para. 102.

<sup>43</sup>*Ibid.*, para. 167.

<sup>44</sup>*Ibid.* The Court concluded that the ‘five techniques’ did not constitute torture for the purpose of article 3 (paragraph 167). However, the UK House of Lords more recently expressed the view that: “It may well be that the conduct complained of in *Ireland v UK*, ... would now be held to fall within the definition in article 1 of the Torture Convention”: *R (A and Others) v Secretary of State for the Home Department* [2005] UKHL 71, paragraph 101. For an analysis of that decision and the more recent ECHR jurisprudence, see Section V below (Legal Analysis).

<sup>45</sup> See e.g., *Tyrer v UK*, 25 August 1978, Series A no. 26 at para 31.

<sup>46</sup>*Selmouni v France*, no. 25803/1994, ECHR 1999-V at para. 101.

torture.”<sup>47</sup> Lord Hope has expressed the view extra-judicially that the five techniques examined in *Ireland v UK* would now be regarded as torture under Article 3.<sup>48</sup>

In a recent judgement handed down in December 2012 in the case of CIA extraordinary rendition victim Khaled El-Masri, the ECtHR found that the treatment suffered by El-Masri in 2003 at the hands of the special CIA rendition team, in Skopje, Macedonia, “*had amounted to torture, in violation of Article 3*” of the ECHR.<sup>49</sup> El-Masri had been subjected to so-called “shock of capture” techniques by the CIA to maintain and deepen the “shock of capture” in order to obtain information when interrogated. El-Masri had been severely beaten, sodomised with an unknown object, shackled and hooded, and subjected to total sensory deprivation. Notably, in the judgement, the Court:

*“reiterates that Article 3 of the Convention enshrines one of the most fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation.”*<sup>50</sup>

This communication concerns the consequences of the authorisation and implementation of similar techniques to maintain the “shock of capture” for use by UK Services Personnel in Iraq. The foreseeable consequences of such authorisations extend beyond the use of the techniques themselves, as it can be said with a high degree of certainty that there is almost always a force drift away from authorised techniques to more serious forms of abuse.<sup>51</sup>

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<sup>47</sup> *A v SSHD (No.2)* [2005] UKHL 71, [2006] 2 AC 22, para 53.

<sup>48</sup> ‘Torture’ [2004] ICLQ 807, p. 826.

<sup>49</sup> *El-Masri v. The Former Yugoslav Republic of Macedonia*, no. 39630, 13 December 2012, para. 211.

<sup>50</sup> *Ibid.*, para. 195.

<sup>51</sup> Philippe Sands, *Torture Team: Deception, Cruelty and the Compromise of Law* (London, UK: Allen Lane, 2008), p. 161. The phrase, “force drift”, is attributable to Mike Gelles, a senior psychologist of the United States Naval Criminal Investigative Service, who visited Guantanamo Bay during 2002 and 2003 and witnessed firsthand some of the authorised techniques that were being used there. Other writers on torture, for instance Rejali, *Torture and Democracy*, *supra* note 23, tend to refer to the same concept as ‘escalation.’

#### **IV) FACTS: SYSTEMATIC ABUSE PERPETRATED BY UK SERVICES PERSONNEL IN IRAQ FROM 2003 TO 2008**

The US and UK along with the coalition States, started the invasion of Iraq on 20 March 2003. The hostilities phase went until 1 May 2003, when US President George W. Bush formally declared the accomplishment of major combat operations. On 22 May 2003 the UNSC adopted Resolution 1483 which explicitly recognised the UK and the US as occupying powers with the specific authorities, responsibilities and obligations under international law of occupying powers under unified command. The UK controlled the south-eastern part of Iraq. On 28 June 2004, Resolution 1546 was unanimously adopted by the UNSC transferring authority from the occupying forces to the “*fully sovereign and independent*” Interim Government of Iraq. The official occupation ended on 28 June 2004; however, the MNF (of which the UK and US were a part) remained in Iraq at the invitation of the Interim Government. It was only on 30 December 2008 when the UN Mandate for Iraq expired and the MNF withdrew from the country<sup>52</sup> in April to June 2009.

Thousands of allegations of mistreatment by UK Services Personnel in Iraq have been made by hundreds of Iraqi victims in the last 10 years. An exemplary sample of these allegations is presented below and summarised in the six tables attached<sup>53</sup> hereto, which detail the detention experiences and allegations of abuse of 109 Iraqi detainees. This evidence is further supported by substantial incriminating material recently disclosed in public inquiries and court proceedings in the UK.

The six tables demonstrate that similar instances of abuse occurred at every stage of detention, at various UK facilities, and during every year of UK military operations in Iraq from 2003 to 2008. Thus the thousands of allegations of abuse from this small sample of 109 victims represent only the tip of the iceberg in terms of the actual scale of abuse experienced by Iraqis in UK custody during these times. Indeed, since PIL originally compiled these six tables in 2010, they have received instruction from an additional 214 surviving Iraqi victims, bringing the total number of Iraqi victims of severe physical and psychological abuse legally represented by PIL in the UK to 412.

Accordingly, we present evidence relating to each stage in the UK detention chain below, summarising both the tables and exemplary cases from the victims’ personal testimonies.

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<sup>52</sup> See also, under Chapter V, A. 1.

<sup>53</sup> See Annex A.

### **A) The Baha Mousa Public Inquiry – a Preliminary Note**

Before examining the victims' allegations, a preliminary note on the BMI is important, as much of the primary material obtained from the UK Government was obtained through the BMI proceedings and is recorded in its 2011 report.<sup>54</sup> Whilst the BMI has facilitated the present communication, it is by no means an answer to the demand for criminal accountability of those most responsible for the crimes in question, for the reasons outlined in Section VII below.

The BMI was a public inquiry under the chairmanship of Sir William Gage, a former Court of Appeal judge. It investigated the circumstances surrounding the death of an Iraqi civilian, Baha Mousa, in UK custody in September 2003. The Inquiry was established in August 2008 following a concession by the government in the course of its defence of court proceedings seeking as their remedy a public inquiry into several instances of unlawful killing and mistreatment by UK Services Personnel in Iraq. A public inquiry is a mechanism for the investigation of matters of public concern developed under English law and Parliamentary convention and now placed on a statutory footing by the Inquiries Act 2005 in the UK. It is a form of public investigation, of an inquisitorial rather than adversarial nature, often (but not necessarily) lead by a judge. Its purposes are to establish controversial facts, decide questions of accountability and blame, learn lessons for the future, and restore public confidence.<sup>55</sup> A public inquiry is established by government, but is intended to be independent thereof. It is sometimes the means by which the government satisfies its investigative duties under the ECHR. The Inquiries Act 2005 invests public inquiries with statutory powers including the taking of evidence on oath and the compulsion of witnesses. However, a public inquiry cannot compel witnesses or persons accused of wrongdoing to attend for interview. It may only compel them to attend at public hearings after they have prepared their own statement. A public inquiry is statutorily prohibited from deciding questions of civil or criminal liability (Inquiries Act 2005, s2). It is purely a fact-finding exercise. In the pursuit of facts, it may arrange for immunities from criminal prosecution to be provided to witnesses.

The BMI's terms of reference were:

*To investigate and report on the circumstances surrounding the death of Baha Mousa and the treatment of those detained with him, taking account of the investigations*

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<sup>54</sup> See generally, Report of the Baha Mousa Inquiry, *supra* note 40.

<sup>55</sup> See further, Jason Beer QC, *Public Inquiries* (New York, NY:Oxford University Press, 2011).

*which have already taken place, in particular where responsibility lay for approving the practice of conditioning detainees by any members of the 1<sup>st</sup> Battalion the Queen's Lancashire Regiment in Iraq in 2003, and to make recommendations.*

The events that led to Baha Mousa's death can be summarized from the BMI Report's findings as follows.<sup>56</sup> Mousa was arrested at a hotel in Basra on 14 September 2003. He was arrested with six other men and taken to a UK base at the former headquarters of the Ba'ath party in Basra, known as BG Main of 1 Queen's Lancashire Regiment. Two other men were subsequently arrested at their homes and taken to a UK base known as Camp Stephen (where 'A Company' of 1 Queen's Lancashire Regiment were based), where they were held for two hours. At Camp Stephen one detainee was made to jump up and down until he collapsed from heat and exhaustion. Both were forced to adopt a kneeling position on pebbled ground and exposed to the hot sun. Whilst kneeling, they were forced to hold their hands outwards, and water bottles were placed on their hands to make the position more difficult and painful. They were then transferred to BG Main. There the nine detainees were joined by a tenth. All the detainees were held in a temporary detention facility which consisted of a disused latrine. During this time, they were each taken for TQ. TQ was the mode of interrogation permitted to capturing units, limited to the obtaining of information that was time-sensitive or relevant to the decision to detain, prior to the transfer of detainees to a dedicated interrogation facility.

However, after 36 hours at BG Main, Baha Mousa died, having sustained 93 separate injuries. The abuses at BG Main included hooding (including with two sandbags); being forced repeatedly into a "ski" stress position and being kicked, slapped and beaten. They also included soldiers conducting what was termed by them as "the choir," in which the detainees were beaten to induce a "choir" of expressions of pain. Additional abuses included being urinated on, being placed next to a noisy generator, being forced to drink urine, being verbally insulted, and being deprived of sleep pending TQ.

The detailed report of the BMI and the evidence to which it refers is illuminating. Notwithstanding the BMI's limitations, the evidence about wider practices of the UK Services Personnel revealed incidentally to the BMI's main task, supports the picture of systematic abuse. The BMI report summarises the evidence regarding incidents of abuse which led the chairman Sir William Gage to the conclusion that the events surrounding Baha

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<sup>56</sup> Report of the Baha Mousa Inquiry, *supra* note 40, Part II.

Mousa's death were “not a ‘one-off’”<sup>57</sup> and are discussed further in Section V of this document.

## **B) UK Detention and Interrogation Policy**

Before examining the allegations of detainee abuse, it is furthermore important to understand the UK's applicable policy framework. Again, much of this information has been gleaned from the BMI.

Prime Minister Heath's 1972 statement committing the UK government to no longer use the “five techniques” in interrogation,<sup>58</sup> the undertaking of the UK Attorney-General,<sup>59</sup> and the ruling of the ECtHR in *Ireland v. UK* did not prevent the five techniques from reappearing. The UK MoD conceded before the BMI that the five techniques should have been banned as an aid to interrogation in all situations and in all operations.<sup>60</sup> However, by 1996 there had been a “gradual loss of the doctrine”<sup>61</sup> to the extent that in some policy documents the five techniques were not expressly prohibited. In 1996 and 1997, the MoD conducted a review of interrogation policy. That review identified a gap in doctrine and required that “[p]rocedures used by UK interrogators in an operational theatre should be governed by a detailed directive that incorporates current legal advice and is issued on behalf of the UK Joint Commander.”<sup>62</sup> However the requirement for a detailed directive in Iraq was not fulfilled. The little interrogation doctrine that did exist was replaced in 1999 with a very generalised publication, the consequence of which was that by 1999 there was, as the MoD put it to the Inquiry, “no corresponding written doctrine for interrogation in times of international armed conflict.”<sup>63</sup>

As a consequence of this significant gap in written doctrine, the limits of interrogation were, in effect, set by those responsible for training the interrogators.<sup>64</sup> Training was conducted by the Defence Intelligence and Security Centre (DISC) and the JSIO, based in Chicksands,

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<sup>57</sup>*Ibid.*, para. 3.61.

<sup>58</sup> See *supra*.

<sup>59</sup> See *supra*.

<sup>60</sup> Report of the Baha Mousa Inquiry, *supra* note 40, para. 4.174.

<sup>61</sup>*Ibid.*

<sup>62</sup>*Ibid.*, para. 5.9.

<sup>63</sup>*Ibid.*, para. 5.27.

<sup>64</sup>*Ibid.*, para. 5.150.

Bedfordshire, UK. The particular unit responsible for training of interrogation and TQ was F Branch.<sup>65</sup>

Commandant DISC was responsible for interrogation policy. A 1997 policy stated that:

*Commandant DISC should review on a routine basis all interrogation related procedures, methods and organisations employed by the UK Services Personnel. He should also be responsible for the supervision and conduct of all interrogation related training carried out by the three Services including practical [Conduct After Capture] training.*

*Commandant DISC should advise the UK Joint Commander over the nomination of a suitably qualified officer to assume command of the UK Service interrogation organisation that is established in an operational theatre.*<sup>66</sup>

The evidence and conclusions of the BMI indicate clearly that the techniques in which UK interrogators were trained did not conform to the Geneva Conventions and aspects of the five techniques as practiced in 1971 remained. Some examples are provided below.

A central principle underlying the approach to interrogation was that the element of shock inherent in an arrest by an enemy, generally referred to as the “shock of capture”, could be maintained and utilised to assist interrogation. A 2004 training document indicated that “[t]his ‘shock of capture’ can be exploited by military interrogators to gain information but is not to be increased artificially.”<sup>67</sup> It is clear, however, that the teaching of the limitation that the ‘shock of capture’ was not to be increased artificially was not clear and lines easily became blurred. For example, military personnel understood from courses on prisoner handling the importance to maintain the ‘shock of capture’ “[t]o keep them as confused as possible in order to aid the interrogators”.<sup>68</sup> Besides this, courses on interrogation techniques, taught interrogators routinely that “[i]f prisoners were deprived of their sight for security purposes this would have had the side-effect, or incidental benefit, of maintaining the

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<sup>65</sup> See Witness Statement of “S040” to the Baha Mousa Inquiry, 5 February 2010, para.39, available at [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_150310/bmi06977.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_150310/bmi06977.pdf).

<sup>66</sup> Report of the Baha Mousa Inquiry, *surpa* note 40, para.7.121.

<sup>67</sup> *Ibid.*, para. 6.185.

<sup>68</sup> *Ibid.*, para. 6.328.

*shock of capture.*”<sup>69</sup> Notably, in a 2003 circulation – i.e. at the start of the Iraq conflict – the limitation on not artificially increasing the “shock of capture” did not appear at all.<sup>70</sup>

One aspect of utilising the “shock of capture” was carrying out TQ, which was designed to take place as soon as possible after arrest and thus at the point at which the shock was at its highest. After a short period of TQ, the detainee could then be subjected to “interrogation,” which was more systematic and conducted over a longer period. Course notes from an F Branch course define TQ as “[t]he obtaining of information from unwilling prisoners, the value of which would deteriorate or be lost altogether if the questioning was delayed until a trained interrogator could be made available.”<sup>71</sup> It explains:

*Tactical Questioning (TQ) is the first questioning to which a Prisoner of War (PW) is subjected. TQ normally takes place at the HQ [Headquarter] location of the capturing unit and is carried out by suitably trained members of that unit. TQ utilises the initial shock of capture in order to obtain specific information and intelligence and identifies individuals for further interrogation [...] It is at this stage that the PW are selected for further interrogation.*<sup>72</sup>

Interrogation, on the other hand, was defined as “[t]he systematic questioning of selected, unwilling individuals by trained interrogators.”<sup>73</sup>

Various means of sensory deprivation and debilitation of detainees continued to be taught as means of maintaining the “shock of capture” and aiding interrogation. An example is sleep deprivation. The evidence of one interrogator before the BMI was that “*sleep was not permitted pending a detainee’s initial interrogation, which could mean no sleep for a stretch of 24 hours.*”<sup>74</sup> Another interrogator believed that “*sleep deprivation was lawful explicitly in order to make detainees ‘more likely to cooperate during questioning’*” and detainees were

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<sup>69</sup>*Ibid.*, para. 6.345.

<sup>70</sup>*Ibid.*, para. 6.185.

<sup>71</sup>Ministry of Defense, “Introduction to Interrogation and Tactical Questioning” (MOD028258-MOD028288), available at [http://www.bahamousainquiry.org/f\\_report/vol\\_iii/Part\\_XVI/ch2/MOD028258.pdf](http://www.bahamousainquiry.org/f_report/vol_iii/Part_XVI/ch2/MOD028258.pdf).

<sup>72</sup>Joint Service Intelligence Organisation, F Branch, “Introduction to Interrogation and Tactical Questioning – Course Notes” (BMI02775-BMI02776), available at [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_071209/bmi02775.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_071209/bmi02775.pdf).

<sup>73</sup>Ministry of Defense, “Introduction to Interrogation and Tactical Questioning” (MOD028258-MOD028288), available at [http://www.bahamousainquiry.org/f\\_report/vol\\_iii/Part\\_XVI/ch2/MOD028258.pdf](http://www.bahamousainquiry.org/f_report/vol_iii/Part_XVI/ch2/MOD028258.pdf).

<sup>74</sup>Ministry of Defense, “Closing Written Submissions on Modules 1-3 to the Baha Mousa Inquiry,” p. 109, available at <http://www.bahamousainquiry.org/hearings/modules13submissi.htm>.



kept awake by being given a ‘gentle nudge.’”<sup>75</sup> Evidence in domestic cases (not before the BMI) confirms the strategic use of sleep deprivation as an aid to interrogation. Contemporaneous logs from September 2006 at the DTDF, the main UK-run detention and internment facility in Iraq at the time, record:

*[North] Compound checked internee 987 wants to see [Military Provost Staff Company Sergeant Major] in morning – says he is being bullied – he is woken every 30 minutes as part of [tactical questioning].*<sup>76</sup>

*Op wide awake conducted using white light.*<sup>77</sup>

The Chair of the BMI concluded that:

*The sole purpose of keeping a prisoner awake was to improve the opportunity of obtaining intelligence product by preventing them from refreshing themselves by sleeping before being interrogated. In my opinion, forcibly keeping prisoners awake by nudging them pending questioning was inappropriate and unacceptable treatment.*<sup>78</sup>

Similarly, sight deprivation remained a central part of handling detainees who were to be interrogated. The BMI heard evidence that some Tactical Questioners advised guards to keep detainees hooded and in isolation in order to condition them before they were questioned.<sup>79</sup> It also found that detainees were hooded in JFIT, the military’s dedicated interrogation facility, including for lengthy periods.<sup>80</sup> The MoD accepted in the BMI that sight deprivation was used by interrogators in JFIT as an aid to interrogation and that it was “*totally unacceptable.*”<sup>81</sup> Both those who taught interrogation and those who had been students understood that sight deprivation had a benefit in maintaining the “shock of capture.”<sup>82</sup> The MoD’s view as expressed in its closing submissions to the BMI was that “*it must be accepted*

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<sup>75</sup>*Ibid.*, p. 110.

<sup>76</sup>Annex D2, Third Witness Statement of Phil Shiner filed on behalf of the claimant in *R (Ali Zaki Mousa & ors) v SSD*[2011] EWCA Civ 1334, 12 October 2010, para 27.

<sup>77</sup>*Ibid.*

<sup>78</sup>Report of the Baha Mousa Inquiry, *supra* note 40, para. 8.466.

<sup>79</sup>*Ibid.*, para. 13.79.

<sup>80</sup>*Ibid.*, para. 8.466

<sup>81</sup>Ministry of Defense, “Closing Written Submissions on Modules 1-3 to the Baha Mousa Inquiry,” *supra* note 74.

<sup>82</sup>*Ibid.*, para. 11.2.

*that any reference to a 'side-benefit' or anything analogous runs a real risk of creating confusion and encouraging illegal behaviour.”<sup>83</sup>*

The MoD made a number of other concessions in respect of its teaching and training of interrogation. In particular:

*there is a training handout which suggests that at the start of questioning sessions, the “Questioner conducts a visual scrutiny of the subject (subject still blindfolded). The Questioner can increase the pressure by moving around the subject [...]”[...]This is unacceptable practice which should not have been taught.<sup>84</sup>*

And:

*There is also a strong body of evidence that highly unsettling behaviour capable of having an intimidating effect was taught, for example deliberately throwing furniture, so long as it did not hit the captured person, or shouting into the face of a prisoner from very close quarters. This too is admittedly unacceptable. The MOD [MoD] does, however, stress that it was universally understood that actual violence could not be used towards prisoners.<sup>85</sup>*

The approach in interrogation of standing close to the detainee and shouting (usually with abusive language) was referred to as “harshing.” The technique involved the interrogator standing within inches of the detainee and screaming. The effect of the invasion into the detainee’s intimate space in front of his face and the screaming is an intense psychological pressure.

The BMI Report reproduces training material from 2003 which describe five varieties of the approach as “*Harsh – Volume*”, “*Harsh – Uncontrolled Fury*”, “*Harsh – Cynical Derision*”, “*Harsh – Malicious Humiliation*,” and “*Harsh – Confusion/Conditioning*.” “*Harsh – Uncontrolled Fury*” was described as “*Possibly start as coldly menacing and then develop. Voice and Actions show psychotic tendencies. Disconnected subjects. Questions, statements and personal abuse.*”<sup>86</sup> There was:

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<sup>83</sup>*Ibid.*, p. 129, para. 11.2.

<sup>84</sup>*Ibid.*, p.125, para. 9.1.

<sup>85</sup>*Ibid.*, p.126, para. 9.2.2.

<sup>86</sup>Report of the Baha Mousa Inquiry,*supra* note 40, para. 6.181.

*no limit on the insults that could be used. Facts could be stated that might be perceived as threats, including comments such as handing the prisoner over to the local police, 'you know what they are like.' Insults such as appeared in the 2005 video, 'You are the unit fucking rent boy, were you?' would have been seen in 2002/2003 as perfectly legitimate.*<sup>87</sup>

Aspects of the approach were described by the Inquiry Chair as “*obviously of concern.*”<sup>88</sup>

In teaching the harsh technique, instructors set only two limits on what a questioner might do. He was prohibited from touching the detainee,<sup>89</sup> and he was discouraged from making threats that he could not follow through – not out of concern for the detainee’s welfare, but so as to avoid losing credibility as a source of fear.<sup>90</sup> The making of threats was advocated, including the threat of indefinite detention (and concomitant risks to one’s family whilst incarcerated), and the threat of being handed over to some other body or Service Personnel with the implication of harsher treatment.<sup>91</sup> Threats were also used in other approaches. For instance, training materials included the following advice for the ‘soft’ approach:

*Suggestion of what will happen if [...]*

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<sup>87</sup> *Ibid.*, para. 6.223.

<sup>88</sup> *Ibid.*, para. 6.181.

<sup>89</sup> See Witness Statement of Michael Kerr Hill to the BMI, BMI 08387, 21 May 2010, available at [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_090610/bmi08387.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_090610/bmi08387.pdf); Witness Statement of Stephen Anthony Graley to the BMI, BMI08314, 18 May 2010, available at [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence180510/bmi08314.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence180510/bmi08314.pdf); Witness Statement of Andrew Haseldine to the BMI, BIMO04594, 28 September 2009, available at [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_260410/bmi04594.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_260410/bmi04594.pdf).

<sup>90</sup> Witness Statement of S004 to the BMI, BMI05047, 8 October 2009, available at [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_040510/bmi05047.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_040510/bmi05047.pdf); Witness Statement of S049 to the BMI, BMI 08071, 21 April 2010, available at [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_060510/bmi08071.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_060510/bmi08071.pdf); Witness Statement of Jonathan Paul Thomas to the BMI, BMI 08181, available at [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_060510/bmi08181.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_060510/bmi08181.pdf); Witness Statement of Stephen Anthony Graley to the BMI, note 81; Witness Statement of Andrew Haseldine to the BMI, *supra* note 81.

<sup>91</sup> Witness Statement of Major Gareth Robert Barber to the BMI, BMI035, 12 August 2009, 35 available at [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_110210/bmi03535.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_110210/bmi03535.pdf); Witness Statement of Major Sian Ellis-Davies to the BMI, BMI05073, 10 October 2009, available at [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_280410/bmi05073.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_280410/bmi05073.pdf); Witness Statement of S012 to the BMI, BMI040510, 22 October 2009, available at [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_040510/bmi05502.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_040510/bmi05502.pdf); Witness Statement of S048 to the BMI, BMI07459, 11 March 2010, available at [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_040510/bmi07459.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_040510/bmi07459.pdf); Witness Statement of Jonathan Paul Thomas, *supra* note 82; 2005 Training Video, BMI02687, available at [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidencev1/bmi02687tacticalquestioninginterrogationharshexamples-pixilated1.wmv](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidencev1/bmi02687tacticalquestioninginterrogationharshexamples-pixilated1.wmv).

*Inevitability of what the future holds in store. Cooperate or worse will follow. (Ensure it does).*

*Dilemma question (Answer or your friends will suffer).*

*You are going mad...tired... cold...ill...hungry [...]*

*Futility of resisting.*<sup>92</sup>

Whilst physical contact was prohibited, the use of physical threats and intimidation was permitted, with students being encouraged to invade the detainee's personal or intimate space,<sup>93</sup> and to throw furniture across the room.<sup>94</sup> A Major, who had received interrogation training, understood that threats of physical violence could be used.<sup>95</sup> He understood that the implication of physical violence was limited "*only by your imagination*" and gave the examples of placing a burly man with a baseball bat in the interrogation room, and holding the nib of a fountain pen inches from the subject's eye, poking it into their face whilst asking questions.<sup>96</sup>

Insults and personal abuse were deemed acceptable, and written training materials advised the use of "*malicious humiliation,*" "*ridicule,*" and "*mockery*" to lower self respect and "*taunt and goad*" detainees.<sup>97</sup> A training video from 2005 shows a detainee being told he is "*fucking*

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<sup>92</sup>Extract from Interrogation Methods and Techniques, Evidence Presented to the Baha Mousa Inquiry, MOD022478, available at [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/hearings/oral\\_submission/evidence\\_190710/mod022477.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/oral_submission/evidence_190710/mod022477.pdf).

<sup>93</sup>Witness Statement of Sergeant Major Michael Porter to the BMI, BMI 04979, BMI04982, 5 October 2009, available at [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_310310/bmi04979.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_310310/bmi04979.pdf); Witness Statement of Major Gareth Robert Barber, *supra* note 83; Witness Statement of Major Bruce Anthony Radbourne to the BMI, BMI04146, 3 September 2009, available at [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_010410/bmi04135.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_010410/bmi04135.pdf); Witness Statement of Major Sian Ellis-Davies, *supra* note at 83.

<sup>94</sup>Witness Statement of Anthony Graley to the BMI, *supra* note 81; Witness Statement of Sergeant Major Michael Porter to the BMI, *supra* note 85; Witness Statement of Joshua King to the BMI, BMI03972, BMI03981, 2 September 2009, available at [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_170210/bmi03972.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_170210/bmi03972.pdf); Witness Statement of S012 to the BMI, *supra* note 83; Witness Statement of Andrew Haseldine to the BMI, *supra* note 81; 2005 Training Video, *supra* note 85, shows a chair thrown during a questioning session and has been described by a JSIO instructor as "what not to do" only because the chair actually strikes the prisoner.

<sup>95</sup>Transcript of the BMI, 26 April 2010, pp. 8-9, available at [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_260410/2010-26-04-day83fullday.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_260410/2010-26-04-day83fullday.pdf). See also Witness Statement of Michael Kerr Hill to the BMI, *supra* note 81, confirming that threats of physical assault could be made, at least implicitly.

<sup>96</sup> Transcript of the BMI, 26 April 2010, *supra* note 87, pp. 78-79.

<sup>97</sup>Extract from Interrogation Methods and Techniques, Evidence Presented to the Baha Mousa Inquiry, MOD022477, available at [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/hearings/oral\\_submission/evidence\\_190710/mod022477.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/oral_submission/evidence_190710/mod022477.pdf).

*stupid.*”<sup>98</sup> Students and instructors have confirmed that homophobic, racist and sexually demeaning expressions were used during courses across the years.<sup>99</sup> One instructor described an initial exercise on the interrogation course in his oral evidence:

*A: With regards to insults, anything goes. One of the first exercises on the course, as strange as it sounds, is to actually – you are told for one minute – you are placed in an interrogation room and you are told for one minute to insult whatever is in there, and that can range from a cardboard cut-out toy to a cuddly toy, and then, when the whistle goes for the minute afterwards, you are to be nice and attempt to make rapport, as it were.*

*Q: When you say ‘anything goes’, do you mean that literally anything in the sense that, for example, racist or homophobic insults were fair play?*

*A: We were certainly never castigated for them. We weren’t told directly to be racist, et cetera, but as far as I remember, no one was castigated or told not to do it again.*<sup>100</sup>

Shouting was designed to indicate “*uncontrolled fury*” and “*psychotic tendencies*,” and was so exhausting that questioners could not keep it up for more than a few minutes.<sup>101</sup> The intention was clearly to intimidate, frighten and coerce, rather than to question directly – as indicated by the evidence of one interrogator that the content of a harsh approach would often not be interpreted:

*Q: Are you really saying that what the interrogator was saying during the course of a harsh would not be being translated?*

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<sup>97</sup>477.pdf. See also materials which appear to post-date TELIC 2 at Extract from assesment during the questioning process Evidence Presented to the Baha Mousa Inquiry, MOD028286, available at [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_040510/mod028280.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_040510/mod028280.pdf).

<sup>98</sup>2005 Training Video, *supra* note 85.

<sup>99</sup>Witness Statement of Michael Kerr Hill to the BMI, *supra* note 81; Witness Statement of Andrew Haseldine to the BMI, *supra* note 81; Witness Statement of S004 to the BMI, BMI 040510, 8 October 2009, available at [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_040510/bmi05047.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_040510/bmi05047.pdf); Witness Statement of S017 to the BMI, BMI06795, 7 January 2010, available at [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_270410/bmi06795.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_270410/bmi06795.pdf).

<sup>100</sup> Transcript of the BMI, 26 April 2010, *supra* note 87 at 10. Witness Statement of S049 to the BMI, BMI08071, 21 April 2010, available at

[http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_060510/bmi08071.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_060510/bmi08071.pdf), explaining that Haseldine, an instructor, confirmed this exercise was used.

<sup>101</sup>Evidence Presented to the Baha Mousa Inquiry, MOD022477, *supra* note 89; OPTAG Pre-Deployment Training Package, Evidence Presented to the Baha Mousa Inquiry, MOD011875, available at [http://www.bahamousainquiry.org/f\\_report/vol%20ii/Part%20VI/ch5/MOD011863.pdf](http://www.bahamousainquiry.org/f_report/vol%20ii/Part%20VI/ch5/MOD011863.pdf); Evidence Presented to the Baha Mousa Inquiry, MOD028286, *supra* note 89.

A: Yes.

*CHAIRMAN: That can't be right, can it?*

*MR MOSS: It is a requirement under the Geneva Convention, of course, that questions are asked of a prisoner in a language which they understand. So if that were right, that would be a breach of the Conventions as well, wouldn't it?*

*A: The harsh is actually – it is an interrogator going full flow for about five minutes. There is no time – if you were to stop and write down every sentence and have it interpreted, you would lose the effect of the harsh approach. Therefore it's – the interrogator is just venting his own – venting his spleen, if you will. It is not asking the prisoner to answer any questions. It is not asking him to – actually even to understand the tenor and the tone of the approach.<sup>102</sup>*

A UK Colonel described its purpose as “to induce a state of concern and anxiety in the prisoner”, and “to lead them to the belief that their failure to satisfy the interrogator will have consequences, physical or otherwise.”<sup>103</sup>

On 25 October 2010 and following the leak of UK interrogation training materials, *The Guardian* reported as follows:

*Training materials drawn up secretly in recent years tell interrogators they should aim to provoke humiliation, insecurity, disorientation, exhaustion, anxiety and fear in the prisoners they are questioning, and suggest ways in which this can be achieved.*

*One PowerPoint training aid created in September 2005 tells trainee military interrogators that prisoners should be stripped before they are questioned. "Get them naked," it says. "Keep them naked if they do not follow commands."<sup>104</sup> Another manual prepared around the same time advises the use of blindfolds to put prisoners under pressure.<sup>105</sup>*

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<sup>102</sup>Witness Statement of Stephen Anthony Graley to the BMI, *supra* note 81, p. 106.

<sup>103</sup>Witness Statement of Michael Kerr Hill to the BMI, *supra* note 81, pp. 81–/82.

<sup>104</sup> See Extract from Assessment During the Questioning Process, MOD028258, available at [http://www.bahamousainquiry.org/f\\_report/vol%20iii/Part%20XVI/ch2/MOD028258.pdf](http://www.bahamousainquiry.org/f_report/vol%20iii/Part%20XVI/ch2/MOD028258.pdf), p.18.

<sup>105</sup>See Extract from Assessment During the Questioning Process, MOD028280, available at [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_040510/mod028280.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_040510/mod028280.pdf)

*A manual prepared in April 2008 suggests that "Cpers" – captured personnel – be kept in conditions of physical discomfort and intimidated. Sensory deprivation is lawful, it adds, if there are "valid operational reasons." It also urges enforced nakedness.<sup>106</sup>*

*More recent training material says blindfolds, earmuffs and plastic handcuffs are essential equipment for military interrogators, and says that while prisoners should be allowed to sleep or rest for eight hours in each 24, they need be permitted only four hours unbroken sleep. It also suggests that interrogators tell prisoners they will be held incommunicado unless they answer questions.[...]*

*Interrogators are advised to find a discreet place to conduct interrogations, preferably somewhere that looks "nasty". Shipping containers are said to be ideal places that offer "privacy for TQ and Interrogation sessions". The chosen location should always be "out of hearing" and "away from media". One of the documents states: "Torture is an absolute No No." However, it then goes on to recommend methods of ill-treatment that can be employed by interrogators.*

*Prisoners should be "conditioned" before questioning, with conditioning defined as the combined effects of self-induced pressure and "system-induced pressure". Harsh questioning – or "harshing" – in which an interrogator puts his face close to the prisoner, screaming, swearing and making threats, is recommended as a means to provoke "anxiety/fear". Other useful responses include "insecurity", "disorientation" and "humiliation."*

*The training material recommends that after a prisoner's clothes are removed, the interrogator ensures he is searched behind his foreskin and that his buttocks are spread.<sup>107</sup> This is part of the conditioning process, rather than as a security measure.*

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<sup>106</sup>Report of Sir Philip Trousdell to the Baha Mousa Inquiry, MIV010047, September 2010, available at [http://www.bahamousainquiry.org/f\\_report/vol%20iii/Part%20XVI/ch5/MIV010047.pdf](http://www.bahamousainquiry.org/f_report/vol%20iii/Part%20XVI/ch5/MIV010047.pdf)

<sup>107</sup>Introduction to Interrogation and Tactical Questioning Manual, MOD028258, p. 18, available at [http://www.bahamousainquiry.org/f\\_report/vol%20iii/Part%20XVI/ch2/MOD028258.pdf](http://www.bahamousainquiry.org/f_report/vol%20iii/Part%20XVI/ch2/MOD028258.pdf); See Notes of Ray Smulski, BMI01265, p. 16, available at [http://www.bahamousainquiry.org/f\\_report/vol%20ii/Part%20VI/ch4/BMI01265.pdf](http://www.bahamousainquiry.org/f_report/vol%20ii/Part%20VI/ch4/BMI01265.pdf), at p. 16 et seq.

*One section of the training course is entitled "positional asphyxiation – signs and symptoms."<sup>108</sup>*

The above insights into UK interrogation policy in Iraq indicate an approach consistently based on coercion and sensory deprivation in interrogation. This is reflected in the allegations made by the victims detailed below.<sup>109</sup>

### **C) Analysis of a Sample of the Abuse of Detainees by UK Services Personnel (2003-2008)**

For the purpose of establishing and clearly communicating the widespread and systematic nature of detainee abuse by UK Services Personnel in Iraq, PIL analysed thousands of allegations made by 109 victims in 85 referenced cases. These 109 individuals instructed PIL in its early litigation in the UK. Although these numbers have now been far exceeded, as PIL is currently representing 412 Iraqis alleging abuse in custody in claims in UK courts, the detailed analysis and presentation of facts compiled by PIL in this first sample of detainee abuse cases remains instructive. From the 109 victims in these 85 cases, there are a total of 2,193 separate allegations of abuse in custody. The allegations are recorded in three primary sources, all outside the criminal justice system: letters before action, Grounds for Judicial Review, and witness statements adduced in a judicial review case in the UK seeking a single public inquiry into all instances of abuse in Iraq, known as *R (Ali Zaki Mousa & ors) v SSD*.<sup>110</sup>

These documents were all based on instructions received by lawyers at PIL from the relevant clients, which bears emphasis lest it be assumed that these accounts of detainee abuse include the sort of detail that would emerge from full investigation. However, no such investigation governed by penal procedure law and aiming for criminal prosecution has been conducted thus far.<sup>111</sup> From PIL's thorough analysis of the allegations in these cases, the six tables in Annex A were created to demonstrate the extent to which UK detainee abuse was widespread in Iraq between 2003 and 2008. These tables and referenced source documents were examined by the High Court and the Court of Appeal of England and Wales in those

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<sup>108</sup>Ian Cobain, "Humiliate, Strip, Threaten: UK Military Interrogation Manuals Discovered," *The Guardian UK*, 25 October 2010, available at <http://www.guardian.co.uk/uk/2010/oct/25/uk-military-interrogation-manuals?INTCMP=SRCH>.

<sup>109</sup> See Chapter VI, Part D.

<sup>110</sup> *R (Ali Zaki Mousa & ors) v SSD* [2011], *supra* note 76.

<sup>111</sup> See Chapter VIII, Part B.



proceedings, with the Court of Appeal recording in its judgment that they established arguable systemic issues:

*The allegations have yet to be proven as facts but it is accepted on behalf of the Secretary of State that they are not incredible, that they raise an arguable case of breach of Article 3 and that in their present form they raise arguable systemic issues, although it is suggested that these may change or fall away in the light of the findings of IHAT [the Iraq Historic Allegations Team] and the reports of the Baha Mousa and Al-Sweady Inquiries.*<sup>112</sup>

Given the voluminous material and number of allegations made, some guidance on how to read the tables and the type of relevant information they contain is provided below. However, this is no substitute for carefully considering the tables themselves.

### **1) UK Military Facilities in Iraq**

It is first necessary to understand the various detention facilities referred to in the tables. These facilities were described by Colonel Prosser on behalf of the SSD in evidence before the Court of Appeal of England and Wales.<sup>113</sup>

Broadly speaking, UK Services Personnel operated two different types of detention facilities in Iraq. The first type was a temporary detention/processing facility known as a TDF or THF where victims were often taken initially, immediately following their arrest. These were located within most of the UK bases in Southern Iraq, of which there were many. It was at these locations that victims were “tactically questioned” prior to being moved further up the detention chain. These locations were numerous, named on the tables as “*The Guesthouse*,” CAN, Camp Akka, the Shatt-Al Arab Hotel, Basra Palace, and the COB. There may well have been other locations which do not feature in the tables, as they are not (yet) the subject of allegations.

The second type of facility was the longer-term detention and internment facility already described above, which were designed for periods of extended internment and interrogation, and of which there was only ever one in operation at any given time between 2003 and 2008. From the beginning of military operations until December 2003, this was the TIF at Camp Bucca; from December 2003 until 20 April 2007, it shifted to the DTDF at SLB; and from 20

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<sup>112</sup>*R (Ali Zaki Mousa & ors) v SSD* [2011], *supra* note 76..

<sup>113</sup>*Ibid.*, para. 6.

April 2007 until the expiry of the UN mandate on 30 December 2008, it was the DIF at COB. JFIT was the UK's main interrogation facility, located within, but operating separately from, each of those main internment and detention facilities.

From around 2005 onwards, UK Services Personnel in certain cases interpolated an intermediate stage between the temporary “*first port of call*” facilities and the detention and internment facility, known as a BPF, located at COB.

## ***2) Presentation and Reading of Six Tables on 85 Cases of Abuse***

The first table is entitled “*Systematic Issues on the Use of Coercive Interrogation Techniques/Unlawful Abuse by Agents of the UK State in SE Iraq: April 2003 - December 2008.*” It collects in 145 different categories the various techniques/abuses that are the subject of the various allegations summarised, outlined and numbered in Tables 2 through 6.

As shown by the second column in Table 2, each case has been numbered chronologically, from 1 to 85. Number 1, the first case, concerns abuse occurring on 10 April 2003, while Number 85, the last case of those tables, relates to abuse dating from 31 August 2008. The number of each victim complaining of a particular technique or abuse in any given case appears alongside that heading in Table 1.

In Tables 2 to 6, the allegations set out by victims are summarised in brief detail. The allegations are separated and ordered by both date and location.<sup>114</sup> Thus, for example, in one column it is possible to see all of the allegations at CAN, while in another, it is possible to see all of the allegations at the UK facility at the Shatt-al-Arab hotel. For two specific locations at which the majority of the allegations arise—the BPF, a temporary detention facility, and the DTDF, the UK detention facility for longer-term internment and interrogation that was active from December 2003 to 20 April 2007—the tables show the allegations separated into sub-headings in order to provide more detail of the alleged abuse. For example, in one column it is possible to see all of the allegations concerning sleep deprivation at the DTDF. In another, it is possible to see all allegations concerning interrogations, and so on. It is thus possible, with relative ease, to consider the recurrent themes of abuse and coercive interrogation techniques at each facility.

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<sup>114</sup> A list of each of the UK military facilities at which allegations are described can be found in Annex A2 – A6.

## Reading Table 1

In reading Table 1, it is important to note that if a victim has complained of a technique or abuse in more than one location, his case reference number appears more than once in the table. However, repeated allegations of the same category of coercive technique or abuse at the same location are given only a single number. To provide a better overall picture of how many victims allege the same type of abuse, the total number of allegations in each category in Table 1 is shown by a number in bold and in brackets “[ ]”.

A few examples easily demonstrate the pertinence of the information conveyed in Table 1. For example, under the subheading, “*Techniques on Sensory Deprivation*”, “*Hooding – 1 or more sandbags*” is listed as number 1. From looking at the number in bold brackets under this category, it appears that 59 allegations of hooding with one or more sandbag were made in the 85 cases. The specific victims alleging this particular abuse are listed out according to their case number, from 1-85, with some victims appearing more than once; for instance, the victims in case number 25, 57 and 72 appear three times, while case numbers such as 26, 37, 40, and 52 appear twice. This means that the victims in these cases complained of being hooded in more than one location. Similarly, under the same subheading of “*Techniques on Sensory Deprivation*” is the abuse of “*Sight Deprivation – Blackened Goggles*,” which is listed as technique number 3. This shows that 117 allegations of sight deprivation imposed through the use of blackened goggles were made. Again, some victims appear more than once.

Under the subheading of “*Techniques on Debility*” is a further subheading of “*Stress Techniques*.” Here, “*Prolonged Kneeling*” appears as technique number 15. Thus, Table 1 shows that a total of 45 allegations of forced prolonged kneeling were made in the 85 cases. Under “*Techniques on Debility*” is another additional subheading for “*Sensory Bombardment/Use of Noise*.” Under this heading, techniques are included such as “*loud DVD pornography*” (technique 31),<sup>115</sup> for which allegations were made by 18 different victims. All complain that UK Services Personnel used pornography on DVDs which were played loudly as a means of debasing them (particularly whilst played at night during Ramadan and leading to obvious sexual arousal in the male detainee, it had the capacity to render the detainee unclean by masturbation or involuntary emission – see, for example, the evidence of victim

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<sup>115</sup> Where initial instructions have referred only to “movies” we have of course not assumed that these were pornographic films, though this cannot of course be discounted.

30, XXX); and/or as a means of depriving sleep; or accompanied by insults; or accompanied by soldiers' masturbatory noises. If this technique were a one-off, it might be thought to be a random and unlawful use of such material by one soldier or group of soldiers on one occasion. That 18 different Iraqis out of 85 cases make complaints about the prolonged use of loud pornographic films played on laptops, however, raises systemic questions.

Under the heading, "*Other Coercive Techniques*" is listed "*Forced Nakedness/Forced Exposure of Genitalia*," listed as technique number 36, and "*Forced Nakedness (in front of women)*," listed as technique number 37. It appears that requiring a detainee to strip naked was Standard Operating Procedure in all cases, and if he refused (particularly because women were present), he was forcibly stripped. Such allegations reflect the issue of forced nakedness as addressed in a MoD training manual from 30 September 2005<sup>116</sup> (over two years after Baha Mousa's death), that was disclosed in the BMI.

Under the same subheading appears "*Threats with Weapons/Other Objects*," "*Threats of Rape/Violence to Female Family Members/Threats of Rape to Detainee*," "*Other "Harshing" Techniques including Death Threats*," "*Express/Implied Threat of Transfer to US (Guantanamo Bay/Abu Ghraib)*," or "*Verbal Violence/Abuse*."

More detail of these allegations made pertaining to technique number 51, listed as "*Use of Superimposed Detainees' photos on paedophiliac and/or pornographic images*," can be found in Table 5 (allegations at the DTDF), where two entries for August 2006 are found, with abuse reported by XXX (victim number 56) and XXX (victim number 57). Essentially, during the same month at the same facility, two different Iraqis complain that they were threatened that if they did not confess to crimes, certain images would be distributed within their families and communities. These images showed their faces superimposed onto those of men having sex with children, one of whom was, according to the testimony given by XXX, a XX-year-old boy. Such abuse resonates with other allegations in section B under the subheading of "*Sexual Acts*," comprising technique numbers 66-91 in Table 1, and arguably contribute to the broader picture that such sexual abuse and humiliation constitute systematic issues of abuse.

Finally, in the last section, entitled "*Other Abuse*," are a number of abuses/techniques that did not fit within the other categories and subgroups. For instance, in this category, one can see

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<sup>116</sup>See Extract from Assessment During the Questioning Process, MOD028258, *supra* 104, p. 18.

that six Iraqis complained of mock executions and that virtually all of the victims in the 85 cases referenced made complaints, totalling 162 allegations in all, of “*Beatings with pistols/rifles/rifle butts/fists/feet/helmets.*” An additional 77 complaints were made regarding punching, and 92 in regards to kicking. This section also contains a variety of other complaints of abuse, such as “*burning, forced standing/kneeling/sitting on very hot tarmac/surfaces,*” as well as “*stamping.*”

### Reading Tables 2-6

Tables 2-6 are best viewed from a number of different perspectives. Arranging the cases by location and chronology allows each table to reflect the particular approach to detention and interrogation taken and techniques used by UK Services Personnel, depending on where they detained and interrogated Iraqis at a particular time. It is important to note that throughout the period March 2003 to December 2008, facilities fell in and out of use, as explained above, and for this reason the tables show temporal groupings of allegations at each facility. For example, from January 2006 to August 2008, the UK appears to have operated the BPF at COB at Basra Air Station. Table 4 gives details of 46 victims’ allegations of various forms of ill-treatment, abuse and coercive interrogation techniques at the BPF during this time.

If one views Tables 2-6 as being laid out side by side as a single long table it enables the reader to view all the allegations from April 2003 to August 2008, from the 85 cases analysed in the tables, at all of the different UK facilities.

Table 6 contains a column entitled “*Complaints/Investigations (not including complaints in medical examinations),*” which shows that throughout the relevant period, a number of victims regularly complained to the UK authorities about their mistreatment and, on many occasions, were interviewed by the RMP. Not only did these investigations fail to secure accountability for the victims with the courage to complain, but they also failed to cause any change in the pattern of abuse endured, as is made clear by the continuing pattern of allegations (for further discussion, see Section VIII Part (B) below).

Overall, these six tables can be used to answer a number of salient questions relating to these 85 cases – which cover a small number of victims compared to the 412 victims of severe physical and psychological abuse now represented by PIL. For example:

- What are the numbers of potential allegations? Answer: 2,193.<sup>117</sup>
- What are the numbers of allegations made of hooding with one or more sandbags? Answer: 59.<sup>118</sup>
- What are the numbers of allegations of hooding made post-early October 2003<sup>119</sup> (post Baha Mousa's death)? Answer: 50.
- What are the latest of the allegations made in respect of hooding? Answer: The allegations date up to 31 August 2008.<sup>120</sup>
- What are the numbers of allegations of doctors and medics seeing clear signs of abuse and apparently taking no action? Answer: 58, spanning the period between 1 May 2003 and 31 August 2008.<sup>121</sup>
- What are the numbers of victims making allegations as to the use of sleep deprivation, including by playing pornographic DVDs very loudly (sometimes all night), other movies loudly, loud radios, loud music and other techniques? Answer: 52, of which 42 make allegations about one or more sleep deprivation techniques whilst interned at the DTDF at SLB.<sup>122</sup>

Of the 58 detainees in these tables interned and/or interrogated at the DTDF at SLB, 24 make allegations about various sexual acts, or the use of sex as a means of humiliation (notably, every victim in these tables is a male Muslim). These allegations include acts of masturbation in front of detainees; sexual intercourse between male and female soldiers in front of detainees; the audible sounds of sex (out of sight of detainees); sexual suggestion by female soldiers/medics; revealing of the breasts and/or genitalia of female soldiers/medics; the playing of loud pornography; touching of detainees' genitalia; and females watching detainees in the toilet or shower.

From the large number of allegations of such sexual abuse and humiliation, it is immediately apparent that serious questions must be answered as to the behaviour of interrogators and

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<sup>117</sup> See Annex A1.1.

<sup>118</sup> *Ibid.* .

<sup>119</sup> This date is significant as the MoD's position historically has been that after Baha Mousa's death (partly due to him being hooded for most of the 36 hours he was detained at BG Main), hooding was banned.

<sup>120</sup> See Annex A2.

<sup>121</sup> See Annex A3, regarding claimants 9, 11, 19, 23, 24, 40; Annex A4, regarding claimants 34, 36, 38, 39, 41, 47, 51, 53, 54, 57, 58, 60-65, 67, 75-80, 85; Annex A5, regarding claimants 27, 29-33, 39-42, 46-50, 53-56, 58, 60, 61, 65, 72, 73, 77.

<sup>122</sup> See Annex A1, regarding technique 12; Annex A5, regarding technique "Sleep Deprivation."

soldiers at the DTDF at SLB during the period December 2003 to April 2007. When this material is analysed over a considerable period of time, what emerges is deeply troubling. Further, what at first appears to be a series of random acts begins to form a clear pattern of systematic abuse. It seems impossible to argue, for instance, that the use of sexual acts and sexually-oriented humiliation at the JFIT interrogation facility at the DTDF is anything other than a carefully designed system targeted at the male Muslim. This can be seen through an examination of the themes that emerge from the specific analysis of sexual matters from Table 5 (in respect of the DTDF).

From July 2004 onwards, allegations emerge of the use of pornographic movies played loudly on laptops so that the detainees had no choice but to hear what was being played. Over time, the use of this technique appears to have intensified. It does not continue once the SLB was closed and all internees were held at the DIF (although it should be noted that allegations of sexual abuse and humiliation continued at the DIF, such as soldiers having sex in front of detainees). Alongside pornographic movies, soldiers appear to have deliberately used pornographic magazines to stimulate, humiliate, or embarrass detainees.

One final point completes the analysis of these tables in regards to the widespread and systematic nature of detainee abuse in Iraq between 2003 and 2008. The tables clearly show that the five techniques used by the UK in Northern Ireland returned in force in Iraq. Numerous allegations were made by detainees regarding abuse involving hooding, stress positions, sleep deprivation, food and water deprivation, and subjection to noise. As can be seen in the tables, there are 50 allegations of hooding from early October 2003 to 31 August 2008. Similarly, the tables show 40 allegations of sleep deprivation at the SLB, continuing until mid-April 2007. As for the use of noise, Table 1 shows that UK Services Personnel appeared to have systematically used noise as an aid to interrogation: there were 18 allegations of loud DVD pornography; 10 allegations of loud radio/DVDs; and 12 allegations of white noise/other noise/use of loud music. These victims' cases demonstrate clearly that such allegations persisted until well into 2007 when the UK ceased having more than a handful of internees, all held (from April 2007 onwards) at the DIF. Thus, in circumstances where JFIT was no longer interrogating Iraqi internees, it is not surprising that such allegations ceased.

The particular stress position used in Northern Ireland was "wall standing" – a positional torture in which victims are forced to hold a particular standing position against a wall with

outstretched fingertips for an abnormal length of time. Humans are not designed to stand utterly immobile, and even short periods of forced standing can be painful. The UK Services Personnel responsible for the death of Baha Mousa used a far more painful stress position known as the “Ski” or “Chair” position. A one-minute video showing Mousa and five of his colleagues being man-handled and violently abused to force them to hold this “ski” position was shown to the BMI and is readily accessible on news websites.<sup>123</sup> From the tables, it can be seen that in the 85 cases under analysis, 18 detainees complained of prolonged squatting, 45 of prolonged kneeling (many of them complained of being forced to kneel for lengthy periods of time on sharp pebbles and under the hot Iraq sun), 6 of prolonged standing with arms lifted (the same effect as “wall standing”), 21 of prolonged standing/wall standing, and 37 of prolonged sitting in a required posture (again many in the hot sun).

Lastly, the tables demonstrate extensive use of food and water deprivation as a means of conditioning detainees for interrogation. Of the 109 detainees represented in the tables, 33 allege food deprivation or restriction, while 68 allege water deprivation. This is of huge significance, first, because the intensely hot temperatures in Iraq make it essential that soldiers and detainees be properly hydrated. Soldiers were encouraged to drink up to 15 litres of water a day. Secondly, it is a well known medical fact that whilst a human can sustain relatively long periods (several days) without food, the body starts to burn fat and muscle relatively quickly and cannot last longer than a few hours without water in normal temperatures without suffering ill-effects.<sup>124</sup> Thirdly, the body’s ability to deal with the effects of bruising depends on the function of the kidneys flushing out the ensuing build-up of the relevant blood enzyme, which it does through urine. This is an aspect of serious concern in the death of Baha Mousa, as Mousa had not been given water and had an empty bladder. Whether or not he would have died in any event, leaving aside his final struggle, is a matter of medical evidence. Again, the high number of detainees alleging water deprivation shows clearly that this practice continued to be used until the end of UK detention operations in Iraq.

### **3) Conclusion**

The tables, covering the first 109 victims represented by PIL in UK proceedings, involve a total of 145 different abusive techniques, a large number of which were repeated on numerous

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<sup>123</sup>The Guardian UK, “Soldier Shouts Abuse at Iraqi Prisoners in Video Shown to Baha Mousa Inquiry,” 13 July 2009, available at <http://www.theguardian.com/uk/video/2009/jul/13/baha-mousa-inquiry/>.

<sup>124</sup> Water is a major component of all tissues and cells in the body. Without water the human body would only survive a few days and no other nutrient deficiency has such profound effects. A prolonged absence of water lowers blood pressure, weakens the heart and shuts down the kidneys.



occasions.<sup>125</sup> The abuse spans all stages of detention, from arrest and transit to detention, both temporary and longer-term, in TQ as well as more formal interrogation, in various types of UK detention facilities over the whole period, amounting to almost six years, in which UK Services Personnel were in Iraq.

From the information conveyed in the six tables, it is clear that detainee abuse in UK detention facilities in Iraq was widespread between 2003 and 2008. In particular considering that a further number of claims made by 619 additional former detainees alleging similar mistreatment while under UK custody in Iraq during the same period are not included in this limited table analysis. More importantly, given the practical difficulties involved in Iraqi civilians accessing and instructing UK lawyers, and the apparently systematic nature of the mistreatment described, it is inevitable that even the large number of Iraqi civilians who have, to date, raised such claims of abuse, represent only a relatively small proportion of the entire number who were detained and actually subjected to such treatment.

Further it is important to note that, whilst some of these allegations do concern abuses not necessarily linked to any gain in terms of intelligence gathering, many of the allegations as to techniques used have at their centre Tactical Questioners at various locations and interrogators at JFIT. A pattern emerges from these cases, even from the brief summaries in the tables, which suggests a deliberate policy of abuse being used to assist Tactical Questioning and interrogation.

As further described in the following subsection looking at various individual accounts, this mistreatment fits clear patterns, with the same techniques repeatedly used at the same locations and for the same purposes. Moreover, these patterns emerge at every stage of detention, from the period of initial arrest and transit of Iraqi suspects, to the phases of processing and TQ at temporary UK detention facilities, and finally, during detention and interrogation at fixed, long-term internment centres.

#### **D) Analysis of Individual Accounts of Abuse of Detainees by UK Services Personnel (2003-2008)**

The following section highlights the detention experiences of Iraqi civilians who have brought claims in the Administrative Court of England & Wales alleging abuse by UK

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<sup>125</sup> See Annex A1.

Services Personnel while detained in Iraq between 2003 and 2008.<sup>126</sup> The following descriptions are based on, but not limited to, the victims from the list of 85 cases referred to in Annex A2.<sup>127</sup> As many of PIL's current clients have entered proceedings or approached PIL at different times, this Communication refers to data analysed at different points in time. A thorough examination of these allegations, of which exemplary selections are outlined below, demonstrates still further that the abuse experienced by Iraqi detainees was not the result of personal misconduct on the part of a few individual soldiers, but rather is an instance of wide-ranging and systematic abuse perpetrated by UK Services Personnel against civilian detainees, some of whom constitute protected persons under the Geneva Conventions and customary international law. From the testimonies and evidence it can clearly be seen that the abuse endured by a vast number of Iraqi detainees primarily occurred for the purpose of extracting information through interrogation or as a form of punitive conditioning meant to "soften" or prepare detainees for such interrogation or TQ by UK Services Personnel.

Iraqi civilian detainees were subjected to all of the notorious five techniques formerly used by UK Services Personnel in Northern Ireland and other colonial conflicts, i.e. hooding, stress positions, noise bombardment, sleep deprivation, and deprivation of food and water. Despite being banned by the UK government in 1972,<sup>128</sup> the witness testimonies collected in this communication make clear that the five techniques remained in use by UK military personnel in their operations in Iraq from 2003 to 2008. Other controversial forms of detainee treatment were also prevalent, which, in the context of broader detention conditions, further aggravate the breach of international law prohibitions. Recurring practices beyond the five techniques described in the testimonies below include the harshing; prolonged and improper cuffing; a wide range of physical assault, including beating, burning and electrocution or electric shocks; both direct and implied threats to the health and safety of the detainee and/or friends and family, including mock executions and threats of rape, death, torture, indefinite detention and further violence; other forms of sensory deprivation and environmental manipulation, such as exposure to extreme temperatures; other forms of general deprivation, such as inadequate bedding, clothing, and space in cells; forced exertion; cultural and religious humiliation; as well as wide-ranging sexual assault and humiliation, including forced nakedness, sexual taunts and attempted seduction, touching of genitalia, forced or simulated sexual acts, as well as forced exposure to pornography and sexual acts between soldiers.

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<sup>126</sup> The case of *R (on the application of Ali Zaki Mousa) v SSD* [2011], *supra* note 76.

<sup>127</sup> See Annex A2.

<sup>128</sup> *Ireland v. UK*, *supra* note 42, paras.102,167.

As noted above, the detainee experiences described in this communication are exemplary rather than exhaustive accounts of the alleged abuse experienced by Iraqi detainees in UK custody between 2003 and 2008.

To most forcefully depict the prevalence and systematic pattern of abuse at the hands of UK Services Personnel exposed by the thousands of allegations collected in this communication, the presentation of facts below is divided into four temporal stages: 1) initial arrest by UK Services Personnel; 2) transit to detention facilities; 3) conditioning and TQ at temporary detention facilities; and 4) interrogation at internment facilities. Abuses at each stage are illustrated by personal testimonies. This reflects the extent to which detainees recount strikingly similar treatment during the various phases of their time in UK custody. The picture provided by these witness testimonies below demonstrates a number of recurring and troubling trends in the approach and tactics used by UK Services Personnel over the course of detention and interrogation operations in Iraq that warrant further investigation by the OTP and demand accountability.

The pattern of conduct involves early morning raids on Iraqi homes, in which any women and children present were abused, verbally and physically (for example, a pregnant woman suffered a miscarriage after serious abuse in the home). During these raids, men were also abused, screamed at, cuffed to the rear, often hooded, arrested and led away to military vehicles. Often property was needlessly damaged or stolen during these raids. Abuse then continued in vehicles in transit to UK facilities: kicking, punching, rifle butting, standing and kneeling on detainees etc.

On arrival at the first facility, victims were made to kneel on sharp pebbles in hot sun, in almost every case hooded or goggled, in almost every case ear-muffled, usually not fed or provided water, often still cuffed to the rear, usually further abused with beatings, etc. There, they were usually tactically questioned, usually in an aggressive, threatening and insulting manner. Thereafter, they were transferred to the JFIT based at the main UK-run detention and internment facility operating at that time in Iraq.

At JFIT, victims complained of some or all of the following: solitary confinement for prolonged periods; sleep deprivation; food and water deprivation; disorientation tactics such as being walked in zig-zags whilst deprived of sight, or banged into walls and beaten; lengthy, repetitive and pointless interrogations; harshing; threats to themselves, their family, and especially the women family members; coercion by women or other inducements; sexual

humiliation through the variety of sexual acts described above. Victims also complain that interrogators left them goggled and ear-muffled in silence at the outset of sessions (whilst they were being silently observed), that nakedness was often used to debase them, and that the interrogation techniques used were clearly designed to coerce or intimidate the victims.

We address each stage of this detention chain below, with reference to the victims' accounts.

### Summaries / Exemplary Cases of Alleged Abuses<sup>129</sup>

<b>Arrest</b>		<b>Year</b>
<b>i.</b>	XXX (27 May 2006)	2006
<b>ii.</b>	XXX (11 July 2008)	2006
<b>iii.</b>	XXX (21 July 2006)	2006
<b>iv.</b>	XXX (10 March 2007)	2007
<b>v.</b>	XXX (28 May 2007)	2007
<b>Transit</b>		
<b>i.</b>	XXX (15 January 2005)	2005
<b>ii.</b>	XXX (16 November 2006)	2006
<b>iii.</b>	XXX (21 December 2006)	2006
<b>Temporary Detention Facility</b>		
<b>i.</b>	XXX (14 September 2003)	2003
<b>ii.</b>	XXX (24 January 2006)	2006
<b>iii.</b>	XXX (27 April 2006)	2006
<b>iv.</b>	XXX (28 May 2006)	2006
<b>v.</b>	XXX (4 June 2006)	2006
<b>Longer-term Interrogation and Internment</b>		
<b>i.</b>	XXX (c. 20 March 2003)	2003
<b>ii.</b>	XXX (21 December 2003)	2003
<b>iii.</b>	XXX (21 December 2003)	2003
<b>iv.</b>	XXX (16 April 2004)	2004
<b>v.</b>	XXX (21 July 2004)	2004
<b>vi.</b>	XXX (July 2004)	2004
<b>vii.</b>	XXX (July 2004 + 18 August 2008)	2004
<b>viii.</b>	XXX (11 December 2004)	2004
<b>ix.</b>	XXX (11 December 2004)	2004
<b>x.</b>	XXX (15 January 2005)	2005
<b>xi.</b>	XXX (18 September 2005)	2005
<b>xii.</b>	XXX (18 September 2005)	2005
<b>xiii.</b>	XXX (22 October 2005)	2005

<sup>129</sup>The following section contains excerpts from the detainee witness statements. For full witness statements, see Annex B. Signed witness statements are on file with PIL.

<b>xiv.</b>	XXX (9 April 2006)	2006
<b>xv.</b>	XXX (27 April 2006)	2006
<b>xvi.</b>	XXX (6/7 June 2006)	2006
<b>xvii.</b>	XXX (12 July 2006)	2006
<b>xviii.</b>	XXX (21 July 2006)	2006
<b>xix.</b>	XXX (20 July 2006)	2006
<b>xx.</b>	XXX (11 August 2006)	2006
<b>xxi.</b>	XXX (30 August 2006)	2006
<b>xxii.</b>	XXX (4 October 2006)	2006
<b>xxiii.</b>	XXX (16 November 2006)	2006
<b>xxiv.</b>	XXX (22 December 2006)	2006
<b>xxv.</b>	XXX (29 December 2006)	2006
<b>xxvi.</b>	XXX (27 January 2007)	2007
<b>xxvii.</b>	XXX (15 March 2007)	2007
<b>xxviii.</b>	XXX (1 April 2007)	2007
<b>xxix.</b>	XXX (11 April 2007)	2007
<b>xxx.</b>	XXX (April 2007)	2007
<b>xxxi.</b>	XXX (11 June 2007)	2007
<b>xxxii.</b>	XXX (July 2007)	2007

### 1) Initial Arrest by UK Services Personnel

According to the testimonies summarised in this communication, abuse of Iraqi detainees often began at the point of initial arrest. During UK military operations in Iraq between 2003 and 2008, many Iraqi victims were arrested in strike operation or raids on homes conducted by UK Services Personnel for search and arrest purposes. Such arrest operations were often conducted at family homes late in the night and carried out by a disproportionately large number of soldiers. They often involved gratuitous violence to persons and property, in which not only those individuals being arrested, but also often their family members, suffered severe assault, and property was wantonly destroyed, damaged, or stolen. As discussed during the BMI, such strike operations carried out at the arrest phase set a specific tone which was then likely to be maintained throughout every subsequent stage of detention.<sup>130</sup> By conducting

<sup>130</sup>See e.g., Report of the Baha Mousa Inquiry, *supra* note 40, Vol. 1, Part II, para. 2.80. See also, *Ibid.*, Part XVI, paras. 16.391-16.395 titled “Maintaining,” “Prolonging,” “Shock of Capture.” Here, reference is made to the evidence of Trousdell, see Report of Sir Philip Trousdell to the Baha Mousa Inquiry *supra* note 98 at para. 85, “[f]rom a common sense point of view to ask a soldier who has been involved in recent combat to prolong, or indeed anything else, the shock of capture is to invite trouble.” See also, Report of the Baha Mousa Inquiry, *supra* note 40, Part XVI, para. 16.394 “the difficulty in using the phrase ‘maintain/prolong the shock of capture’

such violent night raids, soldiers aimed to induce intense feelings of shock upon initial arrest. They were instructed to maximize and maintain this “shock of capture” in order to later exploit its effects on the detainee for the purpose of extracting information during initial rounds of TQ and interrogation.

From the allegations of the 109 claimants included in this communication, common techniques systematically used by soldiers during the phase of initial arrest include: severe assault, often resulting in broken bones and long-term injuries; sensory deprivation through hooding, blindfolds and earmuffs; burning and electric shocks; cuffing so tightly to the rear as to break the skin and result in scarring; humiliation, such as soldiers laughing while assaulting and tossing around a hooded and cuffed victim in front of his children; and threats of physical violence and death, even to young children. Such treatment is exemplified by the first-hand witness accounts provided below, which describe the initial arrest experiences of five Iraqis detained by UK Services Personnel in Iraq between 2003 and 2008.

### **Summaries and Exemplary Cases**

#### **i) Case of XXX (27 May 2006)**

During his arrest on 26 May 2006 in front of his family, XXX was cuffed tightly, forced into a kneeling position, and severely assaulted in front of his family. He was severely beaten in the face, back, and stomach; kicked in the mouth; and electrocuted (probably tasered) in the back. The beating was severe enough to cause extensive bleeding and to dislodge two of his teeth.

#### **Excerpt from Witness Testimony<sup>131</sup>**

*[...] my hands were still cuffed behind my back. They made me sit in a kneeling position with my head pushed downwards and then they started to beat me. They beat me on my face, my back and stomach. They then kicked me really hard in my mouth. I also felt that I was electrocuted on the back. I could not see what they used because I*

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as part of the tactical questioner’s lexicon, as Trousdell points out, is that unqualified personnel will be prone to misunderstand what is intended.”

<sup>131</sup>Annex B1.

*was blindfolded but it was very painful. I am unable to describe it and I had never experienced anything like it before. While they were beating me I could hear the voice of my father who was shouting to them, "please don't kill my son." My mother was screaming and I could still hear the wives and children. At this point I was bleeding a lot because of the damage to my mouth. Two of my teeth were dislodged by the kick. I exhibit a photograph of my missing teeth taken by my solicitor as "SAT1." I was also bleeding from my nose and I could feel that my shirt was wet with blood. My parents told me later that there was a pool of blood on the floor where I was kneeling. My whole mouth was numb and it hurt a lot. My mother kept crying because she was afraid that I would die.*

**ii) Case of XXX (11 July 2008)**

At 2am while XXX and his family were sleeping, approximately 20 UK soldiers raided his house. XXX was severely assaulted by the soldiers; he was punched, held in a stranglehold, repeatedly slammed against a wall, aggressively tossed back and forth by laughing soldiers, and lifted by his neck and dropped to the ground. During his arrest, he sustained more than 60 punches to his head and face alone, as well as extensive beating to the left side of his body. As a result, he not only lost a tooth, but continues to suffer pain from his injuries today, particularly with respect to his head and the left side of his body. For the entire period in which UK soldiers were assaulting XXX, he was also blindfolded and cuffed tightly from behind, to the point of inducing bleeding and causing permanent scarring on his wrists. At one point, a soldier threatened to cut his eye out with a knife, while another soldier slapped, screamed at, and threatened his young son (aged 8) that he would slit his father's throat, in an attempt to obtain information from the child.

**Excerpt from Witness Testimony<sup>132</sup>**

*The soldiers shouted and immediately came towards us. We were still in our beds. Two soldiers came straight to me. I saw a soldier bring their hand hard down on my wife's head which was uncovered. I also saw soldiers hit my son XXX who was 8 and XXX who was 6 on their heads as they tried to get up from their beds.*

*A soldier punched me on my forehead. One soldier sat on my chest and another sat on my legs. I was laying on my back. A soldier who was wearing black gloves punched*

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<sup>132</sup> Annex B2.

*me on my nose. Another soldier at my head grabbed me round the throat below my chin and pulled my head away from my body, it was difficult to breathe. I was then pulled up so that I was sitting and another soldier tied my hands very tightly with plasticuffs to the rear. The plasticuffs were so tight that they cut into my flesh and I still have scars on my wrist. I exhibit a photograph of those scars as “Exhibit JST 2”.<sup>133</sup> [...]*

*A sound bomb was then thrown which made a very loud noise. There was a lot of commotion and the children were screaming because they were so scared. The soldiers took my wife and children into a corner of the yard. The soldiers stood me up and I was blindfolded with a cloth. I was lifted up by two soldiers by my shoulders and they started slamming me sideways against the wall. They pushed my body and my head against the wall. I know my wife and children could see them doing this. I could hear them screaming from the corner.*

*The soldiers then started throwing me to each other as though I was a doll. I felt that there were many soldiers pushing and throwing me. I was being handled very roughly and aggressively. As each soldier caught me they would punch me. I was becoming very dizzy and could hear the soldiers laughing. The soldiers were quite excited and shouting “okay”. I lost all sense of time. I was thrown on the ground and was laying on my side. I felt a soldier’s boot on my head pushing my head into the ground. [...]*

*After about 10 minutes, two soldiers stood me up and slammed me hard against the wall twice. I was taken inside my house to one of the rooms. I was still blindfolded but then somebody punched me in the eye and the blindfold came off. In front of me was a tall UK officer with long hair. He was thin with a reddish face probably in his 40s with a UK flag on his shirt. He was wearing black gloves. He grabbed me round the neck and lifted me up off the floor and then released me so I fell to the ground. I fell onto my back and the tall officer kneeled on my stomach and punched me repeatedly in the face and on the left hand side of my body. I couldn’t protect myself because my hands were behind me plasticuffed. One of the punches broke a tooth which later had to be removed. I must have received some 60 punches on my head. I still suffer pain on my head and down my left hand side from this beating.*

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<sup>133</sup> Annex B2.



*I was on the floor barely conscious. The officer brought a blade and put it next to my eye. There was a Lebanese interpreter and the officer told me that he was going to cut out my eye. A soldier brought my 8 year old son XXX into the room. The officer started slapping my son round his face in front of me and shouting at him. He was asking him where I had hidden all the weapons. I was on the floor in a terrible condition and couldn't move. He was telling XXX that if he didn't tell them where the weapons were they were going to slit my throat. The officer then came and held the blade against my throat. My son was terrified. My son told the officers that we didn't even have a rifle and eventually he was taken away by a soldier. I can't describe how horrific and traumatic these events were. It still upsets me so much that I was unable to give this witness statement to my solicitor without breaking down several times.*

*Soldiers started pouring water on my head, perhaps to revive me as I was semi-conscious. Two soldiers then dragged me by my underarms outside into the yard where a group of soldiers began kicking me. There must have been about 12 soldiers. They kicked me hard all over my body. The kicks were extremely painful and caused a lot of bruising. The beating I received has given me long-term problems. I now have to use a stick to walk. I was kicked for some fifteen minutes continuously.*

*I was then stood up and dragged back inside the house to the officer with long hair. I couldn't walk so they dragged me to him. They spoke in English and I presume he told them to take me away. Soldiers dragged me along the ground outside. I was barefoot and in my pants only as my vest had been ripped off. The ground was very rough with pebbles and was grazing my legs. I was dragged some 40 metres and put aboard a waiting helicopter.*

### **iii) Case of XXX (21 July 2006)**

During his initial arrest during a night-time strike operation on his house in July 2006, XXX, a security guard for the XXX, was earmuffed and goggled in the presence of his wife and ten children, whilst soldiers searched their house over the course of several hours. His pregnant wife was kicked hard in her back by a soldier and subsequently suffered a miscarriage. His young daughter was also kicked by a soldier, while his son, aged 11, was restrained by a soldier and suffered a broken arm.

### Excerpt from Witness Testimony<sup>134</sup>

*[...]I was sleeping in a downstairs room of my house. My wife and the rest of my family were sleeping on the roof of the house because it was a very hot night and our air conditioning was not working. I was meant to sleep with them on the roof but I had remained downstairs to wait for the power to return so that I could obtain an update in the news regarding the war at the time in Lebanon. I awoke to the sound of explosives being used to blow open the door of my house and a large number of UK Services Personnel entered the house. Five soldiers entered my room and I could tell by the badges that one of them was an officer. I had been sleeping and when the soldiers entered my room a soldier pushed [my] neck into the bed and I was handcuffed. They started to search the house and I could hear my son screaming. Ear muffs were placed on me and my eyes were covered with blackened goggles. I saw that the soldiers had dogs with them in the house. The soldiers stayed in the house for two hours but I was taken directly to a vehicle which was waiting outside.[...]*

*[At the internment facility where he was detained] In the second visit, my wife came. She was trying to control herself but she couldn't help it and started to cry. For a long time she was just silent but then she started to tell me what had happened after I had been taken from the home. It was unbearable. She told me that the soldiers went up on to the roof using ladders and gathered everyone together. One of the soldiers stamped on my daughter's leg. My wife wanted to hold her. We think that a female soldier thought that my wife was searching for a weapon because, as my wife started to move towards our daughter, she kicked her hard in the back. My wife fell to the floor. She was two months pregnant at the time and started to bleed. They wanted to handcuff her but they didn't when they saw she was bleeding and she was given some water. The interpreter told her to calm down and not to scream or they would hurt me and the children. They then stayed for two hours searching the house. When my son XXX, who was born in 1995 and was 11 at the time, saw what was happening, he wanted to attack the female soldier. He tried to do this but he was restrained by another soldier. As he was restrained his arm was twisted and it broke. When the soldiers left our neighbours came round and found my wife bleeding. The soldiers had just left her there. Our neighbours took her to hospital and she suffered a miscarriage.*

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<sup>134</sup>Annex B3.

**iv) Case of XXX (10 March 2007)**

During his initial arrest in a night-time strike operation on his family home in March 2007, XXX suffered severe assault, including being knocked unconscious by a blow to the head from a rifle butt and being beaten with soldiers' helmets, batons and boots. He was tightly cuffed behind his back and not only blindfolded with goggles, but also hooded with a tight drawstring tied around his neck. All of his family members were also hooded and verbally threatened with physical violence, including shooting.

**Excerpt from Witness Testimony<sup>135</sup>**

*On 10 March 2007, I was living with my brothers, their wives and children and my parents in the district of Basra known as Jamhuriya 1. I was asleep on the middle, second floor of the house. We awoke to the sound of an explosion, which blew apart the garden gate. My sister shouted for my father, asking him what the noise was. The fourteen children in the house started crying. There was absolute chaos in the house.*

*My father, who was 66 years old, went to investigate what had happened. When he headed towards the front door of the house, it exploded there and then. As a result, a piece of wood flew and struck him in the eye. UK Services Personnel ran inside the house through the place the front door had been. They sprayed tear gas and were screaming at us.*

*My brothers and I panicked and made our way to the roof of the house. I tried to jump onto our neighbour's house. There was a helicopter hovering over the house, and when they saw that I was trying to jump, a soldier descended on a rope and hit me to the back of my head with his rifle butt. I fell to the ground, unconscious. Five soldiers then threw me down onto the roof, handcuffed me to the rear using plasticuffs and placed a hood over my head. The hood was very heavy and had a tie, which they fastened very tightly into my neck. The plasticuffs were also extremely tight. I could not see my brothers, but I could tell that they were being treated in the same way.*

*The UK soldiers beat us severely. They hit us with helmets, with batons, and with their heavy military boots. As we were brought down the stairs to the first floor we were being beaten and I could hear that all of the women and children were being taken to the first*

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<sup>135</sup> Annex B4.

*floor. They made all the men sit in one line, and all of the women were made to sit in a line opposite us. The soldiers began to question us. They asked, "Where is XXX?" and said, "You are terrorists. You are criminals." There was an interpreter named Ali with them. I could tell from his accent that he was Palestinian. My older sister, XXX, started asking the soldiers, "What do you want from us? My father is bleeding. Why are you doing this to us?" A soldier told her through the interpreter, "Shut up or we will shoot you all." They had their rifles pointed at us. All of us were hooded, even my mother.<sup>136</sup>*

**v) Case of XXX (28 May 2007)**

XXX was arrested as he arrived home on 28 May 2007. As he exited his car and approached his front door he was pushed to the ground by UK soldiers, who forced him into the house, where they conducted an aggressive search in the presence of XXX's traumatised family. XXX was cuffed tightly behind his back, to the point of cutting into his skin. He suffered severe assault, including being dragged and repeatedly slammed against a wall, which caused his finger to break in two locations. He was forced to maintain a stress position for 20 minutes and was hooded with a Hessian sack when he was taken away.

**Excerpt from Witness Testimony<sup>137</sup>**

*I got out of my car and was on my way to the front door when I was pushed to the ground. I was then pulled roughly to my feet and saw that I was being held by UK soldiers. Two soldiers then proceeded to drag me through the front door and into the kitchen. Somewhere on the way I was handcuffed to the front. The handcuffs were placed on very tight and cut into my skin. I think there were approximately 5 or 6 soldiers inside the house, including the two dragging me to the kitchen. The soldiers were screaming and seemed frenzied at first. All of the soldiers were wearing uniforms and helmets.*

*Inside the kitchen one tall well built soldier grabbed me by the collar and slammed me against the kitchen wall. The push was so violent that the tip of my middle finger on my left hand hit the wall and broke in two places. It is still disfigured today. A photo of my broken finger is attached to this witness statement as "Exhibit ABJ2".<sup>138</sup> The pain was excruciating, I screamed and fell to the floor. I wanted to sit down because I was so*

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<sup>136</sup> *Ibid.*

<sup>137</sup> Annex B5.

<sup>138</sup> Annex B5.

*scared but I was ordered to squat with my face towards the wall and not to move. I was forced to adopt this position for 15-20 minutes.*

*From the kitchen I could hear the soldiers searching and ransacking the house. I could hear my wife and children screaming. My wife later told me that our eldest son was very scared and had hid inside a cupboard. [...]*

*After approximately 20 minutes in the squatting position, two soldiers lifted me by my arms and marched me outside. As soon as I was outside of the house I was hooded. The hood was made out of a kind of Hessian sack material.*

### **Conclusions Regarding Abuse during Initial Arrest:**

As exemplified in the five testimonies outlined above, the use of two of the five techniques, namely hooding and stress positions, were employed even at this early stage of detention. Severe assault, beatings, cuffing too tightly, often to the rear, humiliation, and threatening both the individuals being arrested as well as their family members with further violence and death in order to obtain information from questioning, or to simply induce fear and shock, were also widespread. From the descriptions provided by those subjected to night raids and strike operations on their homes, the soldiers succeeded in inducing a high level of shock and trauma for all involved. The methods used by UK Services Personnel to elevate and maintain the ‘*shock of capture*’ established during the initial arrest phase during the transit to the holding facilities will be outlined in the following section.

### **2) Abuses in Transit to Detention Centres**

Abuse of detainees invariably continued in transit to detention facilities, as UK Services Personnel attempted to maintain, if not elevate, the ‘*shock of capture*’ successfully established during violent arrest operations whilst out of public view. Of the 109 claimants whose experiences are summarised in the tables attached in Annex A, almost half (42) reported sustaining abuse during transit.<sup>139</sup> From the allegations included in this communication common techniques systematically used by soldiers during the course of transit to UK detention facilities include: sensory deprivation, usually in the form of hooding, goggles, and earmuffs; continuous and severe assault, to the extent of breaking limbs, causing bruising and bleeding, and inducing lapses in consciousness; stress positions; maintaining

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<sup>139</sup> See the column entitled “Transfer to BPF” in Annex A4.

plasticcuffing to the rear; and forced exertion. Such treatment is exemplified by the first-hand witness accounts provided below, which describe the experiences of three Iraqis during transit by UK Services Personnel to various UK detention facilities in Iraq between 2003 and 2008.

### **Summaries and Exemplary Cases**

#### **i) Case of XXX (15 January 2005)**

After his initial arrest January 2005, XXX was handcuffed and then beaten to the point of unconsciousness during his transfer to a detention facility. UK soldiers continued to elbow, kick and generally assault him throughout the entire transit, causing blood to pour from his ear, as well as causing bleeding and bruising of his legs, eyes and nose.

#### **Excerpt from Witness Testimony<sup>140</sup>**

*When the jeep started to move they started to beat me. One of the soldiers who was standing up was a black soldier and he seemed to be very strong. In his right hand he was holding his weapon but with his left elbow he started to beat me. I was trying to lower my head to protect myself from the beating. The other soldier started to kick me. The blows that I suffered were so severe that I lost consciousness. The soldier who was at the back of the Land Rover threw water on me to wake me up. Blood was coming out of my ear and I had bruises on my legs, eyes and nose.*

#### **ii) Case of XXX (16 November 2006)**

After his initial arrest November 2006, XXX was severely and continuously beaten and sat upon by soldiers throughout the duration of his transit from his home to a UK interrogation facility.

#### **Excerpt from Witness Testimony<sup>141</sup>**

*Me and the two other men suspected of being XXX were taken out of the house to a military vehicle. From the moment we were taken outside the house, our suffering intensified. I was beaten continuously. Seven soldiers picked me up and put me inside a UK military vehicle. Inside, around five to ten soldiers sat on top of me. They sat on me all the way to our destination, which I later discovered to be the UK base at Basra*

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<sup>140</sup>Annex B6.

<sup>141</sup>Annex B7.

*International Airport. I could not breathe. They beat me relentlessly all the way to the UK base.*

**iii) Case of XXX (21 December 2006)**

After suffering abuse upon his initial arrest in December 2006, XXX experienced further inhumane techniques during his transit to a temporary UK detention facility, including sensory deprivation, severe assault, forced exertion and stress positions. He was plasticcuffed, with blackened goggles and earmuffs put over his eyes and ears. During transit from his point of arrest to the BPF, he was severely and continuously beaten. From the moment he was placed on the floor of a UK military jeep, soldiers began slapping, punching, and kicking him, treatment which continued until his arrival at the BPF. As a result of being punched in face, his nose was broken, later requiring surgery to re-break and correctly set it. Upon his arrival at the BPF, he was dragged from the jeep onto rough ground, forced to run, and then left in a stress position to await processing.

**Excerpt from Witness Testimony<sup>142</sup>**

*In the kitchen the soldiers put blackened eye goggles and ear muffs on me. My hands were then plasticcuffed to the front. The plasticuffs were extremely tight. A plastic pouch was put around my neck and which I later found out had my belongings in it, like my mobile phone. I could sense and hear through the earmuffs that soldiers were taking more photographs of me.*

*I must have been in the kitchen for about 10 minutes when a soldier roughly grabbed my collar and ran with me extremely fast. I was jumping as I was worried that I would stand on broken glass. The soldiers clearly didn't care whether I stood on the glass or not.*

*I was made to run outside into the court yard. The soldiers slammed my right shoulder against the court yard door. The pain was unbearable and I think I dislocated my shoulder. It still causes me pain now. Sometimes my arm feels completely numb when I wake up during my sleep.*

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<sup>142</sup>Annex B8.

*I was taken to a jeep. I was pushed inside but because of the way I was handled the string of the pouch was broken and the pouch fell off me. The soldiers refastened it on me and pushed me again into the back of the jeep. As I was pushed into the jeep my shin hit the metal side and caused me considerable pain.*

*My neighbour later told me that he came out of his house and witnessed everything. He said that one of the soldiers was videoing the whole event. I was made to sit on the floor of the jeep. A female soldier came who could speak broken Arabic. I could hear her through the ear muffs and she was telling me to move. As soon as she told me to move, soldiers started hitting me. I sensed there were probably about three to four soldiers. They were punching and kicking me. I was punched on the nose. The force of the punch made me feel dizzy and I began to have difficulty breathing. Water was streaming from my nose. Later when I was released I had an operation to straighten my nose in Syria, it was re-broken and set straight.*

*After a short time, the jeep started moving. The soldiers kept slapping me hard on the back of my head. I was driven for about 30 minutes. When the jeep stopped I was dragged off the jeep onto pebbled ground. One soldier pulled me by my hands which were plasticcuffed and one soldier was behind me pushing me. I was made to run very fast on the rocky ground. We ran very fast for some 20 – 30 metres. The soldiers then forcefully pushed me down and made me kneel on the ground with my head down and my hands in front of me. I attach as “Exhibit MMAR2”<sup>143</sup> a photograph of the position I was made to maintain.*

### **Conclusions Regarding Abuse during Transit:**

As exemplified in the three testimonies above, abuse by UK Services Personnel did not stop during transit from the point of arrest to UK detention facilities. Nearly half of the claimants whose testimonies are included in this communication allege abuse during transit, most often characterised by severe assault in the form of continuous beating; the maintenance of sensory deprivation through hoods, blackened goggles and earmuffs; and forced exertion and stress positions. The sheer number of detainees reporting abuse during transit demonstrates that it seemed to be standard operating procedure to maintain and elevate the ‘*shock of capture*’ established during initial arrest.

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<sup>143</sup> Annex B8.



### 3) TQ at Temporary Detention Facilities

After arrest and transport, detainee abuse often continued upon arrival at UK detention facilities.

This section concerns treatment at TDFs, THFs and BPFs (collectively referred to here as “*temporary facilities*”) – the facilities of temporary detention prior to transport to the long-term detention and internment facilities. At these temporary facilities, detainees were subjected to what the UK Services Personnel call TQ, already described above. Detainees were ordinarily held at temporary facilities for no more than 12 to 24 hours, during which certain techniques were used deliberately to maintain the shock and disorientation of capture. This was in order to facilitate the TQ and to condition detainees for further interrogation. For example, during the BMI, the Chairman, Sir William Gage, noted that the ten detainees arrested in Op Salerno on 14 September 2003 “*were subjected to the process of conditioning from their arrival at the TDF until the time of Baha Mousa’s death,*” and that “*this conditioning process was...standard practice at the time.*”<sup>144</sup> Based on the results obtained through TQ, UK Services Personnel would assess whether a detainee ought to be further detained and subjected to prolonged internment and interrogation by the JFIT at a longer-term internment centre. The decision to intern at Battle Group level was made, following the TQing, by the Battle Group Internment Review Officer (BGIRO).<sup>145</sup>

Typical allegations of abuse at temporary facilities include coercive questioning; forced exertion; stress positions, such as prolonged kneeling on hard or pebbled ground; food and water deprivation; beating; disorientation, including hooding, goggles, earmuffs, and forced running in zigzags; continuing plasticuffing to the rear; deprivation of all sight and sound for prolonged periods; and inadequate medical treatment.

### Summaries and Exemplary Cases

#### i) Case of Baha Mousa (14 September 2003)

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<sup>144</sup>Report of the Baha Mousa Inquiry, *supra* note 40, Summary of Findings, Vol. III., p.1316, para. 201.

<sup>145</sup>The BGIRO post was created as an ad-hoc response to concerns at Battle Group level that too many Iraqis were being interned at JFIT without intelligence being fed back to BG level. In the Court Martial into the death of Baha Mousa, a major problem emerged in that the BGIRO was not tied in to the military chain of command.

Baha Mousa, a 26-year-old Iraqi who was a hotel receptionist in Basra and widowed father of two young children, was first arrested after an early morning search of the hotel he worked in on 14 September 2003 uncovered weapons. The search was part of the UK's Op Salerno<sup>146</sup>, and his hotel was only one of many buildings searched that day by UK Services Personnel. Following arrest, Mousa and six other men were taken to TDF located at BG Main, which served as the headquarters for the 1 Queen's Lancashire Regiment (1 QLR). The TDF at that facility was a disused latrine. They were joined there by three other Iraqi detainees also arrested that day. After only 36 hours in UK custody, Baha Mousa died from injuries sustained during detention. His post mortem revealed 93 external injuries in total. As described in the official summary of the UK public inquiry proceedings conducted into his death, after arriving at the TDF, Baha Mousa:<sup>147</sup>

*then spent the most part of the next 36 hours "hooded" with a hessian sandbag over his head. He was forced to adopt "stress positions" ... Both techniques had been banned as aids to interrogation more than 30 years earlier. During his detention, Baha Mousa was subjected to violent and cowardly abuse and assaults by UK servicemen whose job it was to guard him and treat him humanely. At about 21.40hrs on 15 September 2003, following a final struggle and further assaults, Baha Mousa stopped breathing. By that time he was in the centre room of the TDF, a small disused toilet, quite unfit as a place to hold a prisoner. All reasonable attempts were made to resuscitate Baha Mousa, to no avail. He was pronounced dead at 22.05hrs. A subsequent post mortem examination of his body found that he had sustained 93 external injuries.*

As for the other nine Iraqis detained along with Baha Mousa at the TDF, the BMI found that "all were subject to significant abuse. They all sustained injuries, physical and/or mental, some of them serious."<sup>148</sup> While six of these nine detainees were arrested at the same time as Mousa, two were arrested in their homes shortly thereafter and first taken to Camp Stephen, where they were held for two hours before joining the others at BG Main. At Camp Stephen one detainee was made to jump up and down until he collapsed from heat and exhaustion. Both were forced to adopt a kneeling position on pebbled ground and exposed to the hot sun.

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<sup>146</sup>Op Salerno was an Operation authorised at Divisional HQ level to search for Iranians suspected of importing parts into Iraq concerned with the manufacture of improvised explosive devices.

<sup>147</sup>Annex B9. See also, Report of the Baha Mousa Inquiry, *supra* note 40, Summary of Findings, Vol. III, p. 1287, para 1.

<sup>148</sup>Annex B9.

Whilst kneeling, they were forced to hold their hands outwards, and water bottles were placed on their hands to make the position more difficult and painful.

Once at BG Main, all nine detainees held along with Baha Mousa suffered abuse including hooding (sometimes with two sandbags); stress positions, including a squatting “*ski*” stress position; being kicked, slapped, punched, and generally beaten; soldiers conducting a “*choir*,” in which the detainees were beaten to induce a “*choir*” of expressions of pain; being urinated on; noise bombardment (being placed next to a noisy generator while hooded and handcuffed); being forced to drink urine; being splashed with toilet water; verbal insults, threats and harshing; and sleep deprivation pending TQ.

**ii) Case of XXX (24 January 2006)**

When XXX, earmuffed and goggled, arrived by helicopter at the BPF in January 2006, he was dragged off, beaten, his face pushed into the ground, and made to maintain a stress position in the scorching sun. When he faltered in holding his stress position, soldiers beat him, nearly dislocating his thumbs. At times, soldiers ordered him to rise from his stress position and forced him to run, an extremely difficult task given the numbness induced by holding the position. He continued to be treated roughly and humiliated by soldiers. He was also deprived of food, water and bathroom access.

**Excerpt from Witness Testimony<sup>149</sup>**

*When the aircraft landed I was pulled out and pushed down on what felt like gravelly ground. I was forced to the ground and I was put in a kneeling position with my feet tucked up behind me and my body weight resting on my heels. My bound arms were pushed up to shoulder height and were pushed straight. I could sense people around me and I heard the sounds of people walking on gravel and some shouting. I knew that I was not alone.*

*I was kept in this position on my knees with my arms held at shoulder height in front of me for about an hour. My arms felt so heavy and I was straining my back. The weight of my body on my knees became excruciating. Any time that I dropped my head or curved my back, someone would strike me hard on the back of my head. Although I felt like my body was slowly being pulled towards the ground, I did all that I could to*

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<sup>149</sup>Annex B10.

*keep my hands raised to shoulder level. When I dropped my hands, someone would grab my thumbs and pull them right back, almost dislocating them. This was excruciating and I screamed out from the bottom of my chest when this happened. I prayed to God that he would keep me safe and give me the will to keep my hands raised.*

*After being in this position for about an hour, my feet and lower legs were really numb and I felt that my feet had begun to swell. Someone shouted at me to stand up. I tried to lift my body but I could not stand up. Someone lifted me up to make me stand up but I fell straight back down. I was forced up three times and after my third attempt, someone dragged me to a tent where I saw a doctor.*

[After falling to the ground due to numb legs while being forced to strip naked, reporting head and leg injuries to the doctor, and receiving two tablets, XXX' ordeal continued.]

*After I was seen by the doctor, I was told to redress and the earmuffs and the goggles were placed back on me. My hands were bound again with the plastic ties. The two soldiers who had remained in the tent then took me by the arms and ran with me to a second tent; practically dragging me in a zigzag. I was also run around in a circle. I felt totally disorientated and I began to get really dizzy; my head hurt even more than before. In this tent, my earmuffs and goggles were removed and my hands were unbound. I was addressed by a fierce largish woman in her forties with bobbed blonde hair. She shouted at me and took my finger prints. I did not know what she was shouting. After my fingerprints had been taken, the goggles and earmuffs were placed back on me and my hands were bound again with the plastic ties. The soldiers grabbed me and seemed to run round in circles and then ran with me in a zigzag to a third tent. I became really disorientated and my head pounded. I felt myself swaying from side to side when the soldiers ran with me. [...]*

*When I was taken from the tent, I could sense through the gap between my face and the goggles that it was still dark. It was also raining. I walked a few metres and I was forcibly seated on wet gravelly ground. I was pushed down onto the ground with crossed legs and my arms were pushed up like before so I was holding them straight out in front of me at shoulder height. I was sat like this for some time. I was so cold and tired. At some point I started to doze off. I was pushed onto my side by someone*

*so that I was lying on my side. I had been asking all of the time to use the bathroom but I had not been allowed. I continued to ask to go to the bathroom when I was lying on my side as I really needed to relieve myself. [...]*

*I was on my side for some time and kept dozing off. I felt that the sun was getting hotter and hotter. At some point, someone whispered "We are going to release you" in Arabic. This brought me to immediate attention. At this time, I was taken to a toilet by someone. I was forced up from the ground and rushed to the nearby toilet [...]*

*When he saw that I had finished, he replaced the goggles, earmuffs and hand ties and ran out with me. I was pushed down onto the ground again in the same cross legged sitting position with my arms raised to shoulder height and my head facing down towards the ground [...]*

*As before, when my hands dropped below shoulder height, my thumbs were pushed back and when I nodded off I was struck hard on the head. I remember that I stayed in this position until about noon. I knew it was around this time as the sun was scorching.*

*Around noon, a soldier came and placed an apple in my outstretched hands. He also put something down on the ground and said it was Halal. I made out through the gap in the goggles that it was some type of sandwich. I was unable to eat anything, even the apple, as my hands were bound so tightly and my vision was impaired. Also, my constitution had been broken and my will and energy reserves had dwindled to almost nothing. After about thirty minutes, someone removed the food from before me. All of this time, I was given no water or fluids of any kind to drink.*

*I estimate that I remained sitting cross-legged with my arms at shoulder height for two, to two and a half hours, which would have been up until around 3:00pm. After this time, two soldiers picked me up and threw me into a vehicle that seemed high off the ground and I was driven for a short period of time.*

*I was then pulled out of the vehicle and I was forced to run with two soldiers either side of me for what seemed like a long distance. At some point we slowed and I heard the sound of a helicopter propeller and I felt a strong wind, which I thought was from the propeller. This sound was very different from the sound of the previous aircraft.*

*I knew that I was about to be put on the helicopter. Again, I was overcome with anxiety when I heard the helicopter due to my terrible fear of flying. My lack of sensory awareness made this experience even more terrifying than it would have been if I was not wearing goggles and earmuffs. I was shoved onto the helicopter and sat down on a seat. I had no awareness of what was going on around me. I could hear some sound through the earmuffs and I heard people laughing at me. The helicopter flying was erratic and I felt sick. My hands were bound and I could not steady myself. I was being thrown around and I just kept on hearing laughter. I felt like a broken man. I heard what sounded like English words being exchanged between the laughing. The flight seemed to take around thirty minutes. At this time, I still had no idea where my sons and my brother XXX were and, again, I was imagining all sorts of horrible things happening to my family.*

**iii) Case of XXX (27 April 2006)**

XXX was first arrested on 27 April 2006 and taken to the BPF for initial questioning, before eventually being transferred to the DTDF for further detention and interrogation. After being beaten during transit, XXX was dragged out of the jeep on arrival at the BPF, punched, kicked, and forced to run. He was also forced to maintain a stress position, during which he was punished with assault from a soldier for any and every small movement, including having a soldier slam his hands down on his earmuffs. He was held for almost a full day at the BPF before he was given food or water, and his hood was never lifted, not even to allow him to go to the toilet.

**Excerpt from Witness Testimony<sup>150</sup>**

*Whilst I was in the APC [Armoured Personnel Carrier], three soldiers stood on top of me and hit me throughout the whole 20-kilometre journey to what turned out to be Basra International Airport [the BPF]. When the APC stopped, I was dragged from the vehicle and the soldiers walked me across rough pebbled ground. I was then made to run and the beating continued. I was thereafter forced to maintain the same squatting position as before, but this time I had to keep my hands raised just above my head. This was a very difficult position to maintain for even a minute. I was in pain all over my body. It went numb eventually. There were two soldiers beside me and one behind me. Every time my*

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<sup>150</sup> Annex B11.

*hands dropped, I was either kicked from the back or the soldiers at either side of me would slam their palms against my earmuffs, causing me extreme pain.*

*[...] my hood was placed back on my head and I was taken back to the pebbled area where I had to hold the same stress position for fifteen minutes. I was then taken back to the medic. The doctor again asked me whether I had been hit. I simply complained about the pain in my lower back. I was given one tablet and some water with which to swallow it. Up to this moment, despite repeated requests, I had not been given any food or water. I had been detained for around 10 hours by this time.*

*[...]I put on my overalls and the soldiers placed eye goggles and ear muffs on me. They also handcuffed me with metal handcuffs. I was led in a zig-zag motion to a solitary cell measuring 1.5 metres by 1.5 metres. I arrived at the cell at around 1pm. There was a very thin, sponge mattress inside. Each time I tried to sleep, the soldiers prevented me from doing so by kicking the metal door of my cell. They would move me from one solitary cell to the next on a regular basis. The cell had a window that overlooked a path and a high fence. I could not see past that fence. I was held in solitary confinement for the next 10 days.*

*Two hours after I was taken to this cell, I was given an apple. This was the first time I was provided with food following my arrest. I was not permitted to go to the toilet. Eventually, I urinated in an empty bottle I found in my cell. There was no ventilation in the cell. There was a weak light bulb which was always turned on.*

#### **iv) Case of XXX (28 May 2006)**

After enduring beating and having his bare feet burned on the metal floor of the helicopter during transit, XXX arrived at the BPF at Basra Airport in May 2006. He was made to wear earmuffs and blackened goggles for disorientation purposes, and forced to sit on the burning hot ground. Soldiers forced him to maintain stress positions and deprived him of sleep by prodding him awake whenever he would slump. He was also deprived of food and water and subjected to harshing.

#### **Excerpt from Witness Testimony<sup>151</sup>**

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<sup>151</sup> Annex B12.

*We arrived at Basra Airport at approximately 6 am. I was made to sit on rocky ground which, because of the summer heat, was very hot. It was painful to sit on this hard and hot ground. I was forced to sit in a kneeling position with my back upright and straight. My hands were untied and were moved to be cuffed in front of me rather than behind. I had to keep my hands lifted out in front of me in the same position as when I am praying. I was forced to sit in this position for 12 hours, until I was taken from Basra Airport at the end of the day. At one point when I was sitting in this position two soldiers suddenly and abruptly grabbed me by my shoulders. I could not hear them coming because I could not hear anything. I could not stand because my legs were numb and in pain so they started dragging me. They were very rough with me and I could not feel my legs. After a while they stopped dragging me and they made me stand. They took my goggles and earmuffs off and I saw that I was in an interrogation room. There was one female soldier and an interpreter. She was screaming and shouting at me and telling me that I was part of the militia.*

*These were false accusations and I told her that I was just a trader. She did not listen to me or understand. The interrogation was quite short. I think it lasted around 10 minutes. They then replaced my goggles and earmuffs and took me back to the kneeling position. Throughout the whole day I was not given any food. Whilst my hands were cuffed they put a bottle of water in my hands but when I took a sip a soldier came over and took the rest of the bottle away so I was only able to drink a little bit of the bottle. When I was forced to sit in this position I became exhausted and I fainted frequently. The soldiers poured water over me to wake me up. When I slumped out of fatigue a soldier would prod me in the back to make me sit upright. I do not know exactly what was used to prod me. I could not see or hear anything. After a while I felt that my feet were numb. I also felt that my brothers were there with me although I could not speak to them and could not see anything. I was taken once to the toilet.*

*At approximately 6pm I was taken in a helicopter to [the DTDF]. I received exactly the same treatment in the helicopter as before and was continuously beaten. Again, my bare feet were on the hot metal floor.*

v) **XXX (4 June 2006)**



During his arrest in a strike operation on his home on 4 June 2006, XXX was searched and badly beaten. He was then hooded with a black bag, earmuffed, continuously punched, kicked, and hit in the head with a rifle butt, causing blood to pour from his ear. His wife was also kicked, hit in the head with a rifle butt, searched, and forced to remove her hijab. After arriving at the BPF, XXX was forced to maintain stress positions, during which he was burned by what he thinks was either a cigarette or a laser. While at the BPF, he was deprived of food and water, and kept from using the toilet. He suffered humiliation from soldiers pouring water over his head, and on another occasion, pouring urine over his head. He also endured kicking, forced exertion (running and zigzagging while hooded, goggled and cuffed to the rear), and being deliberately run into objects and obstacles. Additionally, he burned the soles of his feet by being forced to stand waiting on hot stones.

**Excerpt from Witness Testimony<sup>152</sup>**

*It was probably around 9 or 10 am in the morning and the sun was burning my whole body as I squatted. At that time of year it is very hot, it was like being in hell. Whilst I was squatting I felt a burning sensation on my neck which must have been either a cigarette or from a laser. I asked for water but instead of giving me water the soldiers poured water over my head. Later urine was poured over my head, I could smell it. If I changed my position at all or tried to rest I was kicked by the soldier. If I tried to put my head back the soldiers would violently force it down. I was exhausted.*

*I must have been there for about 1 – 1 ½ hours before I was taken for my first interrogation. A soldier took me by [my] hand and then two or three soldiers would make me run in circles and take me in different directions, zigzagging. I fell over many times and the soldier would force me to stand. The soldiers continued kicking me. I felt extremely disorientated and very dizzy. I felt that they were deliberately trying to make me lose my consciousness. I don't know how long this lasted but then a soldier lifted one of my earmuffs off and an interpreter told me they were going to take me for an interrogation. He told me that when my goggles were removed I would see an officer who would interrogate me.*

*[...]After the interrogation, the goggles, earmuffs and hood were replaced. I was again run and zigzagged as before in a very disorientating manner. I was exhausted. I*

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<sup>152</sup> Annex B13.

*collapsed but the soldiers kicked me. I was returned to the pebbled area and made to maintain the squatting stress position. I was not taken to the toilet or given any food or water. I didn't ask for anything. I could feel that other people were being taken and I later learned that they had interrogated my sons. I was probably left there for half an hour to an hour before being taken for another interrogation. It was June and the heat was unbearable, the sun was burning my bare skin. The ground underneath my feet was burning hot.*

*The soldiers collected me again for interrogation. Again I was made to run in different directions and circles. The soldiers would make me bang into sandbags and I would bump into other obstacles, I had no idea what might happen next. The soldiers continued to beat me as I ran and when I fell. I felt like I was [in] an epic battle that was never going to end.*

*[After the interrogation,] I was running the same exhausting zig-zags and circles back to the pebbled ground where I was made to maintain the same squatting position [all whilst goggled, earmuffed and hooded]. It must have been around midday. By this time the heat was stifling. The sun was burning down on me and it was like being in an oven. They made me stay in that position for three hours without food or water. I was extremely thirsty. I didn't want any food, I just wanted water. I fell many times and whenever I fell the soldiers would kick me. During the time I was on the pebbled area I felt that the soldiers would change every hour. It was like they were doing shifts so that they could beat me with renewed vigour.*

*At around 3pm, the soldiers made me stand upright, head down with my arms outstretched in front of me. I was made to maintain that position for about 5 – 10 minutes and then the soldier would then move me to a different place. This meant that just as my feet got used to the temperature of the floor I would have to move to burning hot stones. The soles of my feet were burnt and I could feel that they were swollen. I fell over frequently.*

*After an hour and a half of this I collapsed and fell unconscious to the floor. I woke up and felt that I was in a moving vehicle. I was lying on a metal floor. It must have been open roofed because the metal was hot against my skin. It was burning me all over. I was trying not to move as the metal was so hot. I cannot forget this sensation. I felt*

*like I was roasting. My body was drenched in sweat. I must have been in the vehicle for about 25 – 30 minutes.*

### **Conclusions Regarding Abuse at Temporary Detention Facilities:**

As demonstrated by the witness testimonies above, Iraqi detainees often suffered significant abuse during their first 12-24 hours in UK custody at temporary detention facilities. The first-hand accounts above reflect the experiences of abuse endured by many detainees in UK custody at a range of different temporary detention facilities, but particularly the BPF at the COB at Basra Airport, from 2003 through 2008. From the accounts above, it is clear that the treatment is intended to wear down the victims. The effect is to cause mental and physical fatigue and to disorientate through sight deprivation; sound deprivation; stress positions; deprivation of food and water; being dragged or forced to run in zigzags or circles while goggled and earmuffed. The accounts above are typical, but by no means exhaustive in terms of the types of techniques used in TQ and as an aid to interrogation in order to maintain the “shock of capture”.

#### **4) JFIT Interrogation at Long-Term Internment and Detention Centres**

The second “*type*” of detention facility used by UK Services Personnel in Iraq, other than the temporary detention facilities discussed above, were long-term internment facilities. The majority of victims represented in this communication were held in an internment facility after having been tactically questioned during their initial temporary detention.

As described above, throughout UK military operations in Iraq, there was only ever one official UK internment facility at any given time.<sup>153</sup> UK internment facilities in Iraq served two main purposes. First, they were designed to hold those arrested in custody for prolonged periods of time, often for two or more years. Second, they housed JFIT, which was responsible for the in-depth interrogation of detainees. JFIT was established prior to the invasion of Iraq in order to provide an interrogation capability for UK Services Personnel in Iraq. It was the central facility where all detainees identified as meriting interrogation were taken. The facility was largely staffed by reservists and intelligence personnel. It was located within each of the central detention and internment facilities but it operated without

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<sup>153</sup>It now appears that there was a second UK internment facility run by JFIT in Baghdad and the existence of this JFIT facility has not been previously disclosed. PIL are attempting to get relevant disclosure from the SSD in ongoing Judicial Review proceedings in the UK. The Guardian, article entitled “Camp Nama: British personnel reveal horrors of secret US base in Baghdad” by Ian Cobain on 1 April 2013. <http://www.theguardian.com/world/2013/apr/01/camp-nama-iraq-human-rights-abuses>

involvement or oversight of personnel staffing those facilities, including their OCs. JFIT was always housed in its own tightly confined “*compound within a compound*” inside whichever fixed, long-term UK internment facility was in operation at the time.

Upon arrival at the internment facility, the standard procedure was for detainees to be forcibly stripped and searched and then subjected to a medical examination, all of which was often conducted in a very humiliating and invasive manner. The detainees were then immediately moved to JFIT for interrogation. Such interrogation lasted from several days to several weeks, during which time the detainees were routinely held in solitary confinement cells. Of course, as described above, they arrived at the facility having already experienced abuse upon arrest, in transit, and at temporary detention facilities where they were tactically questioned. At JFIT, the process of sensory deprivation, disorientation and debilitation not only continued, but intensified. The allegations summarised in this communication demonstrate that techniques systematically used by UK Services Personnel during the course of detention and interrogation at longer-term UK internment centres included: the use of solitary confinement for prolonged periods in cramped cells; sleep deprivation; food and water deprivation; disorientation tactics such as being walked or run in zig-zags whilst deprived of sight or banged into walls and beaten; lengthy, repetitive and pointless interrogations; sensory deprivation such as the use of blacked-out goggles whenever they were outside their cell; debasement through forced nudity; harshing; threats to themselves, their family, and especially the women members; coercion by women or other inducements; and sexual humiliation through the variety of sexual acts described above.

### **Summaries and Exemplary Cases**

#### **i) Case of XXX (c. 20 March 2003)**

XXX and his brother XXX were apparently the first UK POWs, as they were serving Iraqi soldiers who gave themselves up immediately when the invasion began on 20 March 2003. An important insight into the mind-set of the UK Services Personnel in Iraq at the outset can be seen from the following extracts from the witness statement of XXX, which describes his arrival and initial treatment and interrogation at the TIF at Um Qasr. Upon arrival, he was severely beaten and kicked, to the extent that three of his teeth fell out, for which he now has false teeth. He was handcuffed and tightly hooded with multiple hessian sacks on top of each other and held in a tent with several other detainees for a month. During this period, he and the other detainees were only given a litre of water per day for drinking and hygiene

purposes. They had to accomplish everything from drinking, washing and eating all while handcuffed and hooded. When they needed to use the toilet, they were walked to a ditch in the ground, while soldiers stood nearby laughing and taking photographs of them. After the first week in the tent, interrogations began, for which they were dragged from the tent after midnight, and which involved heavy harshing and the use of dogs and other techniques designed to intimidate, induce fear, humiliate, and generally degrade the detainees.

### **Excerpt from Witness Testimony<sup>154</sup>**

*When the truck stopped we were pushed off the back of the vehicle. I could see a big UK flag and trucks, APCs [Armoured Personnel Carriers], and many vehicles. We had clearly arrived at a UK base. The area was surrounded by sandbags and it was a desert area with a sandy floor. It was some time in the late afternoon. We were searched but when they didn't find anything our few belongings were put back in our pockets. We were made to kneel on the sand. Our knees had to point outwards but this time our backs had to be straight. A very muscular soldier with tattoos all over his arms removed the blindfold and came and hooded both of us.*

*The hood was made of hessian material. It had loose fibres and threads which were very irritating in my face and mouth. It was a very tight fit around my face and I was sweating. Every bit of air in Um Qassar brings grains of sand and the sand kept coming into the hood. It was extremely uncomfortable and difficult to breathe. I didn't know what to do. We were left to kneel in the sun for hours. If I moved position and bent my head forward at all a soldier would come and kick me hard – shouting “shut up” and “fuck you”. I was kicked many times.*

*During this time one of the soldiers kicked me hard in the mouth which caused three of my bottom teeth to fall out later that day. I now have three false teeth and attach a photograph of my teeth as “Exhibit SMAI 2”. After the kick I could feel blood pouring from my mouth. A soldier must have noticed the blood because I was dragged along the sand and taken inside a tent. At this point he removed my plasticuffs and just left me lying on the sand in the tent. I was still hooded. I used my hands to try and dab my mouth with my shirt and the hood. I was semi-conscious. About half an hour later a soldier came and re-cuffed my hands with plasticuffs to the rear.*

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<sup>154</sup>Annex B14.

*An hour later a soldier came -and marked on my hands the number 222. My brother and two other detainees were brought inside the tent. We were not allowed to speak to each other. I could hear another soldier come into the tent and the soldiers talked to each other. I think they must have been discussing our hooding because immediately after another hood was put over my head. This made it even more difficult to see and it was even hotter and more uncomfortable. The handcuffing was changed to the front and we were brought water which we had to drink underneath the hood using our plasticuffed hands. The soldiers were swearing at us continuously.*

*We remained in that tent on the sand floor, hooded and plasticuffed for one entire month. The soldiers would bring us food twice a day. It was always canned food which we had to manage to eat with the plasticuffs on and the hooding over our heads. We had to open the cans ourselves and then struggle to feed ourselves under the hood which was very difficult. We had to eat like animals. Every day we were given 1 litre of water to use. We had to use the water for drinking and washing after the toilet. If we needed the toilet we had to shout 'toilet'. The soldier would take me to an area where there was a makeshift toilet, a ditch in the ground with a plank. My plasticuffs were removed and I could see through the hoods a soldier taking photographs of me when I went to the toilet. I got very angry and was shouting "I am Muslim this shouldn't be allowed". I was photographed going to the toilet a number of times on different occasions. [...]*

*After about 5 days in the tent I could hear that my brother was suffocating in the hood and was in pain. I later found out that he had tried to commit suicide by using the edge of a lid from tinned food because he was so upset and disturbed by the conditions we were being kept in.[...]*

*After one week in the tent the interrogations started. The interrogations always took place after midnight. The soldiers would come with a torch light and check our numbers and then drag whoever was being taken out for interrogation. The interrogation tent was very close by.*

*When I was taken I would be stood up by two soldiers either side of me and taken inside a tent. I was sat on a chair. I remained plasticuffed and hooded but I could see through the hoods that there was a small table in the room. There was a UK interpreter who spoke Arabic with a Lebanese accent and three officers, some of them*

*who seemed to be of a very high rank. The plasticuffs remained on. They were tight but there was enough room for my hands to move.*

*I was asked many questions about where I worked and my involvement with the Feyadaeen. The interrogator was shouting at me very aggressively and told me that he was an officer from the UK intelligence. The soldiers brought maps and lifted my hood and asked me to guide them to where my training camp was. This was the only time the hooding was lifted. I pointed to where my base was in Baghdad. I gave them the names of my officers at the Feyadeen. They asked me how I had become one of the Feyadeen and said that I must be related to Saddam. I was asked where Saddam and Uday sleep and where the weapons of mass destruction and the uranium were hidden. I told them I didn't know. He carried on shouting and when I couldn't answer I broke down crying in tears. I was completely broken.*

*The interrogator used to come very close to me and pretend that he was going to punch me. [...] On three separate occasions in interrogations, soldiers brought large military dogs on a lead and let them get very near me. I was terrified and they asked me whether I was going to answer the questions or whether they should release the dogs and let them cut me into pieces. The interrogators used to threaten me all the time. They would say that I would die in the desert and they shouted and swore at me continuously. They kept telling me that I had been sent by Saddam to spy on them.*

**ii) Case of XXX (21 December 2003)<sup>155</sup>**

During his detention at the DTDF in December 2003, XXX was held in solitary confinement in an extremely small cell without adequate bedding to keep him warm in the cold winter temperatures. He was deprived of sleep by soldiers banging on his cell and pouring cold water over him. In an attempt to culturally and religiously humiliate him, a soldier offered him a pornographic magazine, eventually yelling and throwing it at him after he refused to take it.

**iii) Case of XXX (21 December 2003)**

When XXX was interrogated at the DTDF in December 2003, he was subjected to harshing and other techniques designed to intimidate, induce fear, humiliate and degrade him. A

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<sup>155</sup> Annex B15.

female interrogator swore and yelled at him, and ordered him not to blink. While detained at the DTFD, he was deprived of sleep by the guards either banging on the door of his cell, spraying water on him, or entering his cell with aggressive, barking dogs. He was also made to adopt stress positions in his cell at night, in order to deprive him of sleep. He was generally hit, yelled at, and forced to endure soldiers incessantly flashing the lights in his cell on and off.

### **Excerpt from Witness Testimony<sup>156</sup>**

*After about six days I was taken for my first interrogation in the morning. In total I was interrogated three or four times during the 28 days. A soldier collected me from the cell and took me to an interrogation room. We walked straight to the room. I was not goggled or handcuffed. I think there was a camera inside the room. There was a female interrogator sat behind a desk. There was also a UK male interpreter who spoke broken Arabic and had a dictionary to check words he didn't understand. I couldn't understand some of the sentences he interpreted. She told me that I was working against the coalition forces. I was made to stand for over an hour in a corner. The interrogator stood facing me with her hands on the wall either side of me. She was yelling. She told me that I was not allowed to blink and had to maintain eye contact with her. She smoked a cigarette and blew the smoke in my face. If I turned my face she would swear and yell at me. She started needling me with her fists on my chest and stomach. She said that most Iraqis are thin and asked why I was in good health. She said I shouldn't be in good health having been under Saddam. She told me I was a militant Sunni. During this first interrogation I broke down in tears because of the amount of pressure I was under.*

[...]

*Throughout my time in solitary confinement I was subject to sleep deprivation. It would depend on the shift of the guards but it could start at any time. The guards would hit the iron doors with their truncheons. Twice or three times guards entered into my cell and squirted cold water on me whilst I was sleeping. Once in the middle of the night they entered my cell with a large police dog. The dog started barking and was straining against the chain to attack me. It was extremely frightening. Two or*

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<sup>156</sup> Annex B16.



*three times at night or at dawn soldiers would come into the cell and make me stand up for long periods of time. When I became too tired to stand in the same position and moved at all the soldier would start shouting and yelling at me and poke me with his baton. The light in the cell was always on. The guards controlled the light from a switch outside and one of the soldiers used to switch it on and off continuously for whole hours until I felt like I was going mad.*

**iv) Case of XXX (16 April 2004)**

Upon arrival at the DTDF in April 2004, XXX was told to strip naked. When he refused, he was beaten with a baton, forcibly stripped, and made to adopt humiliating positions while soldiers looked on laughing, turning him around, and photographing him.

**Excerpt from Witness Testimony<sup>157</sup>**

*They took me to a small room where they asked me to undress. There were about four to five soldiers in the room. I refused to do so. The interpreter told me I should take off my clothes. I asked them why but the interpreter did not answer. One soldier tried to pull my shorts off. I grabbed hold of the waistband of my shorts with both hands to resist but they hit me with a baton so I let go. They succeeded in taking my shorts off and I removed my shirt, so I was totally naked. They made me bend forward and backwards. I felt humiliated and degraded. They had mobile phones and were taking photographs of me with these as well as an ordinary camera. I was terrified that they may do to me something similar to what had happened to people at Abu Ghraib. They were laughing and turning me round. This lasted for between 10–15 minutes.*

**v. Case of XXX (21 July 2004)**

The strong religious beliefs of many of the detainees were frequently exploited by interrogators to humiliate, offend and degrade them. When XXX was interrogated by JFIT at the DTDF in July 2004, the interrogator insulted the Qur'an by purposefully slamming it shut, banging it with his fists, and then sitting on it, as a way to religiously and culturally offend XXX.

**Excerpt from Witness Testimony<sup>158</sup>**

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<sup>157</sup> Annex B17.

*The interrogator opened the Quran at a chapter called 'Mary' or 'Mariam'. He said 'is that the chapter of Mary?' and I said yes. And he brought his hand down hard on the book and banged the chapter of Mary. I told him to leave the book alone, that it was important for me. Then he lifted the Quran up, and banged it on the desk. This made me very angry. Spontaneously I shouted at him 'leave this book alone'. This time he put the book on his chair and sat on the Quran. He was watching me to see my reaction. When he did this I lost control. I started shouting at him. And he shouted aggressively at me. Then the soldiers came in and returned me to my cell. I couldn't believe what I had just seen. It is difficult for me to talk about it even today.*

**vi. Case of XXX (July 2004)**

When XXX was interrogated at the DTDF in August 2004, he was subjected to harshing. This was meant to intimidate, induce fear, humiliate and degrade him. In addition to shouting loudly in his ear, the interrogator also threatened to have XXX's mother and sisters brought to the detention facility and tortured in front of him.<sup>159</sup>

**Excerpt from Witness Testimony<sup>160</sup>**

*[The interrogator] was trying different methods with me to get the truth out of me. At times he would shout really loudly in my ear. He also threatened to bring my mother to Al-Shaibah and torture her in front of me.*

**vii. Case of XXX (July 2004 and 18 August 2008)**

During his detention at the DTDF beginning in July 2004, XXX suffered environmental manipulation in the form of exposure to extreme temperatures in his cell. He was also subjected to sleep deprivation from flashing flood lights and harassment by soldiers in the form of shouting, kicking on his cell door, forcing him to yell out his prisoner number, and making him maintain stress positions.

**Excerpt from Witness Testimony<sup>161</sup>**

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<sup>158</sup> Annex B18.

<sup>159</sup> Annex C1, Letter before Claim, 10 September 2010.

<sup>160</sup> Annex B19.

*There were two lights in the cell: one big floodlight and one conventional bulb. Usually, they would use the regular bulb. When they wanted to punish or torture me, however, they would turn off the air conditioning and turn on the main flood light. The regular light was turned on and off at random intervals by the soldiers. I could not tell whether it was night or day. The floodlight produced an intense heat within the cell.*

*I did not sleep at all inside this cell. To punish me, they would pull the mattress out from under me. They would do anything to disturb my sleep. They always kicked the door when they saw me lying down. They would also burst into my cell and order me to shout my number. They would ransack my cell for no apparent reason other than to disturb me. They would also push me around my cell and then make me maintain a stress position with my head against the wall, my hands up to the side and my feet spread apart. It was impossible to sleep.*

**viii. Case of XXX (11 December 2004)**

During his time at the DTDF in 2004, XXX was deliberately disoriented by soldiers through forced exertion in zigzags and circles while goggled, during which he was made to run into obstacles and fall. He was also deprived of sleep through soldier harassment and the playing of very loud pornographic films. During his interrogation he was threatened with indefinite detention and torture.

**Excerpt from Witness Testimony<sup>162</sup>**

*On the second day, I was taken for interrogation. The soldiers banged open the door, which shocked me. My heart rate was racing when they did this after sitting alone for so long. Then they pulled me to my feet, placed goggles on my head and led me by my thumbs with my hands together. I was led quickly, too quick to be able to move when you cannot see where you are going. I was led in a roundabout, zig-zag route, over obstacles. These made me fall over, and I had to put my hands out to stop me before I hit the ground.*

*During the evenings and the nights I was not allowed to sleep. The soldiers kicked the door and lifted the hatch of the door every time that I attempted to go to sleep. They would look through the door, and if they saw me sleeping they would make a loud*

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<sup>161</sup>Annex B20.

<sup>162</sup>Annex B21.

*noise. I also heard pornographic films, these were very loud. They were played every night. They were played all night, till morning. [...] when I couldn't answer their questions, they said that I would be detained forever, I would never see my family. They said that I would be sent to Abu Ghraib. This scared me a great deal.*

**ix. Case of XXX (11 December 2004)**

At the DTDF in December 2004, XXX was held in solitary confinement and deprived of food and adequate bedding in extremely cold temperatures. He was further deprived of sleep by soldiers making loud noises, banging, and shining lights on him. During interrogation at the DTDF, he was subjected to harshing which involved the interrogator yelling, banging, and threatening XXX in order to intimidate, threaten, humiliate and degrade him. He was assaulted, knocked to the ground, and punished after “*unsuccessful*” interrogations by being put in a smaller cell, further deprived of adequate bedding, and deprived of sleep through a light in his cell that was always kept on. XXX became so disoriented, desperate and hopeless about the possibility of his release that he attempted suicide on several occasions.

**Excerpt from Witness Testimony<sup>163</sup>**

*The solitary confinement cell was roughly 1.5m x 2m. There was a window which had no covering, so there was a cold draught blowing through. There was no mattress or sleeping bag inside. I had to sleep on the concrete floor. The weather at this time of year was very cold in the night. I have quite poor circulation, and my hands and feet were numb before long. I was kept in this situation for four days. I wasn't given food or drink till next morning.*

*After four days, the same female doctor as before came to see me. She seemed shocked to see that I was being kept like this, without anything. I couldn't even stand up because I was so exhausted and so cold. She spoke to one of the soldiers, who gave me some black woollen socks and a thin mattress. But I never received a sleeping bag or blanket throughout the 29 days that I was held like this. The skin on my hands and feet was cracking by the end of this period. It was affected by the cold.*

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<sup>163</sup> Annex B22.

*Throughout the whole 29 days, the soldiers would come every 15-20 minutes and open the hatch and either bang the door or shine a light on my face to prevent me from sleeping. This exhausted me. The only times I slept were in short bursts, when they were banging less. I remember that there was a slim and bald soldier who seemed to be in charge of the soldiers at night, who was very keen on doing this.<sup>164</sup>*

*[...]*

*In one interrogation, the interrogator was shouting so much, I said I would cooperate. He called the soldiers to bring me a chair. I sat down and he said tell me what you know. I said that I was innocent and I couldn't help him. The interrogator got very angry and made me stand up and started shouting and banging on the table. Then he hit me with the file that he was holding. He told me that I will do with you what the Americans did at Abu Ghraib. When he said this it was like my worst fears were coming true. I thought that I was going to die. The soldiers led me away and started walking me harshly all the way back to my cell, I was banged frequently against walls and fell a few times on my knees. They kicked me inside the cell and I fell to the floor. Then they took away the mattress and led me into a different cell, that was smaller, and had a reddish light in the room that was always on.*

*After what the interrogator said to me about Abu Ghraib I thought that there would be no escape, that things would just get worse and worse. I tried to commit suicide at this point. There was a wire coming out of the air conditioning unit, which I thought I could pull and use to wrap around my neck. I had to put my foot on the windowsill and I fell. The soldiers came when they heard this, but they didn't know what I was doing, so just left. I tried it again a second time, but I couldn't get the wire loose.<sup>165</sup>*

**x. Case of XXX (15 January 2005)**

During his detention at the DTDF in January 2005, XXX was forced to run when transferring from his cell to interrogations. During interrogations he was always forced to stand sometimes for hours at a time and was interrogated multiple times in a single day, including in the middle of the night.

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<sup>164</sup>Statement, paras. 11 to 13

<sup>165</sup>Statement, paras.19 and 21.

### **Excerpt from Witness Testimony<sup>166</sup>**

*Every time I was taken to an interrogation there would be two soldiers collecting me. One soldier always clasped my hands behind my back while the other pushed my head down and made me run. The interrogations would sometimes last one hour and other times they would last two hours. I always had to stand throughout. Usually there would be an interrogation session in the morning which lasted until lunch. There would be another after lunch and after dinner. Sometimes I was interrogated in the middle of the night.*

#### **xi. Case of XXX (18 September 2005)**

During his detention at the DTFD XXX was held in solitary confinement. He was deprived of sleep by the playing of pornographic movies at an extremely loud volume on the windowsill next to his cell.

### **Excerpt from Witness Testimony<sup>167</sup>**

*On about the third or fourth night of my time in solitary confinement at about sunset the soldiers brought a laptop and placed it on the window sill immediately outside my cell. The back of the laptop was turned so that I could not see the screen. A soldier then started to play a DVD. After a short period of conversation in English it became clear to me that the DVD was showing porn. It was playing at the loudest possible volume. I could hear obvious sounds of people having sex and constant use of the word "fuck". I could hear various other sexual noises as well. From time to time I would see a soldier come to the laptop and change the DVD. There appeared to be a selection of different ones. It was impossible to sleep during this first night of porn movies being played all night.*

*In the morning of this first night the laptop was taken away and the soldiers replaced it with a very loud radio playing a mixture of news and music. I had found it impossible to sleep whilst the porn movies were being played but the loud radio music was not as bad in that there was music from time to time and I could make out the odd word in English. The laptop had been turned up apparently to the highest volume and*

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<sup>166</sup> Annex B6.

<sup>167</sup> Annex B23.

*so too the radio. The radio played throughout this day until sunset. On the second night again the radio was replaced at sunset with the laptop.*

*For the second night running and thereafter for the next month or so the porn movies were played all night and each day was the same routine with loud radio playing a mixture of news and music. At the same time as the soldiers started to play the porn movies I began to expect the worst as they had left porn magazines for me to see by the sinks in the toilets. I could see from the front cover of the porn magazines that it was hard porn as actual acts of sexual intercourse were shown on the covers. Of course I did not open up the porn magazines so I do not know what was inside. I began to expect the worst and thought that the next thing would be that there would be a naked woman in my cell.*

*It is impossible for me to describe in words the effect of the porn movies on my health. It was impossible to sleep. I found it absolutely disgusting and sickening and it in fact made me sick. [...] It was very humiliating for me to be treated in this way by the UK Army.*

### **xii. Case of XXX (18 September 2005)**

At the DTDF, XXX was deliberately disoriented by soldiers through forced exertion in zigzags and circles while goggled and earmuffed, during which he was made to bang into walls. He also endured sleep deprivation, caused by the playing of loud music and pornographic movies, particularly during the month of Ramadan. Hard-core pornographic magazines were also placed in the bathrooms during Ramadan as a source of religious and cultural humiliation.

#### **Excerpt from Witness Testimony<sup>168</sup>**

*The soldiers would collect me for interrogation. One soldier would pull me by my thumbs and the other would push me from behind. I knew where I was because previously the soldiers had taken us straight to the interrogation room but we would be run round and round in circles. I would see the guards doing that to the others. The*

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<sup>168</sup> Annex B24.

*soldiers would make me run in different directions in a zigzag motion and spin me around. They would then just let go of me making me bang against walls.[...]*

*The soldiers would also play very loud music and pornographic movies to prevent us from sleeping. It was extremely difficult for me as a Muslim male to hear these sounds especially during the month of Ramadan. The movies were so loud the soldiers were clearly playing them to keep us awake and humiliate us. When I went to the toilet, if my goggles were a bit loose I could see the laptop from which the pornographic movies were playing. During Ramadan hard core pornography magazines were also placed in the toilet. This was very difficult to live with as during Ramadan one is not allowed to have sexual thoughts. We complained about this behaviour on numerous occasions. Being made to listen to pornography was deeply humiliating and against all of my convictions and beliefs.*

**xiii. Case of XXX (22 October 2005)**

When XXX arrived at the DTDF in October 2005, he was forced to strip naked. When he refused to remove all of his clothing, soldiers held him down, removed his underwear, and spun him around laughing, chanting, and singing.

**Excerpt from Witness Testimony<sup>169</sup>**

*The sergeant then told me they would give me some clothes. I was taken to the CQ (logistics area). They asked me to remove my dish-dash, t-shirt and underwear. In accordance with my Muslim belief, I refused to remove my underwear. I told them that as a Muslim it is forbidden for us to do so. For fifteen minutes I refused. The person in charge brought four sergeants to the room. Two of them grabbed my arms, I was goggled and the other two took off my underwear. They began to spin me around. I was naked. They were laughing at me, chanting and singing. I felt utterly humiliated. I am a man of faith and knew that this was wrong. I was so disturbed I fell to the ground and started crying.*

**xiv. Case of XXX (9 April 2006)**

During interrogation at the DTDF in April 2006, XXX was subjected to severe sexual harassment, humiliation, and assault. This spanned multiple interrogation sessions and the

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<sup>169</sup> Annex B25.



techniques used were meant to offend, shame and degrade him, especially religiously and culturally.

### **Excerpt from Witness Testimony<sup>170</sup>**

*[A female interrogator] took off her t-shirt. She was wearing a bra. It was a pink bra. I put my head down, so I wouldn't look at her. She asked me to look at her. She told me 'I came to help you, and tonight you're going to have a lot of fun'. She offered me a cigarette. She said 'I'm going to help you tonight. You will sleep in my bed. There are alcoholic drinks.' I didn't say anything in reply. She went behind me and started massaging my shoulders. She told me that I must be quite tired and exhausted, that I shouldn't miss out on such a night. After this she started asking me questions, about the same three names as before.[...]*

*[During another interrogation session,] the black soldier said that I should take my trousers off. I said that I couldn't and that it was against Islam. He said 'fuck you and fuck Islam' I was shocked at this. I wanted him to stop, so I said that I would take off my trousers but now the soldiers apart from him and the translator must leave. When I said this and it was translated, the same soldier came over to me and tied my hands to the rear with plasticuffs. Then he opened the belt of my trousers and said 'now jiggy jiggy'. This scared me and I fell to the floor to get away from him. The soldier put his boot on my chest and pulled my trousers down. The other soldiers were laughing. I fought with my legs to stop my trousers coming off, but I couldn't. Then the soldier shouted to take off my underwear. He said that he would cut off the plasticuffs and that I had to take off my underwear. I pleaded with him, saying 'please, what do you want from me?' He shouted 'I need good jiggy jiggy'. Then I swore at him, and said that I am Muslim, that I could not do that.*

*The soldier put his foot on my chest again, and pulled at my underwear. I curled up into a ball to stop him from doing this, but the soldier lifted me in the air and turned me onto my front. He pulled my shorts down. He was saying the words 'jiggy jiggy' again. I called to the interpreter saying what does he mean 'jiggy jiggy' I couldn't believe what he was talking about. The interpreter was quiet. He didn't answer.*

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<sup>170</sup> Annex B26.

*Then the soldier took out his penis and said 'look, look'. I tried to curl up on the floor. I didn't want to look. So the soldier hit me. He was wearing gloves. He said 'look, look, it's big'. The soldier pulled me by the hair at this point, to make me look. When he pulled my head around he said 'very nice'. I was crying. I was telling him 'we are Muslims, you cannot do this'. The interpreter said to me that I had to do whatever he asks you. He told me that I had to lie on my stomach. I was shouting and was curled up against the wall. Then the soldier pulled me by my legs away from the wall. He turned me over on my stomach He started rubbing his penis on my back, while the other soldiers watched. Then I felt him ejaculate on my back. I was trying to move away but another soldier came and pressed his foot on my legs.*

*All of this lasted about 4 to 5 minutes. After this the soldiers left the room, apart from the black soldier, who sat on a chair. I shuffled back against the wall. He asked me, 'was it nice? good?'. I was so upset, but he spat in my face. He kicked me, and started slapping me. He was swearing at me. He said to me 'now I know that you are shamed forever, now you have done the most shameful thing'. He said that 'I have videoed everything I've done, I'm going to spread this on CDs in your area'. Then he left the room.[...]"*

**xv. Case of XXX (27 April 2006)**

During his detention at the DTDF in April 2006, XXX was forced to stand for the duration of long interrogation sessions. He was assaulted if he moved from his prescribed position. Interrogators frequently turned the video camera that recorded the interrogation off in order to inflict physical violence on XXX. He was punched in the face, as well as head-butted during interrogation.

**Excerpt from Witness Testimony<sup>171</sup>**

*Behind me, someone introduced himself as being from the RMP. He told me that if he saw any abuse or assault against me, he would report it. The interrogator asked me to stand with my hands by my side throughout the interrogation. The man who claimed to be from the RMP was not always in the room throughout the interrogation. If I moved even slightly, I would either be hit or shouted at. On the first day, the interrogation lasted 6 hours. The interrogator changed the video tape three times.*

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<sup>171</sup>Annex B11.

*Each tape lasted two hours. It was very difficult to stand up for the long periods required, especially due to the pain in my back. So towards the end of the interrogation, I collapsed.*

*The questions were random and stupid, such as how I met my wife, what the wedding reception was like, what gift I gave my wife, and so on. I was not accused of anything. No allegations were put to me. The interrogator was swearing at me, using words such as “fuck you”. Towards the end, I said that I was not going to answer any questions. I said I wanted to know why I was brought there. I told him about the pain in my back and asked him for a chair to sit on. The interrogator refused. During this first interrogation, any time I moved, even to scratch my nose, the interrogator would come out from around the desk, switch off the camera and hit me in the face. On one occasion, the interrogator headbutted me. I do not know whether the man who claimed to be from the RMP was still standing behind me on these occasions or not.<sup>172</sup>*

**xvi. Case of XXX (6/7 June 2006)<sup>173</sup>**

In interrogations, XXX was made to stand from midday until sunset and told that he was not allowed to move or wipe the sweat from his face. The interrogator frequently told him to look him in the eye. The interrogations were frequent and XXX was always made to stand for a considerable amount of time. He was asked general questions about his family, his home, and so on. He was also asked about how he organised attacks on UK soldiers. During interrogation, there were at least 5 cameras in the room and when a tape ran out it was replaced with another. The interrogation officer was always sitting in front of XXX and an interpreter standing behind him.<sup>174</sup>

**xvii. Case of XXX (12 July 2006)**

During his detention and interrogation in the DTDF in July 2006, XXX was goggled, earmuffed, and handcuffed while zig-zagged to and from his interrogations. Soldiers intentionally ran him into walls or puddles, physically assaulted him if he stopped, and laughed at him during the process.

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<sup>172</sup>Statement, paras. 36 and 37

<sup>173</sup> Annex B27.

<sup>174</sup> Annex C2, Letter before Claim, 19 October 2010.

### **Excerpt from Witness Testimony<sup>175</sup>**

*I was taken for interrogation [...] I was taken in ear mufflers, plasticuffs and goggles. The soldiers led me in a strange zig-zag route. They would let me walk and wait for me to hit a wall or step into water puddles or mud. When I stumbled or hesitated they punched me. They were laughing at me. This treatment carried on for all my interrogations. Sometimes they would run me quicker than other times, when we would go at walking pace.<sup>176</sup>*

### **xviii. Case of XXX (21 July 2006)**

During interrogation at the DTDF in July 2006, XXX reports that a female interrogator was used to sexually harass, attempt to seduce, and generally humiliate and offend him.

### **Excerpt from Witness Testimony<sup>177</sup>**

*[A female interrogator] took her top and shorts off and was completely naked apart from a thong. She sat with her legs on the table. She pushed her breasts together and asked me if I liked them.*

### **xix. Case of XXX (20 July 2006)**

While at the DTDF in July 2006, XXX was repeatedly taken for interrogation in the middle of the night. Goggled and earmuffed, he was dragged by his thumbs and pushed in disorienting paths, forced to run, and made to trip over holes and fall.

### **Excerpt from Witness Testimony<sup>178</sup>**

*I used to be collected from the cell in the middle of the night by two soldiers who goggled and ear muffed me. I was led by my thumbs by one soldier and another*

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<sup>175</sup> Annex B28.

<sup>176</sup> Statement, para. 21

<sup>177</sup> Annex B3.

<sup>178</sup> Annex B29.

*pushed me from behind. I was taken in many different directions and up and over obstacles. I felt that the soldiers were deliberately trying to disorientate me. They took me over holes and made me fall down. The soldiers always ran with me and sometimes when I fell down they would fall on top of me. Every time I was collected or taken back to the cell I was made to run in this manner. It was exhausting. I used to think that we had to go through bendy corridors to get to the interrogation rooms.*

**xx. Case of XXX (11 August 2006)**

During his detention XXX was subjected to permanent light and extreme temperatures in his cell while held in solitary confinement.

**Excerpt from Witness Testimony<sup>179</sup>**

*I was given a sleeping bag to sleep on in the cell and some spare clothes (vest, a pair of trousers, towel and toiletries) in a bag which I used as a pillow. There was no mattress, just the concrete floor. There was no ventilation, there was what looked like a window, but it was covered completely. The temperature in the room was incredibly hot. There was no fan and no air-conditioning. There were a number of light bulbs in the ceiling, which were never turned off, even at night.*

**xxi. Case of XXX and XXX (30 August 2006)**

During the same month, at the same facility, both XXX and XXX were threatened that if they did not confess to their interrogators, then certain images would be distributed within their family and community. These images showed their faces superimposed onto those of men having sex with children, one of whom appeared, according to XXX, to be a 10-year-old boy. For XXX, this was only one of many examples of sexual humiliation used as a means to degrade and threaten him and his family members. He was also repeatedly and forcibly exposed to pornography by soldiers and forced to witness soldiers masturbating in front of him. He was threatened with rape, as well as threatened that his female family members

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<sup>179</sup> Annex B30.

would be raped in front of him while he would be forced to watch. A female soldier posing as a lawyer sent to assist him exposed herself to him during an interrogation session and attempted to seduce him, while another female soldier called “Katie” (mentioned in multiple testimonies by other detainees) repeatedly exposed her breasts to him. He was also forced to strip naked on several occasions and have his genital areas searched after visits from his family. Together, these incidents paint a clear picture of sexual harassment used as a tool to humiliate, degrade, and threaten Iraqi detainees like XXX and XXX, particularly targeting their cultural and religious sensitivities towards matters of a sexual nature.

**Excerpt from Witness Testimony of XXX<sup>180</sup>**

*[At the Al Shaibah Detention Centre] The male doctor who visited me was a Captain. The interpreter introduced him to me. The Captain insisted that I take my clothes off but I refused. It is against my religion to be naked in front of strangers. I refused and [Sergeant] Swede came in with around 3 to 4 soldiers who were all holding batons. He told me that if I didn't take my clothes off, they would beat me with the batons. I knew they would do this, as they had been doing it since my arrest. I felt extremely threatened. I felt obliged to do it and I took my clothes off. The doctor was standing nearby watching this happen. I thought he looked quite young. He asked me to lie on a stretcher naked. He carried out a very quick check on me and asked me whether I was suffering from any conditions. I told the doctor about the beatings I had suffered since my arrest and the injury to my stomach from the hammer. I told him how much pain I was in because of this. He told me he thought I had a stomach ulcer. He said this without examining me, or looking in my throat or taking an x-ray of my stomach. He listened to what I said about the pain and the beatings and made no comment except to diagnose an ulcer. I told him that I had never had anything wrong with my stomach before, until the soldier had smashed me in it with the hammer. The doctor told me he would write me a prescription for an orange tablet that would help but he did not say what this was. My t-shirt and shorts were covered in blood from the beating to my face and in particular my nose. The doctor could clearly see this and didn't ask me about it. I told him about the injury I had received to my nose and that I thought it was broken because it was so swollen but he didn't do or say anything.*

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<sup>180</sup> Annex B31.

*[...] I wasn't able to sleep that night, or at all. I only ever managed to sleep an hour or so in the morning. At first this was mainly because of the pain but later, because of the noise.*

*There was no interrogation on my first day in that cell. I wasn't able to eat anything all day and hadn't slept during the night because of the pain. There was a soldier who came around during the night, kicking all of the doors and making as much noise as possible to keep everyone awake. He would bang on the window bars or shout things at the detainees.*

*During one of the nights, a tall, fair-haired soldier came to my cell with a pornographic magazine. He showed me a big picture in the magazine which covered a full page and was of a naked western woman. You could see everything in the picture. He began to masturbate on top of his clothes and was doing this so that I could see him. He was singing something that sounded like "I like coffee, coffee". I didn't understand this but this is what is [sic] sounded like. He was doing this while masturbating through his clothes and was also singing "jiggy jiggy". I was feeling terrible as I was already in such physical pain and to see this soldier doing this to himself and showing me the picture of the lady was deeply humiliating.*

*I was introduced to a Sergeant called Mike or Mick. He seemed to be the one who gave the orders to prevent me, and the other detainees, from sleeping. The noise began after 8pm and continued until dawn and he would come at night and bang on the doors.*

*[...] They also often brought pornographic papers into the interrogation room and made the interpreter translate them into Arabic. I was ashamed every time they did this and tried to turn away but was told by the soldiers to turn back and look.*

*[...] During one of the interrogations, there were two interrogators. One of them showed me pornographic pictures of young adults/children having sex. The photographs were of western faces and the people looked to be around 15 to 16 years old which I thought was young for them to be doing things like that. The sheet of paper was about A4 size and there were around 10 photographs on it. The interrogator told me that I should admit to raping the children in the pictures. He said that if didn't [sic] confess he would send information to Basra to say that I was part of*

*a sex gang which kidnapped and raped young girls and then threw them onto the street. The other interrogator said that I could do to him, what I had done to the children in the pictures. A photo of my face had been somehow superimposed onto one of the pictures of the boys so that it looked like I was sexually abusing a girl. Although these pictures were awful, all I could think about were the injuries that I had suffered. I was in so much pain that it was difficult to comprehend anything else. I felt destroyed from the pain and scared about what would happen to me.*

*The interrogator said that the picture looked like I was abusing the young girl and he showed me an envelope addressed to the Basra Police. He said they were just about to send the picture to the police unless I gave them the information they required. As well as sending it to the Police, they even said they would distribute it on the streets in my area to my neighbours and friends and would also send it to the head of my tribe. If they had done something like this, people would hate me even more than they do now and would think very badly of me and avoid me. My parents would leave me and there would be at least a 90% chance that I would be killed.*

*One of the interrogators continued to threaten to publish my photo and tell everyone that I had raped the children. This seemed to be a common theme throughout my interrogations. I totally believed they could do this as I knew they could do whatever they wanted. I was so scared I felt sick. They continued to make these accusations for at least 3 days and I felt so worried about what they were threatening to do. They also said that if I didn't admit to doing this, they would torture my mother and father until I confessed. They singled out one of the photos and pretended that it was my sister. It was a picture of a girl behaving in an indecent manner and having sex from behind. The girl was leaning on something like a table and the boy in the photograph was penetrating her from behind. They said that it was my sister and that they would treat her the same way as the girl was being treated in the photograph.*

*They kept saying they had found they found [sic] pornographic pictures on a mobile phone from the night of the raid and they were saying that it belonged to me, despite the fact that I didn't have a mobile phone at that time. They kept showing me the mobile phone in question and asking me who it belonged to but I didn't know.*

*Before I was moved to the hospital, I was interrogated again in the early hours one morning. The interpreter present seemed to be from Kuwait. There was also a female*



*soldier in the interrogation room and she was wearing a skirt and a white t-shirt without a bra. The t-shirt was very transparent and I could see her nipples if I looked at her. She told me that she was a lawyer and that she was going to defend me. I explained that didn't [sic] ask for a lawyer and I didn't need defending as I hadn't done anything wrong. She had blonde hair and I estimated that she was around 38 years old. She was sitting behind the desk with the interpreter. She leant over the desk a couple of times and told me to look at her. She showed me her breasts twice by leaning so far forward that her t-shirt exposed them. Then she leant back in the chair and opened one of her legs, lifting it onto the desk so that I could see straight up her skirt and to the top of her inner thigh. She didn't have any pants on but I turned away before I saw anything else and didn't focus on her. She was trying to embarrass and humiliate me and if I had looked at her properly, I would have been able to see her genitals. She kept saying she was a lawyer and would defend me so I should speak to her as she would help me. The interrogator said she would be good for me and that she was here to help me and wanted to know why I would not speak to her.*

*It was very embarrassing for me to see her do this and open her legs to expose herself and show her breasts. I had to keep my head turned away. Most of her breasts were on display and even the nipple area was clear so I couldn't look. I told them both that I didn't need a lawyer as I hadn't done anything wrong. She stayed that [sic] for what felt like 30 minutes. The interpreter kept saying that I should confess and that if I did she would help me. I told him that the only help I needed was to go to hospital. Eventually she left but before she did she said that it was my last chance to get help from her. This whole incident really humiliated me and I found it very insulting, but I could only focus on the pain.*

*[...] During the last interrogation, the Iraqi Interpreter began dancing around the room. He also brought in pornographic pictures of children having sex and again the interrogators said the pictures were of my sister. They all began to dance together and asked me to join in. I told them that I didn't know how to dance and they began doing Michael Jackson moves. The interpreter said they wanted to see me dance but I refused to do this. I felt really humiliated and uncomfortable in this situation.*

*[...] During those last five days, the interrogators spent a lot of time insulting my sister and other family members. They threatened to rape my sister and force me to*

*watch and said they would also arrest my old mother and father. They asked me whether I had a wife. When I told them I didn't they said that they would bring my sister instead to abuse her. They repeatedly told me I should do to my sister what the children in the pornographic photographs were doing to each other. The bald interrogator asked me whether I would abuse him if I was the officer and he was the prisoner. I said that I wouldn't and he laughed at me and tried to encourage me to abuse him.*

*[After being moved to Camp B, general population][...]There was also a medic called Katie in general population who used to show us her breasts all the time. In the outside yard, she would shout to us to look at them, saying they were really nice. We used to turn our faces away so that we didn't look. One day she fully pulled up her t-shirt and exposed her breasts. We constantly told her that we were Muslims and that this was totally against our religion. We asked her not to do this in front of us. She often exposed other parts of her body as well as her breasts, including her back.*

*[...] I was finally released on 12 October 2007, 14 months after my arrest. I could not believe I had been in detention for this long without charge. [...]When I was released, my family were happy but had mixed feelings. They felt very sad and worried about me as they knew that my arrest and detention would play a significant part of my future. They felt that my future had been ruined because of it. When released [sic] had to move home again and live as a burden on my already poor and struggling family. Things became very difficult, almost impossible, for me socially as people wanted to avoid me, thinking I was guilty as I had been detained for so long.*

*People were also afraid to spend time and socialise with me because the UK had arrested me and they felt that if they socialised with me and had a relationship with me, they would risk being arrested as well. Life has been impossible since my release and I have become an outcast. The majority of my society has rejected me, which is a very bad thing for an Iraqi man in Iraq. Our honour and respect is the most important thing.*

*I have lost my job and am now unemployed. The only work I am able to do is casual work from time to time for very little money. Because I was arrested, the police would not allow me to work for them anymore. It didn't matter that the UK had not found any evidence against me or that I had been released without charge, the Iraqi Police*

*were unwilling to take me back and said I was of no use to them. They did not pay me anything for the period in which I was detained so my family received no financial help. Losing my job in this way felt like being expelled from school.*

**xxii. Case of XXX (4 October 2006)**

Upon arrival at the DTDF, XXX was beaten and forced to strip naked in front of a large number of soldiers. The soldiers laughed, made humiliating comments and threatened him with violence.

**Excerpt from Summary of Witness Testimony<sup>181</sup>**

*On arrival at the DTDF the Claimant [XXX] was put into a jeep. Again, he was beaten inside the jeep. He was then taken into a room where a soldier known to the Claimant as “Sergeant Sweed” asked him to strip off all his clothes. There were many soldiers in the room and the Claimant said that he would take off his clothes but it was not necessary for so many soldiers to be in the room. “Sergeant Sweed” insisted that the Claimant should strip immediately and threatened to hit the Claimant with an iron baton which he held in his hand should he continue to object. The Claimant had no option but to oblige and take off all his clothes. The soldiers then made the Claimant continue to turn around while they laughed and commented. The Claimant stayed in this humiliating position for approximately 15 minutes before a doctor entered the room to inspect him. The Claimant was then given a prison uniform and taken to a solitary confinement cell.*

**xxiii. Case of XXX (16 November 2006)**

During his detention at the DTDF in November 2006, XXX was held in solitary confinement, beaten frequently, and deprived of access to toilet and shower facilities. He was interrogated frequently, up to 24 times during one day alone. He was forced to maintain a stress position for several hours at a time that involved standing perfectly straight while a soldier squeezed his neck. His interrogator humiliated him and threatened his family with violence.

**Excerpt from Witness Testimony<sup>182</sup>**

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<sup>181</sup> Annex C3, Letter before Claim, 26 April 2010.

*A new series of abuse began during this time in solitary confinement. I was beaten regularly, and was not allowed to go to the toilet or to shower. The psychological suffering during this period is indescribable. I was completely alone and could not do anything about it. Only God could take care of me.*

*One day I was taken for interrogation 24 times with three different people interrogating me. During these sessions, I was made to stand up straight with a soldier clutching me by the neck. I was forced to maintain this position for up to seven hours. When I failed to do so, the soldier would pull me straight back into the position. The person who was interrogating me would sometimes turn off the camera and humiliate me and threaten me. One interrogator said that he would attack my family and my wife. He threatened terrible things. I am unable to say exactly what he threatened against my wife and family. It is difficult for me to speak about these things. At this point of the interview, I have become very upset.*<sup>183</sup>

#### **xxiv. Case of XXX (22 December 2006)**

Upon arrival at the UK internment centre, XXX was forcibly stripped naked in front of not only the doctor and soldiers in the room, including female soldiers. After removing his pants, soldiers harassed and humiliated him by repeatedly attempting to expose his genitals, which he was trying to keep covered with his hands. He was threatened with violence should he not cooperate.

#### **Excerpt from Witness Testimony<sup>184</sup>**

*My clothes were extremely dirty by then. I refused to strip naked as it is against our culture. They said that I must because that was the rules. They said that a doctor needed to see me naked. I said that I didn't mind stripping naked in front of the doctor only but not everyone. I tried hard to convince them but they wouldn't listen. A soldier came and started trying to pull my trousers off with force. I kept refusing but in the end they pulled my trousers off. I was covering my private parts with my hands and they were laughing at me and turning me around. They kept trying to hit my hands away so that my genitals were exposed. The female soldiers were still in the*

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<sup>182</sup> Annex B7.

<sup>183</sup> Statement, paras.45 and 46.

<sup>184</sup> Annex B32.

*room. It was deeply humiliating. The interpreter told me to cooperate or else I would get hurt.*<sup>185</sup>

**xxv. Case of XXX (29 December 2006)**

Confined to a wheelchair due to two broken ankles incurred during his arrest by UK Services Personnel, XXX was detained at the DTDF in December 2006. He was kept in solitary confinement and interrogated frequently. Soldiers would laugh at and mock him in his wheelchair. He was violently pushed and tipped in his wheelchair and was also left out in the rain in the wheelchair, unable to move. During interrogation, he was subjected to harshing meant to intimidate, induce fear, humiliate and degrade him. The interrogator specifically targeted his insults and threats against XXX's family members. XXX himself was also threatened with torture, and specifically with electric shock.

**Excerpt from Witness Testimony<sup>186</sup>**

*While in solitary confinement I was interrogated on a number of occasions - sometimes once a day and sometimes every two or three days. I would always be goggled, earmuffed and handcuffed prior to interrogation. The soldiers would either carry me to the interrogation or take me by wheelchair. When they carried me if it was raining they would leave me out in the rain. When they took me by wheelchair the soldiers would push me violently and tip me up - making the wheelchair stand on two wheels rather than four. I had to sit in a certain position to make sure I didn't fall off the wheelchair. I would also be left out in the rain on my wheelchair. Sometimes soldiers would remove the earmuffs and insult me shouting "fuck you" and they would prod my head with their fingers to frighten me.*

*The interrogations would be in two parts. During the first half a camera would be filming and they would ask me questions about my status, my family and my work. There were always two people conducting the interrogation. The kind of questions the first officer would ask were: Where does your family live? How many children do you have? How many wives does your father have? They would bring in photographs of people and would ask me whether I knew them – sometimes they would be acquaintances. I would say if I recognised them but I never knew much about them.*

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<sup>185</sup>Statement, para. 21

<sup>186</sup>Annex B33.

*After such questions the camera would be turned off and the “official interview” would be over. The officers would become very aggressive and they started threatening me. They would threaten to abuse the women of my family which is deeply shaming in Iraqi culture. They would tell me that because my father has four wives he would be sleeping with my wife as would my brother. In one interrogation the soldiers suggested that I had stayed at XXX’s house because I was having sex with him. This was extremely insulting. Throughout the interrogations, they would accuse me of belonging to the militia group known as the Mahdi army. This used to seriously upset me as I come from a very good educated family and have always been brought up to stay away from such organizations. I told them this was untrue and I explained that my father was an engineer and my uncle and aunt were also teachers. I tried to tell them that our family was not of that nature and we could not possibly think of belonging to any militia. However, this was to no avail.*

*The second officer on one or two occasions brought torture tools with him and threatened to use them on me. He brought in half a bottle/glass with two electrodes – one of which had plus sign and the other had a minus sign. He asked me if I recognized this equipment but I said no. He asked me to grab the equipment with my hands but I refused. He then told me to put my tongue on the electrodes but I refused. He told me that he had found it in my pocket. I said I had never seen it in my life. He asked me again to hold it in my hands. I knew if I did that he would take my fingerprints and accuse me of it being mine. He wanted to use it on me but I refused.*

**xxvi. Case of XXX (28 January 2007)**

During his interrogation by UK Services Personnel, XXX was subjected to the practice of a technique whereby detainees are kept blindfolded on entering the interrogation room so as to increase the pressure. He was also subjected to harshing<sup>187</sup> meant to intimidate, induce fear, humiliate and degrade him. He was treated aggressively and threatened with long-term detention without the opportunity to see his family.

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<sup>187</sup>The harshing technique was trained at Chicksands as found by Sir William Gage in the BMI. It involves the extreme shouting of foul abuse into a person’s face from 6-8 inches, that is, the deliberate invasion of intimate space. It is meant to instil complete fear in a detainee as the incident of harshing comes without warning and is accompanied by the desire of the interrogator to appear to be psychotic.

### **Excerpt from Witness Testimony<sup>188</sup>**

*The interrogators were aggressive and the whole environment was very tense. The interrogator threatened that I would not leave until I was very old and that I would not see my children. This was the main threat given. The interrogation rooms were portable cabins. I would be taken into the room and stand there in silence for 4 to 5 minutes. First, when I was waiting I would be able to hear the soldiers talk a little bit. Then, because the soldiers had paved outside the interrogation rooms, I would be able to hear boots coming and I knew that the interrogator was about to enter the room. Then everybody would go silent. In these moments I would be afraid. At first the questions were generally calm but then the interrogator started to shout. Whenever I said that I was Sunni, they said that I wasn't and that I was part of the Mahdi army (which is a Shia group). Even at Shaibah, whenever I said I was Sunni the interrogators got angry. I was interrogated about 4 or 5 times.*

### **xxvii. Case of XXX (15 March 2007)**

During his detention at the DTDF, XXX suffered sensory deprivation through extended solitary confinement, as well as sleep deprivation. Soldiers deprived him of sleep by throwing water on him. He was also forced to run around the yard in zigzags while goggled and earmuffed, causing him to run into obstacles, fall, and sustain cuts and bruises.

### **Excerpt from Witness Testimony<sup>189</sup>**

*I estimate that I was kept in the solitary confinement cell for approximately 17 to 20 days in total. During the first 13 days of solitary confinement my sleep was deliberately disrupted by the soldiers. Whenever I attempted to sleep the soldiers would kick the door or open the door hatch and sometimes they would throw water on me. Another tactic that was employed by them was to wait until I was almost asleep and then wake me up and take me for an enforced run around the yard. During these night-time runs the guards would place goggles and ear muffs on me and I was made to run in a zigzag motion. On almost every occasion the soldiers used it as an opportunity to direct me into obstacles and cause me to fall and sustain cuts and bruises. Every time I was taken out of my cell I was transported in this manner.*

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<sup>188</sup> Annex B34.

<sup>189</sup> Annex B35.

### **xxviii. Case of XXX (1 April 2007)**

During his detention and interrogation by JFIT in April 2007, XXX underwent several interrogations per day. During his first ten days, he endured forced exertion, especially running, as well as sleep deprivation and severe beating that seemed to follow a particular pattern. After interrogations in which the officer had seemed very angry with him, he was always goggled, earmuffed, handcuffed. He was then beaten by soldiers with wooden batons, repeatedly knocking him down to the ground and dragging him up to beat him more. His psychological deterioration was such that the MO at JFIT decided to put XXX on suicide watch after weeks of such treatment and solitary confinement.

#### **Excerpt from Witness Testimony<sup>190</sup>**

*For the first ten days I had between four to five interrogations a day, with the same forced running and being forced to stay awake during this time. After about three days of this, I was also beaten by the soldiers. This happened after one of my interrogations. Instead of being returned to my cell or to the area outside where I was forced to run, I was taken into another room. I had already been handcuffed, goggled and my ears covered, as was usual. The two soldiers then started hitting me with their wooden batons. I was helpless to stop them. I would try to fall to the floor to protect myself from the blows, but they could always hit me where my arms were not. I would try to avoid the blows, but without seeing them it was impossible. When I dropped to the floor they would pull me up and hit me again. They hit me all over my body, but most of the hits were on my stomach and sides and my arms when I tried to block the blows. The beating with the batons lasted around 15 minutes. After this, it happened about another 5 times. It became so that I knew, if I had not been taken to the area where I was forced to run, or to my cell, that I was going to be beaten. These always followed sessions with the officer who was very angry with me.*

### **xxix. Case of XXX (11 April 2007)**

During his detention in April 2007, XXX was subjected to extremely cold temperatures in a cell without adequate bedding, and additionally deprived of food. During interrogation sessions conducted by UK Services Personnel, he was subjected to the harshing technique meant to intimidate, induce fear, humiliate and degrade him. The interrogator repeatedly

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<sup>190</sup> Annex B36.



called XXX a liar, despite his cooperation, and threatened to arrest and physically harm him and his wife.

### **Excerpt from Witness Testimony<sup>191</sup>**

*A soldier placed the goggles and earmuffs back on me, and handcuffed me to the front using plasticuffs. I was then taken to a cell. The soldier opened the door and pushed me inside. The room was air-conditioned and extremely cold. There were no blankets. I had to sleep on the ground. I used the very thin mattress in the cell to try to keep warm. I pulled it over me as I lay there on the cold concrete floor. I was very tired and hungry, but was given nothing to eat. They did give me some water.*

*[Later, during an interrogation session,] The interrogator said, "I am going to show you some pictures. You should cooperate and tell us who they are." I said, "if I know someone, I will tell you about him. If I don't, I can do nothing." He showed me some pictures, but I recognised none of the people in them. He then showed me some pictures of other policemen I work with. I confirmed that I worked with them. He started swearing, telling me I was a liar. He said, "If you don't cooperate with us, we will arrest your wife." At this moment, I started crying. I said, "My wife is pregnant. What wrong did she do?" He said, "I will bring her here so that you will admit everything." I was crying a lot.*

### **xxx. Case of XXX (24 November 2006)**

During his detention at the DTDF in April 2007, XXX was deprived of sleep and interrogated many times. When he was transferred from his cell to interrogation, he was goggled and dragged by his thumbs in zigzags. In the interrogation room, he was made to adopt a stress position that involved holding his arms straight out in front of him horizontally. He was also interrogated for inordinately long periods of time, with one interrogation lasting up to 12 hours non-stop. During interrogation, he was subjected to the harshing technique meant to intimidate, threaten, humiliate and degrade him.

### **Excerpt from Witness Testimony<sup>192</sup>**

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<sup>191</sup> Annex B37.

<sup>192</sup> Annex B38.

*Around 15 minutes after my shower I was taken for interrogation. It must have been at least 10pm by this point. I hadn't slept at all since my arrest and was exhausted. A soldier put goggles on me and zig-zagged me by my thumbs again, dragging me with full force. I was not handcuffed. I was made to stand with my arms out horizontally in front of me, which was a very unnatural position. I was told not to drop my arms down to my sides until I was told to do so. I was forced to stand like this for 1 hour. I was in agony. If I dropped my arms one of the soldiers would make me put them back up. This position was very painful and felt like psychological torture.[...]*

*The eighth day it was extremely bad and I was interrogated from 7am to 7pm. Four interrogators took turns all day to work on me. A Colonel was taking part too. There was someone standing behind me at all times and every time I said I did not know the answer, he would scream 'liar, fucking liar'. I was not allowed to turn around and this was very nerve racking. There was also a female interpreter, a big guy that was bald, an Iraqi looking guy with a big nose and the Colonel. At one point I was talking to the Iraqi looking guy quietly answering questions when suddenly one of the male interrogators stood behind me and screamed. It petrified me as I had no idea he was behind me. He told me I was "a fucking liar". I was really scared as he was so aggressive.*

*They were asking me the same things over and over, the same questions about weapons and the militia. They were showing me pictures of people that I didn't recognise. They continued to say bad things about my wife and children. The Colonel really got to me with this stuff as he was telling me my wife was a bitch and was doing things behind my back. He said that I didn't know about this as I was in detention. I was so exhausted after this extreme questioning that I collapsed onto the floor and started vomiting. Someone brought me a bucket to vomit into and a stool to sit on. They had other chairs that would have been more supportive but wouldn't bring one for me. I was so weak. I began shaking and having convulsions.*

**xxxi. Case of XXX (11 June 2007)**

At the DTDF XXX was deprived of sleep by soldiers who banged on the hatch of his cell and made very loud noises. He was also threatened, on an almost daily basis, that if he did not confess his wife would be brought to the base and raped in front of him.

## Excerpt from Witness Testimony<sup>193</sup>

*During this interrogation, I was accused of killing citizens and Coalition Forces. I asked for proof, but the interrogator said they did not need proof. He told me I should confess because “we have our ways to make you confess”. This interrogator, like other interrogators, threatened to bring my family and torture them if I did not confess. They threatened to rape my wife. They also told me that I would be detained until I was 100 years old and my children would be married and everyone would have forgotten about me. They said many ugly things. The female interrogator said the same disgusting things as the males. I believed what they were saying. When I saw how violent they were, I thought that they were capable of anything, even abuse of my family. Even when they were just searching me and the other detainees, they would do it in the most violent and infuriating way possible in order to wear us down.*

*The interrogations all followed the same pattern, and often involved silly questions about my family and my work. The questions seemed very trivial. They would often shout at me. I was constantly asking for a doctor because I was in such pain. They told me I could only see a doctor if I confessed. I had so much pain in my arms and ribs that I told them “I will sign anything. Just take me to the doctor.”*

*Over my thirty days in solitary confinement, I was interrogated about one hundred times. They would usually last around an hour. I would be standing up the whole time, which was extremely uncomfortable.*

*Conditions in my solitary cell were very bad. Every evening was a war of nerves. The soldiers would slam the hatch in my cell to produce a very loud noise in order to prevent me from sleeping. Detainees were supposed to be permitted five cigarettes a day. They only allowed me to have three and then said, “you took the other two. Don’t you remember?” They did this just to frustrate me and to provoke me.*

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<sup>193</sup> Annex C4, Letter before Claim, 21 September 2010.

*One day, representatives of the Red Cross came to inspect the solitary confinement cells. I was shouting to them from my cell, telling them about the pain in my side and in my arms, but they did not come to see me. Over the thirty days, I was held in three or four cells. They did not know where to put me when the Red Cross came to visit. They moved me because they did not want the Red Cross to see the state I was in – my long beard, my unkempt hair, and my aching arms and side.<sup>194</sup>*

**xxxii. Case of XXX (July 2007)**

XXX was held in solitary confinement and repeatedly interrogated during his detention at the DIF in July 2007. During his interrogation, female interrogators attempted to sexually humiliate and degrade him through actions, threats and insinuations that were deeply offensive, both religiously and culturally.

**Excerpt from Witness Testimony<sup>195</sup>**

*I was humiliated terribly in the interrogations. The young female soldier in particular was humiliating. At first I have just said to my solicitor that he could imagine the things that she did because I find it difficult to talk about but he has urged me to recount what happened. As I have explained, she was always insulting Islam. More than once she lay down on the table in front of me. She also used to come very close to me and stand with her back to me so that her bottom was almost touching my knees (because I was raised up on the plastic bottles) and would talk to the interpreter. She was always implying that if I confessed I could do sexual things with her. For example, she would say, “why don’t you just confess and have some fun” whilst pointing at herself. Sometimes she bought a chair close to me and sat on it whilst spreading her legs wide open and leaning backwards.*

*On about the 17<sup>th</sup> day in solitary confinement, the female interrogator was interrogating me as usual and she was dressed as she always did, with bra and short shorts. However, after about 10 minutes she took off her clothes so that she was completely naked. She then lied down on the desk in front of me. For about half an hour she was just moving around and putting her legs in different positions and then*

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<sup>194</sup> Statement, paragraphs 19-23.

<sup>195</sup> Annex B39.

*she dressed again. About two days later she did the same thing again. However, on this occasion she stayed naked for about one hour. She was sitting on a chair in front of me and moving around. She asked me what I would think if she came to visit me in my cell and I said no thank you. I had complained about this after the first time that she had done this but obviously nothing had changed. There was an interpreter in the room during these occasions who was an Iraqi.*<sup>196</sup>

## **Conclusions Regarding Interrogation in JFIT**

The first 85 PIL cases, involving 109 individuals, that were analysed in the first *Ali Zaki Mousa* proceedings deal with 2,193 allegations.. The majority of these relate to practises and techniques used at JFIT. This number would have increased significantly if this PIL analysis had dealt with the additional cases subsequently before the Court of Appeal in those proceedings. It is obvious that if this analysis were now to be based on the 412 cases (the approximate number now of detention and cruelty cases being handled by PIL) the numbers of potential allegations would rise dramatically. Accordingly, the numbers of allegations relating to JFIT's use of coercive interrogation techniques will eventually number many thousands.

The genesis of JFIT's use of coercive interrogation techniques in the Chicksands (JSIO) training is referred to above at chapter IV D (4).

### **5) Other Killings of Civilians in Custody**

We have already detailed above the Baha Mousa incident. However, this was not the only killing of a detainee by UK Services Personnel in Iraq. On 20 May 2003, a UK Officer and lawyer, Lieutenant Colonel Nicholas Mercer, distributed Fragmented Order number 152, which indicated as follows:

*There have recently been a number of deaths in custody where Iraqi civilians have died whilst being held by various units in Theatre. At the same time, the ICRC have advised that they have received a number of complaints about the handling of detainees by coalition forces. A number of these cases are currently being investigated by the SIB [Special Investigation Branch] but all units in Theatre are to ensure that all*

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<sup>196</sup> Statement, paras. 42 and 43

*persons detained by UK Services Personnel are treated with humanity and dignity at all times.*<sup>197</sup>

Lt. Col. Mercer was the most senior lawyer in Theatre at that time. Fragmented Orders were widely circulated throughout the Armoured Division in Iraq and the Battlegroups comprised within it.

On 21 July 2009, the then Service Personnel Minister, Mr Bob Ainsworth MP, stated as follows to Parliament regarding deaths in custody in Iraq:

**“21 July 2009 : Column 1183W**

Service Personnel: Detainees

**Adam Price:** To ask the SSD what the names are of all detainees who have died in the custody of UK Services Personnel in each year since 2001; and what the (a) date and (b) cause of death was in each case. [260499]

**Mr. Bob Ainsworth** [*holding answer 3 March 2009*]: The following table lists the detainees that have died while within the custody of the UK in Iraq. Where known, the official cause of death is included. However, burial is often within 24 hours in accordance with religious custom, preventing a post mortem from occurring.

<i>Operation Telic</i>		
<i>Date of death</i>	<i>Name of deceased</i>	<i>Post Mortem Cause of Death</i>
12 April 2003	XXX	Not established
8 May 2003	XXX	Drowned
8 May 2003	XXX	Heart Attack
17 May 2003	XXX	Not established

<sup>197</sup>[http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_180310/mod019145.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_180310/mod019145.pdf) . See also Annex D1, First Witness Statement of Philip Shiner in *Ali Zaki Mousa(1)*, “in May 2003 at least 8 Iraqi civilians had died whilst in custody with various UK units.”

24 May 2003	XXX	Not established
7 August 2003	XXX	Not established
15 September 2003	Baha Mousa	Asphyxia
10 April 2004	Unknown	Not established”

On the basis of this information provided to the UK Parliament in 2009:

- four Iraqi persons had died in UK custody by the time of Nicholas Mercer’s Fragmented Order Number 152 on 20 May 2003;
- another four Iraqi persons died in UK custody following the Order (one of these deaths occurred only four days later);
- a total of eight Iraqis died in UK custody during UK operations in Iraq.

However, the precise number of Iraqi deaths in custody for the period March 2003 until December 2008 is unknown as the UK Ministry of Defence has not provided full disclosure of this information. By the time of Fragmented Order 152, at least eight Iraqi persons had died in UK custody, and PIL is aware of at least another four deaths after this date.<sup>198</sup>

Further, we note that an earlier parliamentary answer, given on 23 March 2004, contained a longer list of names but without conceding that the men had died within UK custody. It stated as follows:

**“Tuesday 23 March 2004**

**Adam Price:** To ask the SSD

(1) where and on what date (a) XXX, (b) XXX, (c) XXX, (d) XXX, (e) XXX, (f) XXX and (g) XXX died; and what the cause of death was in each case;  
[154352]

<sup>198</sup>Richard Norton-Taylor, Tuesday 16 March 2010, *Baha Mousa inquiry: Eight or more civilians died in British custody*, <http://www.theguardian.com/world/2010/mar/16/baha-mousa-inquiry>

(2) where and on what date (a) XXX, (b) XXX, (c) XXX, (d) XXX, (e) XXX, (f) XXX, (g) XXX and (h) XXX died; and what the cause of death was in each case. [154357]

**Mr. Ingram:** The deaths occurred within the UK Area of Operations, though it is not the purpose of the SIB inquiry to determine the cause of death.

<b>Name</b>	<b><i>Date of death</i></b>
XXX	8 May 2003
XXX	8 May 2003
XXX	11 May 2003
XXX	17 May 2003
XXX	18 May 2003
XXX	26 May 2003
XXX	15 June 2003
XXX	24 October 2003
XXX	24 May 2003
XXX	2 September 2003
XXX	15 September 2003
XXX	2 August 2003
XXX	29 April 2003
XXX	3 May 2003
XXX	5 May 2003 “



An investigation by the OTP may reveal further deaths occurring in custody situations. However, the apparent cessation of deaths in custody after 10 April 2004 despite the numbers in UK custody continuing to increase after this date suggests strongly that these deaths in custody cannot be attributed to natural causes. For example, the cause of death of Baha Mousa was not solely attributable to “*asphyxia*”, as was stated to Parliament in 2009. It was also a result of prolonged and brutal physical assaults, as the conclusions of the BMI subsequently showed. We set out below further details in relation to the incidents of unlawful killing of persons in the custody of UK Services Personnel in Iraq that are known to the authors of this communication.

We also detail below examples of Iraqi civilians killed by UK Services Personnel outside custody situations, but in circumstances giving rise to concerns that war crimes of wilful killing and serious violations of the laws and customs applicable in international armed conflict may have occurred. There are eight accounts included below. However, there are a total of eleven named deaths in custody which are at present known to PIL. These figures have come from the *R (Ali Zaki Mousa (No.2)) v Secretary of State for Defence* proceedings.

## **Summaries and Exemplary Cases**

### **i) Case of XXX**

XXX was an Iraqi citizen detained by UK Services Personnel. He died in custody whilst being transported by UK RAF personnel on 11 April 2003. The parliamentary answer above states the cause of death as “*not established*”. However, subsequent investigations by the Guardian newspaper obtained original documentation<sup>199</sup> which recorded an anonymous complaint that “*three RAF Regiment personnel on board the helicopter had kicked, punched or otherwise assaulted Mr Mahmud leading to unlawful killing.*”<sup>200</sup> That investigation also revealed that UK Services Personnel had operated in Western Iraq, outside their area of operation, in relation to secret detention sites involving Special Forces and a US military unit

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<sup>199</sup> Available at <http://www.guardian.co.uk/world/interactive/2012/feb/08/iraq-military?intcmp=239>

<sup>200</sup> The Guardian, *RAF helicopter death revelation leads to secret Iraq detention camp*, 7 February 2012 (at <http://www.guardian.co.uk/world/2012/feb/07/iraq-death-secret-detention-camp>)

known as Task Force 20. Task Force 20 are the subject of a Human Rights Watch report entitled *No Blood, No Foul*<sup>201</sup>, which condemned the unit as being responsible for “*some of the most serious allegations of detainee abuse*” in Iraq. This death has now been the subject of investigation by IHAT which has reported its findings to the RAF police. However, the outcome of those investigations is not known. Certainly, no arrests have been made to the knowledge of the authors. All of the matters implicated by the death of XXX call for investigation by the OTP. In particular, the OTP needs to focus on the role of UK Special Forces in this Operation and elsewhere in Iraq during the period March 2003 – December 2008.

**ii) XXX**

XXX is known to have been killed on 29 Apr 2003. He was not referred to in the answer to Parliament in 2009, but had been referred to in the earlier 2004 statement. He was mentioned at that time in articles in *The Independent* and *The Mirror* newspapers.<sup>202</sup> *The Guardian* reported in July 2010 that witnesses had informed them that he had been shot in the abdomen by a UK soldier after the door of his car struck the soldier. He was then dragged from the car and beaten by UK soldiers before dying later in hospital.<sup>203</sup>

**iii) XXX**

XXX was a XX year old boy, who died on 8 May 2003. His body was found in the Shatt al-Basra canal in Basra. He had drowned. Eye witnesses, including another boy who received the same treatment, reported that XXX was arrested by Iraqi police and UK soldiers before being forced by the soldiers to swim across the canal<sup>204</sup>. Four soldiers (three from Irish Guards, one from Coldstream Guards) were subsequently investigated by the RMP and found not guilty of manslaughter in a Court Martial in June 2006. In the course of subsequent civil damages proceedings, the UK Government admitted that XXX died from an unlawful assault

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<sup>201</sup><http://www.hrw.org/sites/default/files/reports/us0706web.pdf>

<sup>202</sup>Tom Newton Dunn, “18 cases that still need answer”, *The Mirror*, published on 5 May 2004. The article is only available at <http://www.thefreelibrary.com/18+CASES+THAT+NEED+ANSWERS.-a0116206711>

<sup>203</sup> <http://www.theguardian.com/world/2010/jul/01/iraq-deaths-custody-military-legal>

<sup>204</sup>It appears that there were a number of other similar cases where UK Services Personnel caused the drowning of Iraqi civilians in circumstances which would amount to at least unlawful killings. PIL cannot be sure of the number because the MoD have not given full disclosure of the numbers of deaths of Iraqi Civilians whilst in custody with UK Services Personnel. However, references during discussions with Geoff White when he was the Head of IHAT suggest strongly that there are other cases of which PIL are unaware.

by UK soldiers. He was one of the claimants in the *Al-Skeini* proceedings (see below), whose cases were subsequently referred to IHAT, although the outcome of any further investigations are not known.

**iv) XXX**

XXX died on 8 May 2003 in UK custody. The cause of death was recorded as being a heart attack. The RMP investigated the death at the time and took no further action.<sup>205</sup> His family however say that he had no history of heart trouble. The case was included in the Amnesty International report of July 2003, in which concerns as to mistreatment were also raised<sup>206</sup>. Press reports at the time reported the father of a soldier serving at that time as telling the Daily Mail newspaper as follows:

*My son phoned me and was very upset about what he said had happened, it seemed this man had been 'roughed up' and died in custody. A number of the soldiers are extremely upset.*<sup>207</sup>

A copy of the RMP's investigation report was disclosed to the BMI and is enclosed at [Bundle pages 371-376]. It is clearly inadequate, reiterating the "heart attack" explanation, noting that he had been kept hooded, that family members complain of witnessing his abuse, that possessions in the home were damaged at the time of arrest, and that the eldest daughter witnessed the state of her father's body at the hospital ("*he was dirty, his clothes were torn and his face and body were bruised*" (para 3)). A UK medical officer was apparently not available to examine the dead man. Instead, the body was handed over to "*a Czech Republic Army Doctor who, without comment or examination, immediately referred him to an Iraqi Doctor, namely [redacted]*" (para 17), a Post Mortem was not carried out (para 19), the Iraqis handling the body appeared to have had "*no formal qualifications*" (para 19) and the doctor who signed the death certificate did so "*without conducting any formal examination of the body*" (para 20).

**v) XXX**

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<sup>205</sup> See report at:

[http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_160210/mo\\_d052221.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_160210/mo_d052221.pdf)

<sup>206</sup> <http://image.guardian.co.uk/sys-files/Guardian/documents/2003/07/23/MDE1415703.pdf>

<sup>207</sup> <http://www.aljazeeraah.info/News%20archives/2003%20News%20archives/June%202003%20News/5n/UK%20Soldiers%20Questioned%20Over%20POW%20Deaths.htm>

XXX was a schoolteacher, arrested along with his son on 17 May 2003, when UK soldiers searched houses in his street and found a rifle in his home. The Guardian newspaper reported that his son alleged they were both slapped and kicked and that his father was repeatedly hit with a rifle butt as he was taken away for questioning by UK Services Personnel. He later died in custody in unexplained circumstances. The Parliamentary answer of July 2009 cites the cause of death as '*not established*'. XXX's other son says that on viewing his father's body he saw bruises and the body was covered in mud. A RMP investigation was conducted without further action being taken.<sup>208</sup>

**vi) XXX**

XXX is reported to have been pushed into the water near a marine base in Basra by soldiers from 32 Engineer Regiment. He died on 24 May 2003, only two weeks after the death of XXX (above) in strikingly similar circumstances. However, the Parliamentary answer of July 2009 cites the cause of death as '*not established*'. Again, an RMP investigation was conducted into the death without result. A news report in May 2005 stated that the Army Prosecuting Authority was deliberating whether to charge soldiers. In 2011, it was reported that the UK Government compensated his family with £100,000.00.<sup>209</sup>

**vii) XXX**

Little is known about the death of XXX in UK custody, beyond the date of his death – 7 August 2003 – and his being named in the Parliamentary answer of July 2009, which cited the cause of his death as '*not established*'.

**viii) XXX**

Again, little is known about the death of XXX. He was not referred to in the parliamentary answer of July 2009. But in the earlier 2004 answer, the date of his death was given as 2 August 2003. The Guardian reported on 1 July 2010 that:

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<sup>208</sup><http://www.guardian.co.uk/world/2010/jul/01/iraq-deaths-custody-military-legal>

<sup>209</sup><http://www.guardian.co.uk/world/2011/jul/21/iraq-drowning-UK-army-compensation>

*A soldier was charged with the murder of Said, a lawyer and a father of nine children, who was shot in the back, allegedly while resisting arrest, but the case was later abandoned.*<sup>210</sup>

#### **ix) The Al-Sweady Incident**

PIL is instructed by nine detainees detained by UK Services Personnel in Maysan province in Iraq on 14 May 2004 following a protracted gun battle and taken to a nearby base known as CAN. PIL is also instructed by the relatives of 20 victims whose bodies were released from that facility the following day. Between them, all of these individuals allege that UK Services Personnel not only tortured and mistreated the 9 surviving detainees, that Iraqi civilians were executed or otherwise unlawfully killed at the battlefield, and that UK Services Personnel also killed civilians within the UK base. These are allegations of the utmost seriousness. A previous investigation by the RMP concluded that no wrongdoing had taken place. However, this investigation was subsequently criticised by the High Court of England & Wales, prompting the establishment of a public inquiry. That inquiry – the Al-Sweady Public Inquiry – is currently underway. Oral hearings are expected to be complete by April in 2014.

#### **Conclusions Regarding Other Killings of Civilians in Custody**

The above incidents constitute the most serious allegations of war crimes and merit the most anxious scrutiny of the OTP. Further investigation by the OTP may uncover evidence of additional killings in custody.

#### **E) Other Available Evidence Indicating the Commission of War Crimes**

In addition to the victims' own testimonies, a number of independent corroborative sources support the conclusion that UK Services Personnel were responsible for the abuse and killing of detainees in their custody amounting to war crimes.

#### **1) Video and Photographic Evidence**

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<sup>210</sup><http://www.guardian.co.uk/world/2010/jul/01/iraq-deaths-custody-military-legal>

Photographic and video evidence recorded by both UK Services Personnel (as part of standard operating procedure, and by individual soldiers) and by Iraqi citizens constitutes an important source of evidence for the OTP in considering investigation.

We describe four relevant videos below:

The first video that deserves consideration is a training video disclosed in the BMI and available on the BMI website under reference BMI02687.<sup>211</sup> It demonstrates that UK military interrogators were trained in the use of aggressive interrogation techniques such as harshing, shown here. The video also shows the throwing of items close to detainees.

The second video was disclosed by the UK MoD in judicial review proceedings brought by the man featured in the video, seeking an independent investigation into his mistreatment and those detained alongside him.<sup>212</sup> Additional videos relating to the same claimant were said to have been lost. The recording is of an interrogation session in JFIT in April 2007. In his Witness Statement), in the *Ali Zaki Mousa* domestic proceedings, Geoff White, the former head of IHAT (see further below) stated that there are currently available over 3,500 such recordings.

The interrogation video (the second video) provides evidence of the use of the following abuses and techniques:

- Sensory deprivation (goggles and earmuffs)
- Food and water deprivation
- Sleep deprivation
- Harshing
- Invasion of intimate space
- Intimidation
- Threats (including, in other interrogations of XXX<sup>213</sup> of death)
- Foul and abusive language
- Disorientation techniques (the demands to pick up and put down the goggles)

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<sup>211</sup>Tactical Interrogation Video, 10 March 2002, available at [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidencev1/bmi02687tacticalquestioninginterrogationharshexamples-pixilated1.wmv](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidencev1/bmi02687tacticalquestioninginterrogationharshexamples-pixilated1.wmv).

<sup>212</sup> Please note that due to legal restraints the second and third video described above cannot be disclosed to the OPT for their own consideration. These videos are not within the public domain and PIL would be breaching a court order if they were to be released. We suggest that the OPT requests copies of the videos from the Ministry of Defence.

<sup>213</sup>See Annex B36.

- Insults to Allah
- Items being thrown

It appears to show practices and techniques that the interrogators believed, even as late as April 2007, to be perfectly legitimate. The trained interrogators on this video know they are being filmed and appear to be completely comfortable with that. This raises serious questions as to how they acted off-camera.

The transcript of the other disclosed interrogation sessions shows the following:

- The use of language that is explicit and extreme, such as the interrogator shouting in session 6: *“Shut up, I’m speaking, fucking cunt. Do you understand cunt. You are a cunt.”* And in session 11 asking *“Have you got a mental nervous problem? Well fucking stop bouncing about then or I’ll knock you out you prick...I hope you die of cancer. I hope your kids die”*.
- The transcript of excerpts from session 7 from 12.25 minutes onwards (page 5 of PJS13) includes a line of questioning regarding the Claimant’s wife. He is then told *“How about I deliberately asked you that question to insult you. Do you think I don’t know about fucking Arabs? Do you think I have not been in Iraq for 5 years? Do you not think I’ve seen a thousand cunts like you?”*
- The use of threats, such as in session 11 when the detainee is informed that *“If I had a chance, I would take you outside and kick you fucking round [...] and then I would probably put a bullet in your head.”*
- Suggesting deliberate sleep deprivation, in session 1, the interrogator tells the man *“Your story is a load of crap. So when you come back in you better answer questions cause if you’re tired now, you ain’t seen nothing yet.”* In session 4 the interrogator then says *“He is looking for real rough treatment this fucker like no sleep for three nights.”* In session 8 the detainee himself makes a specific reference to sleep deprivation, describing himself as *“sleepless”* when asked whether he had a *“good night”*.

The statement of the victim given long before this recording was obtained, is broadly corroborated by this video. The victim himself says of the effect of this mistreatment :<sup>214</sup>

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<sup>214</sup>See Annex B38.

*41. I broke down completely. I felt like it was destroying me, to be treated in this way, to be disorientated every time I left my cell, to be at the mercy of the soldiers, to have to run the assault course and to not know where I was or where I was going. I thought this treatment was going to kill me. I started banging my head against the walls of my cell. I was basically trying to kill myself.*

The third video shows the end of another interrogation session of this detainee, which is suggestive of physical abuse outside the interrogation room. The session ends with one of the two interrogators saying to the guard who is removing the detainee from the interrogation room what sounds like “*rough the fucker up*” or possibly “*rough the fucker off*”. Shortly afterwards the interrogator can be heard saying “*fuck him up*”. The detainee is then shown being led fast out of the room, down the corridor and out of sight of the camera. However the camera and the microphone have not been switched off and shortly after the detainee disappears from sight there are sounds of what sounds like a man groaning in pain. This final part of session 8 can be viewed on the DVD. It is numbered “*Video 3*”.

The fourth video is a video that was leaked from a military source to the *News of the World* in February 2005.<sup>215</sup> The video shows three boys being badly beaten and kicked by UK soldiers, whilst another soldier videos the incident and encourages the abuse. The RMP investigated this incident but despite identifying the persons concerned and obtaining an additional video of the abuse (which is not public), the prosecuting authority declined to bring charges against the soldiers.<sup>216</sup>

## **2) Documentation Disclosed by the UK Government**

The UK Government has also disclosed documentation to the BMI and in judicial review proceedings seeking an independent investigation that corroborates the victims’ allegations. It must be stressed, that PIL have received only very limited disclosure in relation to a limited number of the hundreds of complainants recorded herein. The corroborative material

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<sup>215</sup> The video is available at <http://www.youtube.com/watch?v=fxi5kxzx3V0>.

<sup>216</sup> BBC News UK, “No Charges over Iraq Video Riots,” 4 January 2007, available at <http://news.bbc.co.uk/1/hi/uk/6230711.stm>.



available to them is therefore very slight. Nevertheless, the Report of the Baha Mousa Inquiry is included in the accompanying Bundle.<sup>217</sup> Some key points:

- Documentation has been disclosed in relation to the detainee interrogated in the video noted above. The interrogators' interrogation reports note on one occasion: "*the subject has been openly crying in his cell.*"<sup>218</sup> The detainee's medical records show that he was placed on "*SO [suicide observation] list by DIF MO [medical officer] due to his low moods*" and that he informed doctors that "*some of his hair is falling out and he believes that this is down to stress.*"<sup>219</sup> In June 2007 the MO recorded in an e-mail: "*this internee is showing evidence of some psychological symptoms resulting from his internment.*"<sup>220</sup>
- A document dated 16 November 2005 apparently reviews the legality of sleep deprivation, commenting on whether there should be some humane minimum. It says: "*The suggestion of a minimum of four hours uninterrupted sleep in Ref B, as I understand it, has no basis in law.*"<sup>221</sup> The proposal commented on was not provided to PIL by the UK Government, despite requests.
- Daily Occurrence Books, which record movements of detainees around the JFIT facility, show the following entries:<sup>222</sup>
  - o 14 August 2006 at 1700: "*1 x MPS (JFIT) visited guardroom instructed us to take internees out of cells then placed back in cells every 15 minutes also to get them up and dressed at random times.*"
  - o 22 August 2006 reads: "*15 minute checks complete, plus was informed that int 984-983-973 are to be kept awake between [illegible] and 0400.*"
  - o 16 September 2006 records: "*TQ request 987 + 984 be kept awake till 0400 then 0800 onwards at 0358 987 said he was being bullied and asked to see Sergeant Major.*"
- Watchkeepers' Logs, monitoring radio traffic and movements at the base, also record sleep deprivation practices:<sup>223</sup>

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<sup>217</sup> Annex K1.

<sup>218</sup> Annex K1, p. 167.

<sup>219</sup> Annex K1, p. 171.

<sup>220</sup> Annex K1, 172.

<sup>221</sup> Annex K1, p. 209.

<sup>222</sup> Annex K1, pp. 210-2.

- 16 September 2006: “*N Compound checked internee 987 wants to see MPS CSM in morning – says he is being bullied – he is woken every 30 mins as part of TQ.*”
- Several references are made to ‘Operation Wideawake’, including the following on 20 September 2006 at 0315: “*Op wide awake conducted using white light*”.
- An internal JFIT document entitled “*Draft Field Exploitation Team Standing Operating Procedures*” dated 19 September 2006 states: “*The Guard force personnel will bring the internee into the room and remove the ear defenders of the internee(s). Blindfolds will remain on the internee(s) until the interrogator instructs the removal of them from the internee. The interrogator at this point has charge of the internee(s)*”<sup>224</sup>.
- Statements obtained from military witnesses in the course of RMP investigations contain comments as to JFIT’s activities. For example, Private Mepsted stated as follows:<sup>225</sup> “*In relation to him being “spun about” prior to interrogation, I never personally witnessed this occur, but I know that it did happen in order to disorientate the detainee. The MPS would not have done this, it would have been FET [JFIT].*” A Major provides a detailed description: “*When taken outside the cell, the internee would be walked in circles for an indeterminate period in order to disorientate him, again for security purposes.*”<sup>226</sup>
- Following interrogation the victims would be taken, with goggles and earmuffs on, back to their isolation cells in JFIT. Major Whatmough’s evidence suggests that their treatment at this time still sought to prolong and exploit the ‘*shock of capture*’<sup>227</sup>: “*Tqing would start promptly after processing if detainees were in a fit state. This was to make use of the shock of capture*”. The ‘*Draft Field Exploitation Team [JFIT] Standing Operating Procedures*’ states: “*The interrogator will conduct the session*

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<sup>223</sup> Annex K1, pp. 213-4.

<sup>224</sup> Annex K1, p. 231.

<sup>225</sup> Annex K1, p. 252.

<sup>226</sup> Annex K1, p. 257.

<sup>227</sup> Annex K1, p. 259.

*using the approach outlined and agreed by the controller in the interrogation plan in order to maintain the shock of capture for the respective individual.”<sup>228</sup>*

- Corroborating allegations that an elderly man’s clothing had been torn and his genitals exposed to his family upon arrest, Captain Whillis, OC of the BPF, stated to the RMP that *“I can recall on a couple of occasions that persons would be naked when they initially arrived at the BPF.”<sup>229</sup>*
- The medical records relating to one detainee – XXX – who was examined upon arrival at a UK facility after arrest, notes as follows:

*“I noted the following injuries:*

- a) *Soft tissue swelling to the back of the head (occiput)*
- b) *Bruising (extensive) to the left and right shoulders[...]*
- c) *Tender over right shoulder tip from bruising [...]*
- d) *1x1x2cm graze to the mid upper back*
- e) *15cm superficial longitudinal graze to right mid-lower part of upper forearm.*
- f) *Bruise behind left knee*
- g) *Right hand generally swollen with boney tenderness over the middle and ring finger metatarsals*
- h) *Small bruise to right maxilla (cheek) area.*
- i) *Small graze to front of chest*
- j) *Graze to right wrist from cuffs*
- k) *Left tympanic membrane (ear drum had slight blood streak which appeared fresh*  
*[...]XXX did not tell me during the examination how he had been injured, nor did I*  
*ask him, due to the circumstances and the injuries appeared to me to be fresh and of*

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<sup>228</sup> Annex K1, pp. 230-1.

<sup>229</sup> Annex K1, p. 235.

recent origin. I did not notice any old injuries or scars to XXX, on his back or other areas of his body [...]

Later that same day about 1700 hrs at DTDF, I conducted a second examination of XXX. I noted the following injuries, not detailed previously:

- l) *Superficial graze to right upper calf*
- m) *2 x 2 cm circular graze of front upper right thigh (possibly as pictured in images 12 and 13 but I cannot be sure)*
- n) *Superficial linear bruise to upper posterior thigh*
- o) *Superficial grazes to right side hip area*

[...]In my opinion, XXX's injuries were fresh and I can state, no older than 72 hours as there was no yellowing of the bruises. He did not give me a history of the injuries and therefore I cannot comment on the mechanism of injury."

We refer to disclosure to the BMI throughout this submission, although one additional item of BMI disclosure merits mention here, as it did not directly relate to the Baha Mousa incident itself. A diary kept by one soldier – Private Stuart Mackenzie – recorded abuse of Iraqi civilians as a matter of daily routine, in uncompromising terms. His diary entries culminate in the killing of Baha Mousa.<sup>230</sup>

***“Thursday 24/07/03***

*Still on QRF [quick reaction force] + called out about 12pm. Ali Baba [soldiers' term for suspected Iraqi looters] stealing steel rods from outside camp. Chased them. Asp and Benny swam the sewer to catch him. I warning shot fired by soldier X [his identity has been protected for legal reasons]. Man caught and roughed up. Head under water. He is going to be ill [...]*

***Friday 25/07/03***

*Leg and a winged [threw] Ali Baba into Shat al Arab [Shatt al-Arab canal] for stealing wood. Piss funny.*

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<sup>230</sup> See The Guardian UK, “Diary of a Squaddie,” 28 April 2007, available at <http://www.guardian.co.uk/uk/2007/apr/28/iraq.military>.

**Monday, 28/07/03**

*Out on VCP [vehicle checkpoint] and went for a swim in the Shat-al-Arab. Caught some Ali Babas. Leg and a wing three Ali Babas into river. Tried to row their boat. Well hard.*

**Tuesday, 29/07/03**

*Still on op [operation] about 2am. Ali Babas x 5 on boat moored on dry dock. 10 shots fired. 1x Ali Baba 9 x soldier. 1 Ali Baba hit twice in chest. Moaning + dying. Artificial bleed. Died before being casevaced [medically evacuated]. Soldier X, me + Graham on scene. 1 Ali Baba towards us. X fired 1 x shot. Fell in water. Not found. Stayed on op. Remaining 3 Ali Babas left in boat. Came back after 2 hours to rob more + possible attack on us. We withdrew. OC [officer commanding] gave us a beer each. Made our statements.*

**Undated [p. 271]**

*Up at 4am [...] At Bassra [sic] Bank by 6am. Public order training for police. Women with leather faces pushing to claim pension. Punched a policeman for not doing as told. Sunburn on arms Finish @ 1pm. Sore feet and very tired. Out to VCP at 4pm. Found 5 SMGs [submachine guns] - UK issue + 1 9mm pistol + mags [magazines]. Arrest perp [perpetrator] and take car. Hostage beaten up - broken wrist, concussion, sore bollocks. Raid on market to no avail. Kids throwing stones. Hit on calf and shoulder - no damage. Back for 9pm [...]*

**Undated**

*Every other multiple seems to have a day off, apart from us - again. Up at 7am then out at 8am-11am. Petrol station - boring, no power so no petrol could be pumped [...] A big Iraqi punched Mr Rodgers and got filled in immediately by about 10 of us. He was bleeding from his head, face and ears. He was battered from head to toe so we let him go instead of arresting him.*

**Thursday 11/9/03**

*On 4 hour patrol [...] found anti-aircraft gun [...] Horse bit me. Found 3 Ali Babas at WTP7. Beat them up with sticks and filmed it - good day so far.*

***Friday - Sat 13/9/03***

*House raid, for hours, nothing found. Caught 3 Ali Babas - beat fuck out of them in back of Saxon. I had a punctured lung + broken ribs + fingers. I had a dislocated shoulder + broken fingers.*

***Sunday 14/9/03***

*Up at 4.45am, on task by 5.30. Soft knocks at a hotel. Found money. Dinar Dave [a fellow soldier who was fully named in court] was caught stealing and grassed up everyone else. We were searched but nothing found. We also found 3 x AKs [AK47s], 3 x pistols, 2 x grenades, Russian, super binos, NBC kit [nuclear, biological, chemical warfare protection], bayonets and electrical devices for IEDs [improvised explosive devices]. Good find. Back at 12.30pm [...] Out a few times then to main for conditioning prisoners. [words scribbled out] all night - no sleep for them - about 3 hours for me. (7pm)*

***Monday 15/9/03***

*Still conditioning the terrorists. They are in clip [trouble] big time. Finally got back to camp at 13.30pm. Back to BG [brigade] Main for 10pm. The fat bastard [believed to be Baha Mousa] who kept taking his hood off and escaping from his plasticuffs got put in another room. He resisted [words scribbled out]. He stopped breathing. Then we couldn't revive him. [words scribbled out] What a shame.*

***Tuesday 16/9/03***

*Still guarding the prisoners, Back to Camp Stephen for b/fast at 7.45am. Back to guard prisoners - took them to Um Kasar [Umm Qasar]: found out I had a fractured neck, I had a punctured liver, I had a massive hernia. The others were just really beaten up. It's going massive. It's a SIB [Special Investigation Branch of the RMP] investigation. Murder."*

### 3) Third-party Observers' Reports

A number of international organisations and non-governmental organisations produced reports documenting mistreatment of detainees by coalition forces (including the UK).

Amnesty International first published a report on 18 March 2004 entitled *Iraq – one year on the human rights situation remains dire*, which drew a critical assessment of the coalition forces' standards of treatment of detainees. It is explained that “*Amnesty International has on numerous occasions reminded the occupying powers of their obligations and in many areas they have failed to respect them*”<sup>231</sup> and reported that:

*Thousands of Iraqis have been detained, often in extremely harsh conditions, in unacknowledged centres. Many have been tortured or ill-treated; some have died as a result. [...] Many detainees have alleged they were tortured and ill-treated by US and UK Services Personnel.*<sup>232</sup>

The ICRC made a lengthy and serious complaint to the UK Government about standards of treatment dated February 2004 which was leaked to the public on 7 May 2004.<sup>233</sup> That report stated that:

*On 1<sup>st</sup> April [2003] the ICRC informed orally the political advisor of the command of UK Services Personnel at the Coalition Forces Central Command in Doha about methods of ill-treatment used by Military Intelligence Personnel to interrogate persons deprived of their liberty at the internment camp at Umm Qasr. This intervention had the immediate effect to stop the systematic use of hoods and flexi-cuffs in the interrogation section of Umm Qasr (JFIT).*

The Report summarised the “*main violations, which are described in the ICRC report*” as including:

*Brutality against protected persons upon capture and initial custody, sometimes causing death or serious injury / Absence of notification of arrest of persons deprived of their liberty to their families causing distress among persons deprived of their*

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<sup>231</sup> Amnesty International “One Year on the Human Rights Situation Remains Dire,” March 2004, p.3, available at <http://www.amnesty.org/en/library/asset/MDE14/006/2004/en/abb12f40-d601-11dd-bb24-1fb85fe8fa05/mde140062004en.pdf>.

<sup>232</sup> *Ibid.*, pp. 3, 11.

<sup>233</sup> International Committee of the Red Cross, Report on the Treatment by the Coalition Forces of Prisoners of War and other Protected Persons by the Geneva Conventions in Iraq during Arrest, Internment and Interrogation, February 2004, available at <http://www.derechos.org/nizkor/us/doc/icrc-prisoner-report-feb-2004.pdf>.

*liberty and their families / Physical and psychological coercion during interrogation to secure information / Prolonged solitary confinement in cells devoid of daylight / Excessive and disproportionate use of force against persons deprived of their liberty resulting in death or injury during their period of internment.*

ICRC explained that ill-treatment during interrogation:

*was not systematic, except with regard to persons arrested in connection with suspected security offences or deemed to have an ‘intelligence’ value. In these cases, persons deprived of their liberty under supervision of the Military intelligence were at high risk of being subjected to a variety of harsh treatments ranging from insults, threats and humiliations to both physical and psychological coercion, which in some cases was tantamount to torture, in order to force cooperation with their interrogators.*<sup>234</sup>

We address below (Section VI, B) how the ICRC report is conclusive proof that senior members of the military and civil service must have been aware of the use of hooding and unlawful interrogation of detainees upon receipt of the report in February 2004.

Three years later, in October 2007 the London-based non-governmental organization REDRESS published a lengthy report, *UK Army in Iraq: Time to Come Clean on Civilian Torture*. This report reviews several severe detention cases where Iraqis had been ill-treated and tortured by UK Services Personnel and it laid out accountability elements for these crimes. Amongst other findings, REDRESS concluded that the “*use of conditioning techniques in Iraq*” by UK Services Personnel were “*rampan*” and led to multiple detainee abuse.<sup>235</sup>

## **F) Overall Factual Conclusion**

The testimonies and the tables provided<sup>236</sup> demonstrate the repeated use of abusive detention and interrogation practices by UK Services Personnel in Iraq. These allegations are corroborated by material from the UK Government and independent third parties. It is

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<sup>234</sup> *Ibid.*

<sup>235</sup> REDRESS, “UK Army in Iraq: Time to Come Clean on Civilian Torture”, October 2007, p. 56, available at [http://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>236</sup> See Annexes A and B.



submitted that further investigation by the OTP will provide further corroboration and additional evidence.

The allegations include killing of detainees in custody and, connected thereto, the use of specific techniques—including, but not limited to the five techniques—that are clearly prohibited under domestic UK law, as well as international humanitarian law. The above accounts exemplify practices that, when viewed collectively, reveal a clear and deeply disturbing picture of systematic and widespread detainee abuse. At every stage of detention, from the period of initial arrest, during transit, and after arrival at UK detention facilities and in both temporary processing facilities and longer-term internment centres, recurring patterns of detainee abuse clearly emerge. Many aspects of this mistreatment, for example, the use of hooding or specific coercive or humiliating interrogation techniques such as harshing, were pervasively carried out over the course of six years of UK detention operations in Iraq.

From the sample of 109 detainees highlighted in the six tables, it can be seen that similar instances of abuse were recurring during every stage of detention, in many and various UK military facilities, and during every year of UK military operations in Iraq from 2003 to 2008. Thus the thousands of allegations of abuse from this small sample of 109 detainees most likely represent only the tip of the iceberg in terms of the actual scale of abuse experienced by Iraqis in UK custody during these times.

In total, the witness testimonies included in this communication involve allegations of 145 different techniques that either in isolation or in combination with broader detention conditions may amount to torture; cruel, inhuman and degrading treatment; or outrages upon person dignity.

In relation to the tabulation of the allegations, in July 2010, the High Court of England & Wales ruled that “*there is an arguable case that the alleged ill-treatment [of Iraqis] was systematic, and not just at the whim of individual soldiers.*”<sup>237</sup> Similarly, the BMI concluded that evidence in relation to “*other incidents of violence against detainees does demonstrate that the events of 14 to 16 September,*” in which Baha Mousa and the nine other detainees held with him in a temporary UK detention facility were so severely abused as to result in Mousa’s death with 93 separate injuries, “*cannot be described as a ‘one off’ event.*”<sup>238</sup>

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<sup>237</sup> *Ali Zaki Mousa and others v SSD*[2010] EWHC 1823 (Admin), para. 6.

<sup>238</sup> Report of the Baha Mousa Inquiry, *supra* note 40, Summary of Findings, Vol. III, p.1315, para. 199.

In order to clearly show that the use of these techniques, whether in isolation or in concert, potentially constitute war crimes within the jurisdiction of the ICC and provide ample evidence to warrant further investigation by the OTP, the following section will describe the overarching legal framework prohibiting coercive interrogation techniques under the ICC Statute and customary international law, as well as a detailed legal analysis of the provisions and relevant case law applicable to the specific coercive interrogation techniques alleged herein.

## V) LEGAL ANALYSIS OF ALLEGED WAR CRIMES

Article 53(1) provides that in deciding whether to initiate an investigation, the Prosecutor shall consider whether:

*“(a) the information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;*

*(b) the case is or would be admissible under article 17; and*

*(c) taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.”*

In this Chapter, we examine whether, pursuant to Article 53(1)(a) of the ICC Statute, there is a reasonable basis to believe that crimes within the jurisdiction of the court have been committed. We note that in previous requests for the authorization of an investigation, the Pre-Trial Chamber has stated that the “*reasonable basis to believe*” standard in Article 51(3)(a) of the ICC Statute is “*the lowest evidentiary standard provided for in the Statute.*”<sup>239</sup> We also take into account the filtering process as described in the OTP’s Policy Paper on Preliminary Examinations.<sup>240</sup>

In Part A, we set out the legal requirements for war crimes under Article 8 of the ICC Statute. In Section 1, we set out the requirements relating to the existence of an armed conflict, the character of the armed conflict, and the nexus between the acts committed and the armed conflict. In Section 2, we discuss the threshold in Article 8(1) of the ICC Statute. In Section 3,

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<sup>239</sup>ICC Pre-Trial Chamber II, *Decision Pursuant to Article 15 of the ICC Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya* (ICC-01/09-19-Corr), 31 March 2010, para. 27, “[...] the Chamber considers that this is the lowest evidentiary standard provided for in the Statute. This is logical given that the nature of this early stage of the proceedings is confined to a preliminary examination. Thus, the information available to the Prosecutor is neither expected to be “comprehensive” nor “conclusive,” if compared to evidence gathered during the investigation. This conclusion also results from the fact that, at this early stage, the Prosecutor has limited powers, which cannot be compared to those provided in Article 54 of the Statute at the investigative stage.” See also, Office of The Prosecutor, *Situation in the Republic of Côte d’Ivoire*, Request for Authorisation of an Investigation pursuant to Article 15 (ICC-02/11), 23 June 2011, para. 23, “In examining the available information, the Prosecution has borne in mind the nature of the proceedings under article 15, the low threshold to reach the relevant findings, as well as the object and purpose of the authorisation procedure decision”; *Ibid.*, fn. 14, “The Prosecution stresses that for the purposes of the investigation and the development of the proceedings, it is neither bound by its submissions, with regard to the different acts alleged in its article 15 application, nor by the incidents and persons identified therein, and accordingly may, upon investigation, take further procedural steps in respect of these or other acts, incidents or persons, subject to the parameters of the authorised situation.”

<sup>240</sup>OTP, *Policy Paper on Preliminary Examinations*, *supra* note 14, , pp. 18-20.

we set out relevant types of conduct constituting war crimes under Article 8(2) of the ICC Statute in international and non-international armed conflicts, and the requisite mental elements.

In Part B, we apply the facts of the situation in Iraq to the legal requirements discussed in Part A. In Section 1, we discuss the nature of the armed conflict in Iraq and the nexus between the conduct alleged to have been committed by UK Service Personnel and the armed conflict. In Section 2, we discuss how the acts committed by UK Service Personnel in Iraq meet the threshold in Article 8(1) of the ICC Statute. In Section 3, we provide a concise analysis demonstrating that, in light of the evidence already detailed in Chapter IV, there is a reasonable basis to believe that between 20 March 2003 and 30 December 2008, UK Service Personnel committed war crimes in Iraq. In particular, that the use of the “five techniques” and other techniques by UK Service Personnel constituted war crimes of wilful killing;<sup>241</sup> torture and inhuman treatment;<sup>242</sup> wilfully causing great suffering, or serious injury to body or health;<sup>243</sup> outrages upon personal dignity, in particular humiliating and degrading treatment;<sup>244</sup> and violence to life and person, in particular murder, cruel treatment and torture.<sup>245</sup>

### **A) Legal Requirements for War Crimes under Article 8 of the ICC Statute**

In order to establish that a war crime under Article 8 of the ICC Statute has been committed, the following must be demonstrated:

- i. the existence of an international armed conflict covered by the Geneva Conventions of 12 August 1949 or the laws and customs applicable in international armed conflict; or the existence of an armed conflict not of an international character covered by common Article 3 of the four Geneva Conventions of 12 August 1949 or the laws and customs applicable in armed conflicts not of an international character;
- ii. relevant conduct as set out in Article 8(2)(a),(b),(c) or (e) of the ICC Statute;<sup>246</sup>

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<sup>241</sup> Article 8 (2)(a)(i) ICC Statute.

<sup>242</sup> Article 8 (2)(a)(ii) ICC Statute.

<sup>243</sup> Article 8 (2)(a)(iii) ICC Statute.

<sup>244</sup> Article 8 (2)(b) xxi and Article 8 (2)(c)(ii), ICC Statute.

<sup>245</sup> Article 8 (2)(c)(i) ICC Statute.

<sup>246</sup> Whether or not particular conduct constitutes a war crime will depend on, *inter alia*, whether the armed conflict is international or non-international. See Articles 8(2)(a) and (b) ICC Statute which detail conduct amounting to war crimes in the context of international armed conflict. See also Article 8(2)(c) and (e) ICC Statute, which detail conduct amounting to war crimes in the context of non-international armed conflict.

- iii. the conduct took place in the context of, and was associated with, the armed conflict;<sup>247</sup> and
- iv. the perpetrator had the requisite knowledge and intent;<sup>248</sup>

### 1) Existence of an Armed Conflict, its Character and Nexus to the Acts

#### *Armed Conflict*

The term “armed conflict” is not defined in the Geneva Conventions or the ICC Statute. However, Article 8(f) of the ICC Statute and ICC jurisprudence<sup>249</sup> reflect the definition articulated by the ICTY Appeals Chamber in *Tadić*:

“[...] *an armed conflict exists whenever there is a resort to armed force between States or protracted violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.*”<sup>250</sup>

#### *International Armed Conflict*

With respect to an “*international armed conflict*”, the Pre-Trial Chamber in *Lubanga* (drawing on the *Tadić* decision) considered that an armed conflict is international in character:

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The Trial Chamber in *Lubanga* noted the importance of clearly identifying the nature of the conflict as part of the established framework of the ICC. See *Lubanga* (ICC-01/04-01/06), Judgment, Trial Chamber I, 14 March 2012, para. 539.

<sup>247</sup>Elements of Crimes, Article 8 – War Crimes, pp. 13 – 42.

<sup>248</sup>See discussion below, Part B, Section 3, “Mental Requirements.”

<sup>249</sup>See e.g., *Lubanga* (ICC-01/04-01/06), Judgment, Trial Chamber I, *supra* note 246, para.533 which relied upon the *Tadić* judgment.

<sup>250</sup>*Prosecutor v Tadić*, ICTY (Appeal Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

“... if it takes place between two or more States; this extends to the partial or total occupation of the territory of another State, whether or not the said occupation meets with armed resistance.”<sup>251</sup>

#### *Armed Conflict Not of an International Character*

With respect to the existence of an “armed conflict not of an international character,” the ICC Statute provides two threshold requirements in Article 8(d) and (f). First, an armed conflict requires a certain level of intensity and does not include situations of internal disturbances and tensions. Second, armed conflicts in the territory of a State take place when there is protracted armed conflict between governmental authorities and organized armed groups, or between such groups. With respect to the level of organization and control of armed groups, it is not necessary for the armed groups to exercise control over a territory. Rather, the armed groups must have the ability to plan or carry out military operations for a prolonged period of time, and must be under responsible command (this includes some form of organisation and the possibility to impose discipline).<sup>252</sup>

#### *Nexus Between the Conduct Alleged and the Armed Conflict*

With respect to the nexus between the conduct alleged and the armed conflict, it is a requirement that the conduct took place in the context of, and was associated with, the armed conflict.<sup>253</sup>

### **2) Threshold Requirement - Article 8(1) ICC Statute**

Article 8(1) of the ICC Statute provides that:

*“The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.”*<sup>254</sup>

In the *Letter to Senders Re Iraq* in 2006, the OTP stated:

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<sup>251</sup>*Lubanga*, (ICC-01/04-01/06), Decision on the Confirmation of Charges, Pre-Trial Chamber I, 29 January 2007, para. 209.

<sup>252</sup>*Ibid.*, para. 234; *Bemba*, (ICC-01/05-01/08), Decision Pursuant to Art. 61(7)(a) and (b), Pre Trial Chamber II, 15 June 2009, para. 233.

<sup>253</sup>See Elements of Crimes, Article 8(2)(a) and (b).

<sup>254</sup>Article 8(1) ICC Statute is to be distinguished from the general gravity requirement under Article 53(1)(b) and Article 17 ICC Statute. This is dealt with in Chapter VIII of this Communication.

*“For war crimes, a specific gravity threshold is set down in Article 8(1), which states that ‘the Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes’. This threshold is not an element of the crime, and the words ‘in particular’ suggest that this is not a strict requirement. It does, however, provide Statute guidance that the Court is intended to focus on situations meeting these requirements. According to the available information, it did not appear that any of the criteria of Article 8(1) were satisfied.”*<sup>255</sup>

In other cases, the Court has stated that Article 8(1) is a practical guideline rather than a strict or determinative requirement.<sup>256</sup> The Appeals Chamber in the *Situation in the Democratic Republic of the Congo* found that the requirement in Article 8(1) is not absolute as it is qualified by the expression *“in particular.”*<sup>257</sup> There is no established jurisprudence regarding the contextual elements *“large-scale commission”* and *“plan or policy.”*<sup>258</sup>

At this stage, we note that it is important to distinguish between the analysis of whether there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed, and the analysis of whether a crime is of sufficient “gravity” to justify further action by the Court.<sup>259</sup> Whereas “gravity” is a formal requirement concerning the admissibility of a situation or case, the reference in Article 8(1) to war crimes *“committed as part of a plan or policy or as part of a large scale commission,”* forms a non-mandatory part of the material elements of war crimes under the ICC Statute.

The specific conduct amounting to war crimes is discussed in the following section.

### **3) Acts of Crimes - Article 8(2) of the ICC Statute**

Acts constituting war crimes under the ICC Statute are set out in Article 8(2). The relevant parts of Article 8(2) are as follows:

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<sup>255</sup>Office of the Prosecutor, *Letter to Senders Re Iraq*, *supra* note 11, p. 8.

<sup>256</sup>*Bemba*, (ICC-01/05-01/08), Decision pursuant to article 61 (7)(a) and (b), *supra* note 252, para. 211. The Pre-Trial Chamber stated that this is *“not a prerequisite for the Court to exercise jurisdiction over war crimes ... it rather serves as a practical guideline for the Court”*. We also note the view that Article 8(1) ICC Statute can be described as *“an expedient to be invoked opportunistically rather than a meaningful legal norm.”* William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010), p. 202.

<sup>257</sup>See *Situation in the Democratic Republic of the Congo* (ICC-01/04), Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled *“Decision on the Prosecutor’s Application for Warrants of Arrest, article 58,”* Appeals Chamber, 13 July 2006, para. 70.

<sup>258</sup>Schabas, *A Commentary on the Rome Statute*, *supra* note 256, p. 201.

<sup>259</sup>See also, Chapter VIII of this Communication.

“2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering, or serious injury to body or health;

[...]

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

[...]

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

[...]

(c) In the case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of Service Personnel who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

[...].”

Each of these crimes is discussed below. We first address war crimes in international armed conflict before turning to war crimes in non-international armed conflict.



## War Crimes in International Armed Conflict

### *Protected persons*

It is a requirement of all of the Article 8(2)(a) crimes alleged in this communication<sup>260</sup> that the victims were “*protected persons*” under the relevant Geneva Convention.<sup>261</sup>

“*Protected persons*” under the Geneva Conventions include:

- i. Prisoners of war - this includes prisoners belonging to one of the parties to the conflict, regardless of whether they are members of the Service Personnel, militias or volunteer corps; and<sup>262</sup>
- ii. Civilians - this includes other detained persons, who do not belong to a party to the conflict.<sup>263</sup> This also includes persons “... *who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a party to the conflict or occupying power of which they are not nationals.*”<sup>264</sup>

### *War crime of wilful killing - Article 8 (2)(a)(i)*

“Wilful killing” means the killing or causing death of one or more persons.<sup>265</sup> The crime may be committed by an act or omission and a killing will be “wilful” where the requisite intention under Article 30 of the ICC Statute is met.<sup>266</sup> No every instance of killing in an armed conflict constitutes a war crime. A “wilful killing” under the ICC Statute must also be in breach of international humanitarian law.<sup>267</sup>

### *War crime of torture- Article 8(2)(a)(ii)*

“Torture” means the intentional infliction of “*severe physical or mental pain or suffering upon one or more persons.*”<sup>268</sup> Permanent injury is not a requirement.<sup>269</sup> Torture under Article

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<sup>260</sup> This includes war crimes under Article 8(2)(a) ICC Statute of wilful killing, torture, inhuman treatment, and wilfully causing great suffering. However this is not a requirement for the war crime of outrages upon personal dignity under Article 8(2)(b) ICC Statute.

<sup>261</sup> Elements of Crimes, Article 8 (2)(a)(i), no. 2; Article 8 (2)(a)(ii)-1, no. 3; Article 8 (2)(a)(ii)-2, no. 2; Article 8 (2)(a)(iii), no. 2.

<sup>262</sup> Geneva Convention (III), Article 4.

<sup>263</sup> Schabas, *A Commentary on the Rome Statute*, supra note 256, p. 210.

<sup>264</sup> Geneva Convention (IV), Article 4.

<sup>265</sup> Elements of Crimes, Article 8(2)(a)(i).

<sup>266</sup> *Ibid.*

<sup>267</sup> Schabas, *A Commentary on the Rome Statute*, supra note 256, p. 214.

<sup>268</sup> Elements of Crimes, Article 8(2)(a)(ii)-1.

<sup>269</sup> *Miroslav Kvocka et al*, ICTY Trial Chamber, Judgment, 2 November 2001, para. 148.

8 of the ICC Statute must serve a specific purpose, although torture itself need not be the sole purpose of the action.<sup>270</sup> Specifically, the infliction of such pain and suffering must be carried out with the intention of “*obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.*”<sup>271</sup> Unlike Article 1 of the Torture Convention, the ICC Statute does not require that acts of torture be carried out “*by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*”<sup>272</sup>

### ***War crime of inhuman treatment - Article 8(2)(a)(ii)***

Inhuman treatment is the intentional infliction of “*severe physical or mental pain or suffering upon one or more persons.*”<sup>273</sup> The scope of inhuman treatment is wide and can include poor conditions of detention and solitary confinement<sup>274</sup> and would also extend to violations of the prohibition on physical and moral coercion under the Geneva Conventions.<sup>275</sup> In *Prosecutor v Mucić*, the ICTY Trial Chamber found that the crime of inhuman treatment went beyond the scope of torture and wilfully causing great suffering, to encompass crimes which “*violate the basic principle of humane treatment, particularly the respect for human dignity.*”<sup>276</sup> However, the threshold of suffering required for conduct to be deemed inhuman treatment is lower than for torture.<sup>277</sup>

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<sup>270</sup> Schabas, *A Commentary on the Rome Statute*, supra note 256, p. 215. Note that this distinguishes torture as a war crime from torture as a crime against humanity.

<sup>271</sup> Elements of Crimes, Article 8 (2) (a) (ii) -1 and Article 8 (2) (c) (i)-4.

<sup>272</sup> International Committee of the Red Cross, Customary IHL Database, *Rule 90: Torture and Cruel, Inhuman or Degrading Treatment*, available at [http://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter32\\_rule90](http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_rule90).

<sup>273</sup> Elements of Crimes, Article 8(2)(a)(ii)-2. Note that there is no requirement that the act be carried out for a specific purpose (as opposed to torture).

<sup>274</sup> See International Committee for the Red Cross, *Rule 90, Torture and Cruel, Inhuman or Degrading Treatment*, supra note 272.

<sup>275</sup> Schabas, *A Commentary on the Rome Statute*, supra note 256, p. 216. Schabas notes that the concept of inhuman treatment has been referred to by the ICTY Trial Chamber as “*the umbrella under which the remainder of the listed grave breaches in the Conventions fall.*” See *Prosecutor v. Blaskic*, Judgment, 3 March 2000, paras. 154-155. Geneva Convention (III), Article 17 states “*No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted or exposed to unpleasant or disadvantageous treatment of any kind.*” Geneva Convention (IV), Article 31 states “*No physical or moral coercion shall be exercised against protected persons, in particular, to obtain information from them or from third parties.*”

<sup>276</sup> *Prosecutor v. Mucić*, ICTY Trial Chamber, 16 November 1998, para. 442.

<sup>277</sup> *Prosecutor v. Naletilić*, ICTY Trial Chamber, 31 March 2003, para 246. For commentary see Schabas, *A Commentary on the Rome Statute*, supra note 256, p.216.

***War crime of wilfully causing great suffering, or serious injury to body or health - Article 8(2)(a)(iii)***

The crime of wilfully causing great suffering, or serious injury to body or health, is elaborated in the Elements of Crime as “*causing great physical or mental pain or suffering to, or serious injury to body or health of, one or more persons.*”<sup>278</sup> The elements of the crime are set out in the alternative.<sup>279</sup> For the purpose of proving serious mental health or physical injury, it is not necessary to show that the effects are permanent. However, effects of a non-serious nature, such as embarrassment, are insufficient.<sup>280</sup> The inclusion of mental suffering in the definition means that extreme disciplinary measures, such as solitary confinement, may fall within this section.<sup>281</sup>

***War crime of outrages upon personal dignity, particularly humiliating and degrading treatment - Article 8(2)(b)(xxi)***

This crime involves the humiliation, degradation or otherwise violation of the dignity of one or more persons.<sup>282</sup> The severity of the humiliation, degradation or other violation must be of such a degree as to be generally recognised as an outrage upon personal dignity.<sup>283</sup> The determination of the severity of humiliation and degradation caused by the acts alleged is an objective test.<sup>284</sup> According to the ICTY, an outrage upon personal dignity is “*any act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity.*”<sup>285</sup>

“Persons” under this provision can include deceased persons. The Elements of Crimes states that “*it is understood that the victim need not personally be aware of the existence of the humiliation or degradation or other violation. This takes into account relevant aspects of the*

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<sup>278</sup> See *Prosecutor v. Mucić*, *supra* note 309, para.511 for further discussion.

<sup>279</sup> See Dörmann, K. and Colassis, L. *International Humanitarian Law in the Iraq Conflict*, International Committee of the Red Cross Resources, pp. 76-78, available at [http://www.icrc.org/eng/assets/files/other/ihl\\_in\\_iraq\\_conflict.pdf](http://www.icrc.org/eng/assets/files/other/ihl_in_iraq_conflict.pdf).

<sup>280</sup> Schabas, *A Commentary on the Rome Statute*, *supra* note 256, p. 218., *Prosecutor v Akayesu*, ICTR Trial Chamber Judgment, 3 September 1998, para. 502.

<sup>281</sup> Gerhard Werle, *Principles of International Criminal Law*, 2<sup>nd</sup> Ed. (The Hague, Netherlands: Asser Press, 2009), para.1046.

<sup>282</sup> Elements of Crimes, Article 8(2)(b)(xxi).

<sup>283</sup> Elements of Crimes, Article 8(2)(b)(xxi).

<sup>284</sup> See the discussion in *Prosecutor v. Kunarac and Others*, ICTY Trial Chamber Judgment, 22 February 2001, paras. 504 – 507; *Prosecutor v. Aleksovski*, ICTY Trial Chamber judgement 25 June 1999, para 56. See also Schabas, *A Commentary on the Rome Statute*, *supra* note 256, p. 249.

<sup>285</sup> *Prosecutor v. Aleksovski*, ICTY Trial Chamber Judgment, *supra* note 317.

*cultural background of the victim.*”<sup>286</sup>“Persons” would also include persons with a mental disability and unconscious persons who may be unaware of the outrages upon their person.<sup>287</sup>

“Outrage on a person’s dignity” encompasses a wide range of acts which are aimed at humiliating the individual. Such acts would include forcing a person to perform degrading acts and outrages to the dignity of detainees.<sup>288</sup> The acts need not be long-lasting or permanent however, the length of suffering may be relevant to the interpretation of the seriousness criteria.<sup>289</sup>

## **War Crimes in Non-International Armed Conflict**

### ***Civilians and persons hors de combat***

It is a requirement of all of the Article 8(2)(c) crimes alleged in this communication that the victims were persons *hors de combat*, civilians, medical personnel, or religious personnel taking no active part in the hostilities.<sup>290</sup>

### ***War crime of murder - Article 8 (2)(c)(i)***

The war crime of murder under Article 8(2)(c)(i) carries the same legal requirements as willful killing under Article 8(2)(a)(i), discussed above, with the exception of the requirement that the conduct took place in the context of, and was associated with, a non-international armed conflict.<sup>291</sup>

### ***War crime of torture - Article 8(2)(c)(i)***

The war crime of torture under Article 8(2)(c)(i) carries the same legal requirements as torture under Article 8(2)(a)(ii), discussed above, with the exception of the requirement that the conduct took place in the context of, and was associated with, a non-international armed conflict.<sup>292</sup>

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<sup>286</sup> Elements of Crimes, Article 8 (2)(b)(xxi)-no.1, fn. 49.

<sup>287</sup> Dörmann and Colassis, *International Humanitarian Law in the Iraq Conflict*, supra note 279, p. 315.

<sup>288</sup> See *Katanga et. al.*, ICC Pre-Trial Chamber I, Confirmation of Charges, 30 September 2008, paras. 369 – 371.

<sup>289</sup> Schabas, *A Commentary on the Rome Statute*, supra note 256, p. 249.

<sup>290</sup> Elements of Crimes, Article 8 (2)(c)(i)-1, no.2, Article 8 (2)(c)(i)-3, no.2, Article 8 (2)(c)(i)-4, no.3, Article 8 (2)(c)(ii), no. 3.

<sup>291</sup> *Ibid.*

<sup>292</sup> See Elements of Crimes, Article 8(2)(c)(i)-4.

### ***War crime of cruel treatment - Article 8 (2)(c)(i)***

The war crime of cruel treatment under Article 8(2)(c)(i) carries the same legal requirements as inhuman treatment under Article 8(2)(a)(ii), discussed above, with the exception of the requirement that the conduct took place in the context of, and was associated with, a non-international armed conflict.<sup>293</sup> Therefore, there is no requirement that the act be carried out for a specific purpose.

### ***War crime of outrages upon personal dignity, particularly humiliating and degrading treatment - Article 8(2)(c)(ii)***

The war crime of outrages upon personal dignity pursuant to Article 8(2)(c)(ii) carries the same legal requirements as Article 8(2)(b)(xxi), discussed above, with the exception of the requirement that the conduct took place in the context of, and was associated with, a non-international armed conflict.<sup>294</sup>

## **Mental requirements**

### *Intention and knowledge*

With respect to the mental elements of war crimes under the ICC Statute, Article 30 provides:

*“Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.”*<sup>295</sup>

### *Awareness of the existence of the armed conflict*

In addition, for each war crime under Article 8 of the ICC Statute, the Elements of Crimes requires that the perpetrator was aware of the factual circumstances that established the existence of the armed conflict.<sup>296</sup>

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<sup>293</sup> See Elements of Crimes, Article 8(2)(c)(i).

<sup>294</sup> See Elements of Crimes, Article 8(2)(c)(ii).

<sup>295</sup> Article 30, ICC statute. Article 30 provides “*For the purposes of this article, a person has intent where: (a) in relation to conduct, that person means to engage in the conduct; (b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. For the purposes of this article, ‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly.*”

<sup>296</sup> Elements of Crimes, Article 8 – War Crimes, p. 13 – 42.

### *Awareness of the status of the victim(s)*

With respect to war crimes of wilful killing, torture, inhuman treatment and willfully causing great suffering, committed in the context of an international armed conflict,<sup>297</sup> the Elements of Crimes requires that the perpetrator was aware of the factual circumstances that established the protected status of the victim(s).<sup>298</sup>

For war crimes of murder, cruel treatment, torture, and outrages upon personal dignity committed in the context of non-international armed conflict,<sup>299</sup> the Elements of Crimes requires that the perpetrator was aware of the factual circumstances that established the status of the victim(s) as persons *hors de combat*, civilians, medical or religious personnel taking no active part in hostilities.<sup>300</sup>

## **B) Analysis**

### **1) Existence of an Armed Conflict, its Character and Nexus to the Acts**

The conduct alleged in this communication occurred during three distinct phases of UK military operations in Iraq:

- i. the hostilities phase from 20 March 2003 to 1 May 2003;
- ii. the occupation phase from 1 May 2003 to 28 June 2004; and
- iii. and the Multi-National Force in Iraq (MNF-I) phase from 28 June 2004 to 31 December 2008. During this period, the United Nations Security Council (UNSC), through successive resolutions, authorized the MNF-I to support the Interim Government in Iraq.

As discussed above, whether particular conduct constitutes a war crime under the ICC Statute depends on the legal character of the armed conflict. It is widely accepted that an armed conflict existed in Iraq during the period of time covered by this communication. However,

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<sup>297</sup> See Articles 8(2)(a)(i),(ii),(iii), ICC Statute.

<sup>298</sup> Elements of Crimes, Article 8 (2)(a)(i), no. 2 and 3; Article 8 (2)(a)(ii)-1, no. 3 and 4; Article 8 (2)(a)(ii)-2, no. 2 and 3; Article 8 (2)(a)(iii), no. 2 and 3 ICC Statute. Note that this is not a requirement of the war crime of outrages upon personal dignity under Article 8(2)(b) ICC Statute.

<sup>299</sup> See Articles 8(2)(c)(i),(ii), ICC Statute.

<sup>300</sup> Elements of Crimes, Article 8 (2)(c)(i)-1,3,4 and Article 8 (2)(c)(ii).

the classification of the armed conflict in Iraq after 28 June 2004, as an ongoing international armed conflict, or as a non-international armed conflict is the subject of debate.<sup>301</sup>

### *20 March to 1 May 2003: Invasion Phase*

The UK was engaged in an international armed conflict, along with the US and coalition States, against Iraq from 20 March 2003 (the beginning of the invasion by air strikes) until 1 May 2003 (when US President George W. Bush formally declared the accomplishment of major combat operations). During this period, the four Geneva Conventions of 1949, Additional Protocol I and the laws and customs governing an international armed conflict applied to the UK during the armed conflict in Iraq.<sup>302</sup>

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<sup>301</sup> A key aspect of this debate is whether it can be said that the occupation ended after 28 June 2004, on the basis of the UN Security Council Resolutions, or whether the occupation continued, de facto, after 28 June 2004. See e.g., Zouhair Al Hassani, *International Humanitarian Law and its Implementation in Iraq*, 90 *IRRC* (2008) 51-70, pp. 57-62. Al-Hassani, writing in 2008, discusses the laws applicable to the situation in Iraq and concludes at 69 that “*the political situation in Iraq is different from the legal situation specified in the Security Council Resolutions...*” On that basis “*the insurgents are subject to the provisions of Article 5 of the Fourth Geneva Convention of 1949, among others, when they fall into the hands of the Multinational Force as the detaining force.*” For a contrary view see Dörmann and Colassis, *International Humanitarian Law in the Iraq Conflict*, *supra* note 279. Dörmann and Colassis emphasize that the laws of occupation apply to any situation that factually amounts to an occupation, regardless of the lawfulness of that occupation, the characterization of the situation by the UN Security Council, or any formal proclamation of the end of the occupation. With respect to the situation after 28 June 2004, they state that a functional approach to the law of occupation could be defended in the specific context of Iraq. “*Such an approach would mean that whenever and in so far as the Multinational Forces are exercising authority over persons or property in Iraq and is carrying out certain functions instead of the Iraqi Interim Government in specific fields ... it would be bound to apply the rules on occupation relevant to those activities.*” However, they also state that “*if one agrees that the new Iraqi Interim Government could give valid consent to the presence of the Multinational Forces and the occupation thus ended on 28 June 2004, the most straightforward legal approach would be to re-qualify the conflict as one or possible several internationalized internal armed conflicts regulated by Common Article 3 GC and customary rules (applicable in non-international armed conflicts)...*” See also ICRC, *Iraq Post 28 June 2004, Protecting Persons Deprived of Freedom Remains a Priority*, available at <http://www.icrc.org/eng/resources/documents/misc/63kkj8.htm>. According to the ICRC: “*After the hand-over of power from the Coalition Provisional Authority to the interim Iraqi Government on 28 June 2004, following the United Nations Security Council resolution 1546 stating the end of the foreign occupation, the legal situation has changed. As stated in the resolution, the presence and the military operations of the Multinational Forces in Iraq are based on the consent of the Interim Government of Iraq. The ICRC therefore no longer considers the situation in Iraq to be that of an international armed conflict between the US-led coalition and the state of Iraq and covered by the Geneva Conventions of 1949 in their entirety. The current hostilities in Iraq between armed fighters on one hand opposing the Multinational Force (MNF-I) and/or the newly established authorities on the other, amount to a non-international armed conflict. This means that all parties including MNF-I are bound by Article 3 common to the four Geneva Conventions, and by customary rules applicable to non-international armed conflicts.*”

<sup>302</sup> The UK signed the Geneva Conventions on 8 December 1949 and Additional Protocol was signed on 12 December 1977. However, the ratification followed only years later in 1998. The UK ratified the four Geneva Conventions of 1949 on 23 September 1957, and ratified Additional Protocols I and II on 28 January 1998. It should be noted that Additional Protocol I did not apply to the actions of the US Service Personnel in Iraq as the US has not ratified the Protocol.

### *1 May 2003 to 28 June 2004: Occupation Phase*

Major combat operations between the coalition forces and the Iraqi government forces ceased on 30 April 2003. From 1 May 2003 the UK and US were occupying powers in Iraq, with the specific authorities, responsibilities and obligations under international law as occupying powers under unified command.<sup>303</sup> This was explicitly recognized by the UNSC in Resolution 1483 of 22 May 2003. The Elements of Crimes provides that “*international armed conflict*” includes “*military occupation*.”<sup>304</sup> Therefore, during the period of military occupation of Iraq by the UK and US, the four Geneva Conventions and Additional Protocol I continued to apply.

### *29 June 2004 to 31 December 2008: MNF-I Deployed in Sovereign Iraq*

On 28 June 2004, the UNSC unanimously adopted Resolution 1546, thereby transferring authority from the occupying forces to the “*fully sovereign and independent*” Interim Government of Iraq and ending the official occupation on 30 June 2004.<sup>305</sup> However, the MNF (including the US and UK) remained in Iraq. According to Resolution 1546, the MNF was to provide security assistance for the United Nations mission in Iraq; to deter and prevent terrorism; carry out capacity-building and training for the Iraq military; and support the planned program for elections.<sup>306</sup>

Resolution 1546 further stated that the situation in Iraq continued to pose a threat to international peace and security.<sup>307</sup> In its letter to the UNSC and annexed to Resolution 1546, the Interim Government of Iraq noted that “[*t*]here continue, however, to be forces in Iraq, including foreign elements, that are opposed to our transition to peace, democracy, and security.”<sup>308</sup> Similarly, in his letter to the President of the UNSC, the then US Secretary of

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<sup>303</sup>See the Hague Regulations Act 1907, Geneva Convention (IV) 1949, and Geneva Convention (IV) Additional Protocol I, for a list of the duties of occupying powers.

<sup>303</sup>Prior to this formal declaration the US and UK had discussed “*liberation*” of Iraq rather than “*occupation*.” See Dörmann and Colassis, *International Humanitarian Law in the Iraq Conflict*, *supra* note 279, “*after President George W. Bush declared the end of major combat operations on 1 May 2003, the law of international armed conflict continued to apply, including the law of occupation in its entirety. Taking into account the intensity of the fighting after 1 May 2003, the threshold of Article 6 paras. 2 and 3 GC IV – “general close of military operations” – was not reached. The general close of military operations would have led to an end of application of the Fourth Geneva Convention, with the exception of a number of provisions if occupation continues.*”

<sup>304</sup>Elements of Crimes, Art. 8 (2)(a)(i)-no. 4, fn 34. See also *Lubanga* (ICC-01/04-01/06), Judgment, Trial Chamber I, *supra* note 246, fn. 1651.

<sup>305</sup> Authority was, however, already transferred to the Iraqi interim government on 28 June 2004.

<sup>306</sup>United Nations Security Council, Resolution 1546 (2004) 28 June 2004.

<sup>307</sup>*Ibid.*

<sup>308</sup>*Ibid.*, Annex to S/RES/1546 (2004), available at <http://www.uncc.ch/resolutio/res1546.pdf>.



State Colin Powell stated that Iraq was suffering continued attacks by “*insurgents, including former regime elements, foreign fighters, and illegal militias.*”<sup>309</sup> Despite the change in the formal position of the MNF and the establishment of the Interim Government, the security situation remained the same under both formal sets of arrangements. Secretary Powell also stated that the framework in place would remain the same and that the MNF was committed to acting in a manner consistent with its obligations under the Geneva Conventions (although he did not stipulate which ones applied).<sup>310</sup> In addition, the UK government acknowledged in an asylum case in 2008 that “ [...] *Iraq as a whole is in a state of internal armed conflict for the purposes of IHL and that the GOI [the Government of Iraq] is one of the parties to the conflict [...].*”<sup>311</sup>

Pursuant to Resolution 1546 and the agreed framework between the MNF and the Interim Government, the qualification of the armed conflict and applicable law technically shifted to that of an armed conflict of a non-international character governed by Article 3 common to the four Geneva Conventions. This followed the cessation of hostilities between the coalition forces and the then Iraqi government forces and the phase of occupation, and this was despite the continuous deployment of international forces on Iraqi territory. Thus, it was the mutual understanding that the armed groups involved in the conflict, such as Baathist supporters of the previous government, Sunni and Shia Islamists as well as foreign fighters and Al-Qaeda operatives, had a sufficient degree of organisation and would hence qualify as opponents in an armed conflict not of an international character. In addition, it is presumed that the intensity of violence between the Iraqi government with the multinational forces and the organised armed groups amounted to a protracted form of intensity in attacks rather than mere disturbances and tensions.<sup>312</sup>

Although the classification of the armed conflict in Iraq following UNSC Resolution 1546 as one of an international or non-international armed conflict is the subject of debate,<sup>313</sup> for the purposes of this communication, even if the occupation officially ended on 28 June 2004, the conduct by UK Service Personnel alleged after this date fulfils the nexus requirement of having taken place in the context of, and being associated with, an armed conflict. The

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<sup>309</sup>*Ibid.*, Letter from the Secretary of State (US) Colin Powell.

<sup>310</sup>*Idem.*

<sup>311</sup> KH (Article 15(c) Qualification Directive) Iraq CG [2008] UKAIT 00023, para. 75.

<sup>312</sup> See also Dörmann and Colassis, *International Humanitarian Law in the Iraq Conflict*, *supra* note 279; See also ICRC, Iraq post 28 June 2004, *supra* note 335, available at <http://www.icrc.org/eng/resources/documents/misc/63kkj8.htm>.

<sup>313</sup> See *supra* note 306.

conduct by UK Service Personnel detailed in this communication concerns the treatment of individuals detained under the suspicion of membership, activity or sympathy for an opponent armed group in Iraq. On this view, the law applicable to UK Service Personnel operating in Iraq after 28 June 2004 until the expiration of the UN Mandate for Iraq on 30 December 2008, and relevant to the application of Article 8 of the ICC Statute, was Article 3 common to the four Geneva Conventions and the laws and customs governing non-international armed conflicts.<sup>314</sup>

## 2) Threshold Requirement - Article 8 (1) ICC Statute

The evidence presented in this communication provides a reasonable basis to believe that war crimes committed by UK Service Personnel against Iraqi detainees in Iraq between 2003 and 2008 were committed as part of “*a large-scale commission of such crimes*” and as part of a policy of abuse by UK Service Personnel in Iraq.

The evidence presented in this communication is quantitatively and qualitatively different from the evidence provided to the OTP in the 2006 communication. In 2006, the OTP acknowledged “*4 to 12 victims of wilful killing and a limited number of victims of inhuman treatment, totaling in all less than 20 persons.*”<sup>315</sup> The present communication details thousands of allegations of abuse, from over 700 victims.

In addition, the pattern of allegations strongly suggests systematic mistreatment and that war crimes were committed as part of a policy. We note that the UN Committee against Torture considers that torture is “systematic” where mistreatment, even in the absence of formal policies, is pervasively carried out:

*“The Committee considers that torture is practised systematically when it is apparent that the torture cases reported have not occurred fortuitously in a particular place or at a particular time, but are seen to be habitual, widespread and*

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<sup>314</sup>We note however that international human rights law also continued to apply and that the legal framework in Iraq was not limited to international humanitarian law. For the purposes of this communication, and the analysis of whether war crimes pursuant to Article 8 of the ICC Statute were committed by UK Service Personnel in Iraq, we have confined our consideration to international humanitarian law.

<sup>315</sup>Office of the Prosecutor, *Letter to Senders Re Iraq*, *supra* note 11, p. 8.

*deliberate in at least a considerable part of the territory of the country in question.*”<sup>316</sup>

The evidence presented in this communication offers qualitative and quantitative insights into the type, scope, and severity of abuse committed by UK Service Personnel in Iraq. This evidence provides a reasonable basis to believe that this abuse was habitual, widespread and deliberate, and strongly suggests that war crimes were committed as part of a policy.

Therefore, although the threshold in Article 8(1) is limited to a practical guideline rather than a strict requirement, the evidence in this communication clearly demonstrates a situation where war crimes were committed by UK Service Personnel in Iraq as part of a “*large-scale commission*” of such crimes, and there is concerning evidence that these war crimes were committed as part of a policy.

### **3) Elements of Crimes – Status of the Detainees, Conduct (“Five Techniques” and Other Techniques), Mental Requirements**

In this section we first examine the status of the Iraqi detainees under the Geneva Conventions and Common Article 3. Second, we analyse various techniques used by UK Service Personnel in Iraq between 2003 and 2008 (including the “five techniques” and other techniques) and demonstrate that these techniques constitute conduct amounting to war crimes under Article 8 of the ICC Statute. Finally, we briefly address the mental requirements of knowledge and intention.

#### **a) Status of the Detainees**

During period covered in this communication, Iraqi detainees in UK custody in Iraq were:

- i. “*protected persons*” for the purposes of the four Geneva Conventions (during the phase of an international armed conflict and occupation from 20 March 2003 to 28 June 2004), and/or
- ii. “*persons taking no active part in the hostilities, including members of Service Personnel who have laid down their arms and those placed hors de combat by*

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<sup>316</sup> UN Committee Against Torture, Official Records of the General Assembly, Forty-Eighth Session, Supplement No. 44, Addendum 1 (A/48/44/Add.1) 1994, para.39, available at <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/A.48.44.Add.1.En?Opendocument>.

*sickness, wounds, detention or any other cause*” for the purposes of Common Article 3 to the Geneva Conventions (during the phase of an armed conflict not of an international character from 29 June 2004 to 31 December 2008).

Given the evidentiary threshold at this stage of proceedings, this communication will not detail the status of the detained persons. However, the available evidence suggests that most of the detainees were civilians or persons taking no active part in hostilities. The evidence indicates that most of the Iraqi persons detained by UK Service Personnel did not belong to armed forces or groups; were taken from their homes; and were not preparing or exercising combat activities or other forms of hostilities.

### **b) Conduct**

As detailed in Chapter IV, UK Service Personnel in Iraq employed methods of abuse extending beyond physical abuse to a broad range of psychological techniques aimed at humiliating and inducing a state of fear and distress in detainees, in order to “soften” or “condition” them for interrogation.<sup>317</sup> It is clear from European jurisprudence that such techniques may amount to inhuman and degrading treatment or even torture, in violation of Article 3 of the ECHR.<sup>318</sup> In addition to the “five techniques”, UK Service Personnel employed methods of religious and sexual humiliation against detainees and their families.

In this section we provide a concise analysis, demonstrating that, in light of the evidence detailed in Chapter IV above, the use of the “five techniques” and other techniques by UK Service Personnel in Iraq constituted war crimes. This analysis should be read in conjunctions with Table 1 on “*Systematic Issues on the Use of Coercive Interrogation Techniques/Unlawful Abuse by Agents of the UK State in SE Iraq: April 2003 – December 2008.*”<sup>319</sup>

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<sup>317</sup> The history of the use of psychological interrogation techniques by the UK, in particular the “five techniques” is detailed in Chapter III.

<sup>318</sup> See Chapter III and the discussion of the cases *Ireland v. UK, Series A no. 25, supra* note 42 and *El-Masri v. The Former Yugoslav Republic Of Macedonia, no. 39630, supra* note 49, para. 211.

<sup>319</sup> Annex A1 details the various techniques and abuses suffered by the first 85 victims. The total number of categories of abuse in Annex A1 is 145.

## Analysis of the “Five Techniques” as Acts of War Crimes

### *Hooding*

The use of hooding by UK Service Personnel to limit the sensory awareness of detainees for prolonged periods of time is well documented in the testimonies of 34 of the 85 cases included in the sample presented above.<sup>320</sup> These 34 testimonies include 59 allegations of hooding with one or more sandbags.<sup>321</sup> The impact of hooding, and particularly hooding with one or more sandbags, was exacerbated in the context of extremely high temperatures in Iraq. Further, some detainees were hooded for lengthy periods of time. For example, in one case, two detainees were handcuffed and tightly hooded with multiple hessian sacks and held in a tent for one month.<sup>322</sup>

The aim of hooding was to limit detainees’ awareness of their surroundings (including people and places) and to foster disorientation. Limited awareness and disorientation served to prolong the “shock of capture” and to provide the basis for the application of further techniques. The physical and psychological effects of hooding are well understood both by the MoD in the UK and by experts in the field.<sup>323</sup> The impact of hooding was aggravated by the use of severe isolation and sensory deprivation of detainees. Severe isolation and sensory deprivation include techniques where a detainee is denied contact with other human beings, including through segregation from other detainees (solitary confinement), and/or subjected

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<sup>320</sup> See e.g., the cases of XXX above at Chapter IV, p. 48. XXX and his family were hooded and threatened with physical violence, including shooting, during a night raid on their home. See also the case of XXX and his brother XXX above at Chapter IV, p. 66. They were forced to drink, eat, wash, and visit the toilet while handcuffed and hooded. See also the case of Baha Mousa and nine other detainees who were hooded with hessian sandbags for 36 hours while in custody at a TDF.

<sup>321</sup> See the discussion on “Presentation and Reading of Six Tables of 85 Cases of Abuse” above at Chapter (IV)(C)(1), pp. 36-37.

<sup>322</sup> See e.g., the case of XXX and his brother XXX, *supra* note 354.

<sup>323</sup> See e.g., *Allaa’ Nassif Jassim Al Bazzouni v The Prime Minister & others* [2011] EWHC 2401 (Admin). The claimant in this case sought judicial review of a UK document published on 6 July 2010 titled “*Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees.*” In order to provide guidance on acceptable standards of detainee treatment, the document contained a section setting out conduct that the UK Government considered could constitute cruel, inhuman and degrading treatment (see paragraph 75 of the judgment). This included “*methods of obscuring vision or hooding except where these do not pose a risk to the detainee’s physical or mental health and is necessary for security reasons during arrest or transit*”. The claimant’s case was that this exception had the effect of condoning hooding where it was regarded as necessary for security reasons during arrest or transit. With respect to the claimant’s assertion that “*hooding is to be regarded, without exception, as cruel, inhuman and degrading treatment, which will always by its nature pose a risk to the detainee’s physical or mental health*”, the Court noted that the claimant “*has uncontradicted evidence to this latter effect*”. See paragraph 77 of the judgment. The “uncontradicted evidence” referred to by the Court is summarized in an address by Philip Shiner of PIL to Proceedings of a Conference Presented by the American University of Washington College of Law and the International Rehabilitation Council for Torture Victims, February 15-16, 2012. These proceedings are published in *Human Rights Brief*, American University Washington College of Law, Vol 19, Issue 4, Spring 2012 Special Edition.

to a reduction or removal of stimuli from one or more of the senses for prolonged periods of time.<sup>324</sup> In the majority of cases outlined above, hooding was combined with the use of ear muffs and goggles as a form of severe isolation and sensory deprivation. In some cases, hooding was also combined with severe isolation. The psychological impact of severe isolation and sensory deprivation through solitary confinement or other methods includes serious and long-term impacts not limited to anxiety, depression, paranoia and hallucinations.<sup>325</sup>

The use of hooding, alone and in combination with aggravating techniques such as severe isolation, caused severe physical and mental pain and suffering to detainees sufficient to constitute war crimes of inhuman or cruel treatment and willfully causing great suffering. Further, there is evidence which indicates that hooding and severe isolation were used for the purposes of interrogating, punishing, intimidating and coercing detainees, therefore also constituting torture.

### *Stress Positions*

“Stress positions” are a torture technique in which a person is forced to maintain painful physical positions, such as forced standing or an awkward sitting position, for a prolonged time period. The use of stress positions is documented in the testimonies of 65 former detainees in the 85 cases included in the sample presented above.<sup>326</sup> Detainees were most often required to squat for prolonged periods with their hands raised above their head or held out in front of their body. The BMI also heard extensive evidence as to the use of stress positions by members of 1QLR on Baha Mousa and nine other detainees at the TDF at BG Main.<sup>327</sup>

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<sup>324</sup> See Physicians for Human Rights, Istanbul Protocol Model Medical Curriculum, *Torture Methods: Prolonged Isolation and Sensory Deprivation*, available at: <http://phrtoolkits.org/toolkits/istanbul-protocol-model-medical-curriculum/module-4-torture-methods-and-their-medical-consequences/torture-methods/prolonged-isolation-and-sensory-deprivation/>.

<sup>325</sup> For a detailed account of the physical and psychological effects of prolonged isolation and sensory deprivation see Physicians for Human Rights *Break Them Down: Systematic Use of Psychological Torture by US Forces* (2005), pp. 10-11, 61-70 [hereafter PHR, *Break Them Down*]; and Physicians for Human Rights & Human Rights First *Leave no Marks: Enhanced Interrogation Techniques and the Risk of Criminality* (2007), pp. 31-32 [hereafter PHR, *Leave no Marks*]. See also, Interim report of the Special Rapporteur of the Human Rights Council on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, A/66/268, 5 August 2011, para. 65.

<sup>326</sup> See e.g., the cases of XXX above at Chapter IV, pp. 69-70; XXX above at Chapter IV, pp. 72-73; Ali Zaki Mousa above at Chapter IV, pp. 95-96.

<sup>327</sup> See BMI Report, *supra* note 40, Part II, pp. 47-255; BMI Report Summary of Findings, Vol. III, p. 1316, paras.201-202 (describing stress positions used as part of “conditioning”); BMI Closing Written Submissions on

To maximise the physical and psychological impact of stress positions, detainees were also often hooded, ear muffed, goggled and subjected to severe “harshing.” In videos released during the BMI, detainees are shown being threatened with physical violence when they failed to maintain the squat.<sup>328</sup>

The physical effects of prolonged stress positions may be long lasting or even permanent and include nerve, joint and circulatory damage. Such damage can result in foot and back pain, decreased motor sensation, and decreased ability to feel warmth, cold or vibrations.<sup>329</sup> Prolonged standing may also cause pulmonary embolism which can lead to a risk of fainting (and consequent head injury and fractures) or even death. In addition, detainees suffered significant psychological stress as a result of painful restraints and positions, especially where these were combined with sensory deprivation and “harshing”.

The physical and psychological impact of stress positions caused severe or great physical and mental pain and suffering to detainees, sufficient to constitute war crimes of inhuman or cruel treatment and willfully causing great suffering. Further, the infliction of pain and suffering was carried out with the intention to punish, intimidate and coerce detainees, and may also meet the level of pain and suffering required to constitute torture.

In this respect, we note that in 2006, the UN Special Rapporteur on Torture characterized the forcing of detainees to “*maintain uncomfortable positions, such as sitting, squatting, lying down, or standing for long periods of time, sometimes with objects held under arms*” as torture.<sup>330</sup> Further, the UN Special Rapporteur on Torture noted in a 2010 study that there is an increasing variety of torture methods including, *inter alia*, stress positions, that are being applied “*with the intent not to leave any visible physical traces.*”<sup>331</sup>

### *Noise Bombardment*

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behalf of the Detainees, p. 11, para.15 (describing submissions on the systemic use of stress positions). A video showing Corporal Donald Payne applying the “ski position” position to six hooded detainees, including Baha Mousa, is available at [http://www.bahamousainquiry.org/baha\\_mousa\\_inquiry\\_evidence/evidence\\_100210.htm](http://www.bahamousainquiry.org/baha_mousa_inquiry_evidence/evidence_100210.htm).

<sup>328</sup> See The Guardian UK, “Soldier Shouts Abuse at Iraqi Prisoners in Video shown to Baha Mousa Inquiry Video,” 13 July 2009, available at <http://www.guardian.co.uk/uk/video/2009/jul/13/baha-mousa-inquiry>.

<sup>329</sup> PHR, *Leave no Marks*, *supra* note 325, p. 11.

<sup>330</sup> United Nations Special Rapporteur on Torture, *Mission Report on China*, 10 March 2006, para. 45, available at [http://www.univie.ac.at/bimtor/dateien/china\\_unsrt\\_2006\\_report.pdf](http://www.univie.ac.at/bimtor/dateien/china_unsrt_2006_report.pdf).

<sup>331</sup> United Nations Special Rapporteur on Torture, Study on the Phenomena of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in the World, including an Assessment of Conditions of Detention, 5 February 2010, A/HRC/13/39/Add.5, available at [http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.39.Add.5\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.39.Add.5_en.pdf).

Noise bombardment as a form of sensory overstimulation (also known as sensory overload or sensory bombardment) refers to a method of interrogation whereby a detainee is exposed to loud music or noise. This method is used to disorient, cause anxiety and deprive the person of sleep. The evidence of witnesses detailed above in Chapter IV contains accounts of loud music and pornographic DVDs being played in cells, generators being left on for extended periods in solitary confinement cells and the use of harshing.<sup>332</sup> In the sample of PIL's first 85 detainee abuse cases there were 18 allegations of loud DVD pornography; 10 allegations of loud radio/DVDs; and 12 allegations of white noise/other noise/use of loud music.<sup>333</sup>

According to Physicians for Human Rights, the physical and psychological impact of sensory overstimulation includes short term or chronic hearing loss or ringing in the ears, increased heart rate and blood pressure, increased risk of heart disease or heart attack and potentially life threatening electrical rhythm disturbances of the heart.<sup>334</sup>

As a technique used throughout various stages of detention, usually in combination with other techniques, these various forms of noise bombardment were sufficient to cause severe or great physical and mental pain or suffering for detainees, constituting war crimes of inhuman or cruel treatment and wilfully causing great suffering. Where UK Service Personnel used such techniques to punish and intimidate detainees, this would constitute the war crime of torture.

### *Sleep Deprivation*

Sleep deprivation refers to a method of torture in which a detainee is deprived of normal sleep for extended periods of time through the use of stress positions, sensory overload, or other techniques of interrupting normal sleep. UK Service Personnel subjected detainees to sleep deprivation for long periods of time, throughout the various stages of arrest and detention

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<sup>332</sup> See e.g., the case of XXX above at Chapter (IV)(D) (4)(ix), pp.76-78. XXX became so disoriented, desperate and hopeless as a result of sleep deprivation caused by loud noises and other forms of environmental manipulation that he attempted suicide on several occasions. See also, the case of XXX above at Chapter (IV)(D)(4)(viii), pp. 75-6. He was subjected to loud noise and loud pornographic films played during the night. See also the case of XXX above at Chapter (IV)(D)(4)(xi), pp. 78-79. He described being unable to sleep and feeling disgusted, sickened, and humiliated as a result of loud pornographic films played on the windowsill of his cell all night for over a month.

<sup>333</sup> *Ibid.*

<sup>334</sup> PHR, *Leave no Marks*, *supra* note 325, p. 25.



including at TDF and JFIT. In the sample of PIL's first 85 detainee abuse cases, 47 former detainees gave evidence of the use of sleep deprivation, including roll calls and banging on cell doors during the night.<sup>335</sup>

Sleep deprivation causes impairments in short-term memory, learning, logical reasoning and decision making. Health consequences include decreased pain tolerance, insulin resistance, high blood pressure and other cardiovascular diseases. Additionally, sleep deprivation can impair immune function and result in increased risk of infectious diseases.<sup>336</sup> Aside from suffering physical exhaustion, many detainees in the sample of PIL's first 85 cases also cited psychological exhaustion from the lack of sleep, particularly where sleep deprivation was used in combination with other forms of abuse.

It is clear that UK Service Personnel employed sleep deprivation in such a way as to cause severe or great physical and mental pain and suffering to detainees, constituting war crimes of inhuman or cruel treatment and willfully causing great suffering. As a method to punish, intimidate and coerce detainees, prolonged and severe sleep deprivation (alone or in combination with other methods) also constitutes the war crime of torture.

We note that the ICTY considered the prolonged denial of sleep among the acts most likely to constitute torture.<sup>337</sup>

### *Deprivation of Food and Water*

The use of deprivation of food for prolonged time periods is well documented in the testimony of 31 former detainees included in the sample of PIL's first 85 cases and in the

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<sup>335</sup> See e.g., the case of XXX above at Chapter (IV)(D)(4)(xxvii), pp. 96-97. He was deprived of sleep for the first 13 of approximately 17-20 days in solitary confinement. UK Service Personnel threw water on him and abruptly forced him awake to run around the yard. See e.g., the case of XXX above at Chapter (IV)(D)(3)(iii), pp. 62-63. XXX was held in solitary confinement for ten days in a cell where the light was always on, and soldiers would bang on the cell door to keep him awake. See also the case of XXX above at Chapter (IV)(D)(4)(iii) Part III, pp.72-73. He stated that soldiers would switch the light on and off continuously for hours, inducing feelings of insanity.

<sup>336</sup> PHR, *Break Them Down*, supra note 325, p.11. PHR, *Leave no Marks*, supra note 325, p. 23.

<sup>337</sup> *Kvockaet. al.*, ICTY, Trial Chamber Judgment, supra note 302, para. 144.

attached tables. Water deprivation is well documented in 50 testimonies.<sup>338</sup> Like sleep deprivation, the deprivation of food and water, produces significant physical and psychological effects on a human being.<sup>339</sup> The effect of food and water deprivation in the context of Iraq, where temperatures were often extreme, must be taken into account when considering the physical and psychological effects on detainees.

In this context, the use of food and water deprivation by UK Service Personnel, and the physical and psychological impact was sufficient to cause, and did cause severe or great physical and mental pain and suffering to detainees, constituting war crimes of inhuman or cruel treatment and willfully causing great suffering. As a method to punish, intimidate and coerce detainees, the deprivation of food and water (alone or in combination with other methods) also constitutes the war crime of torture.

### **Analysis of Further Techniques as War Crimes**

#### *“Harshing”*

UK Services Personnel used techniques of “fear up” and “harshing” (or “harsh up”) to elicit information from detainees. With respect to “fear up”, the 2006 UK Army Field Manual on interrogation provides:

*“In the fear-up approach, the HUMINT collector identifies a pre-existing fear or creates a fear within the source. He then links the elimination or reduction of the fear to cooperation on the part of the source. ... The HUMINT collector should also be extremely careful that he does not create so much fear that the source becomes unresponsive.”*<sup>340</sup>

With respect to the use of “harshing”, detainees were subjected to loud and aggressive yelling, close to their person, often without translation from English. Witnesses report that their reactions to this technique, especially over prolonged periods, included fear, exhaustion, vomiting, shaking, breaking down and crying.<sup>341</sup>

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<sup>338</sup> See e.g., the case of XXX above at Chapter (IV)(D)(3)(iii), pp. 62-63. He was held at the BPF for almost 24 hours without being provided with food or water. See also the cases of XXX above at Chapter (IV)(D)(3)(iv), pp. 63-64; the case of XXX above at Chapter (IV)(D)(3)(v), pp.65-67.

<sup>339</sup> Rebecca Schechter, *Intentional Starvation as Torture*, 18 Am. U. Int'l. L. Review 2003, p. 1233.

<sup>340</sup> UK Army Field Manual 2006, Chapter 2, pp. 8-10.

<sup>341</sup> Further details on “harshing” are contained in the *Grounds of Claim in R (Kammash and others) v The Secretary of State for Defence* and another CO/6345/2008. See also the case of Ali Zaki Mousa above at Chapter

“Harshing” was used to cause a detainee fear and distress (particularly when used in combination with hooding), and to weaken the psychological resolve of a detainee (especially when used for prolonged periods) such that he would confess or provide information.

The nature and severity of “harshing” used by UK Service Personnel was sufficient to constitute war crimes of outrages upon personal dignity. The repeated and prolonged use of the technique in combination with other techniques was sufficient to cause severe or great mental pain or suffering to detainees, constituting the war crimes of inhuman or cruel treatment, wilfully causing great suffering, and, where these techniques were used to intimidate detainees and to illicit information, the war crime of torture.

### *Solitary Confinement*

As detailed in Chapter IV above, UK Service Personnel frequently placed detainees in solitary confinement, often for periods lasting from around 10 days to a month. By way of example, one detainee reported that his experience in solitary confinement, in combination with sleep deprivation and noise bombardment, made him feel like he was “*going mad*.”<sup>342</sup>

The harmful effects of solitary confinement are well recognized, and the use of solitary confinement as a punitive tool or for interrogation purposes has been deemed to constitute inhuman and degrading treatment.

We note that the European Committee for the Prevention of Torture has acknowledged the harmful consequences of solitary confinement and warned that, in certain circumstances, solitary confinement may amount to inhuman and degrading treatment.<sup>343</sup> The Committee noted that “*all forms of solitary confinement must be as short as possible*.”<sup>344</sup> In 2011, the UN Special Rapporteur expressed the need for a ban of solitary confinement as an interrogation technique:

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(IV)(D)(4)(xxx), pp. 98-99. During interrogation, a soldier repeatedly yelled “*liar, fucking liar*” in Mousa’s face in response to his answers to interrogation questions. Mousa stated that he was scared by the aggression and that he was so exhausted after this extreme questioning that he collapsed, vomited and experienced shaking and convulsions. See also the case of XXX above at Chapter (IV)(D)(4) (iii), pp. 72-73. He was made to stand in a corner for an hour and was screamed, yelled, and sworn at by a female interrogator. He eventually broke down in tears due to the pressure.

<sup>342</sup>See e.g., the case of XXX.

<sup>343</sup>European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Second General Report on the CPT’s activities covering the period 1 January to 31 December 1991, CPT/Inf (92) 3, para. 56.

<sup>344</sup>*Ibid.*

*“Segregation, isolation, separation, cellular, lockdown, supermax, the hole, secure housing unit [...] whatever the name, solitary confinement should be banned by states as a punishment or extortion technique.”*<sup>345</sup>

The prolonged use of solitary confinement, and the use of solitary confinement as a punitive measure or for interrogation purposes by UK Service Personnel in Iraq caused severe or great mental pain or suffering to detainees. The use of this technique amounts to war crimes of inhuman or cruel treatment, and wilfully causing great suffering. Where solitary confinement was used to obtain information from detainees, or as a form of punishment, this conduct could, in some situations, also amount to torture.

### *Threats*

Threats of harm to detainees and their family members were widely utilized by UK Service Personnel during the arrest and detention process in Iraq. Detainees were threatened with shooting, death, rape and other sexual abuse of themselves and of female family members, transfer to Guantanamo Bay and Abu Ghraib, and ill-treatment equivalent to that which had occurred in those facilities.<sup>346</sup> Threats were used as ultimatums to elicit information and “confessions” from detainees.<sup>347</sup>

Where such threats amounted to the infliction of severe or great mental pain or suffering on detainees in order to obtain information or a confession, this conduct by UK Service Personnel constitutes war crimes of inhuman treatment, cruel treatment, and torture under the ICC Statute. Threats of sexual abuse and rape, and threats which humiliated or degraded detainees or their families (for example, where threats insulted religious values), may also be sufficient to constitute war crimes of outrages upon personal dignity under the ICC Statute.

### *Sexual and Religious Humiliation*

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<sup>345</sup> BBC News, “UN Urges Ban on Solitary Confinement,” 19 October 2011, available at <http://www.bbc.co.uk/news/world-us-canada-15362896>.

<sup>346</sup> Annex A1 shows that 12 allegations of threats of transfer to Guantanamo Bay or Abu Ghraib were reported by 11 out of 109 victims. See Victim case numbers: 16, 27, 28, 37, 54, 56, 57, 60, 62, 107, and 79.

<sup>347</sup> See e.g., the case of XXX. XXX stated that one of his interrogators said that “[...]he didn’t care what I thought and that if I didn’t confess soon, he would send me to the Americans. He said they would do to me what they did to others in Abu Ghraib and Guantanamo Bay. He told me they would rape me, and abuse my family. He asked me whether I had seen what they had done in other prisons and told me they would do that to me.” See Witness Statement of XXX, para. 64.

Religious or moral humiliation involves a deliberate attack on a detainee's faith and a violation of religious or moral taboos. Sexual humiliation refers to a method of torture where the victim is subjected to sexually humiliating behaviour or forced to perform sexually humiliating acts, often in an attempt to exploit cultural and religious stereotypes regarding sexual behaviour and to induce feelings of shame, guilt and worthlessness.<sup>348</sup>

Humiliation is intended to create a power difference between a detainee and the interrogator(s) during interrogations, to show that interrogators have absolute control over the detainees.<sup>349</sup> This adds to the sense of vulnerability of the detainee.<sup>350</sup> The use of these two forms of humiliation by UK Service Personnel in Iraq often overlapped, and had the effect of inducing mental anguish, attacking the dignity of the detainee, and reinforcing the existing power imbalance. As detailed above in Section IV, there is ample evidence of the use of sexual and religious humiliation of detainees by UK Service Personnel in Iraq.<sup>351</sup>

Humiliation and sexual humiliation in particular, can have devastating mental health consequences for victims; it is considered a form of both physical and psychological torture.<sup>352</sup> Consequences include post-traumatic stress disorder, major depression, anxiety, depersonalization, dissociative states, and multiple physical problems such as chronic headaches, eating disorders, digestive problems and inability to sleep.<sup>353</sup> Further, when forced to engage in humiliating acts, individuals may feel responsible for participating in their own degradation.<sup>354</sup> A brief outline of some of the relevant jurisprudence is provided below.

Stripping detainees naked has been recognized as a form of cruel and degrading treatment and torture. In 2006 the UN Working Group on Arbitrary Detention and four UN Special

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<sup>348</sup> PHR, *Leave no Marks*, *supra* note 325, p.27.

<sup>349</sup> PHR, *Break them Down*, *supra* note 325, p.12.

<sup>350</sup> *Aydin v. Turkey*, European Court of Human Rights, Application no. 57/1996/676/866, 25 September 1997, para 25.

<sup>351</sup> By way of summary, Chapter IV details evidence of: strip searches of detainees and medical examinations conducted in a humiliating and invasive manner; urine being poured over the heads of detainees; detainees being made to perform ablutions in an outside pit whilst hooded with soldiers present and laughing and taking photographs; detainees being stripped (sometimes forcibly) and then made to perform humiliating positions for the amusement of soldiers who took photographs on mobile phones and cameras; detainees being threatened with the release of paedophilic and sexual images, where their own faces were superimposed onto the images; sexual innuendo and “*come-ons*” used by female guards in an attempt to entice a confession from the detainee; pornographic movies being played loudly and hard-core pornographic magazines placed in bathrooms, particularly during Ramadan. Family members were also subjected to acts of humiliation including the forced removal of headscarves, which also indirectly humiliated the detainee.

<sup>352</sup> PHR, *Break them Down*, *supra* note 325, p.57.

<sup>353</sup> *Ibid.*, pp. 12 and 58. PHR, *Leave No Marks*, *supra* note 325, pp.28-29.

<sup>354</sup> Jacobs U., “Struggling with our own inhumanity,” *San Francisco Chronicle*, 2 March 2005 in PHR, *Leave no Marks*, *supra* note 325, p.57.

Rapporteurs issued a report titled *Situation of Detainees at Guantánamo Bay*.<sup>355</sup> They considered that:

*“stripping detainees naked, particularly in the presence of women, and taking into account cultural sensitivities, can in individual cases cause extreme psychological pressure and can amount to degrading treatment, or even torture.”*<sup>356</sup>

The ECtHR in *Elçi and others v. Turkey* also recognized stripping of detainees to be an established crime of torture and/or cruel treatment.<sup>357</sup> Such conduct has also been recognized as an attack on human dignity.<sup>358</sup> Additionally, the ICTY has held that forcing detainees to dance naked clearly violates Common Article 3 of the Geneva Conventions.<sup>359</sup>

Sexual violence can also be used for the purpose of humiliation and it need not involve physical contact, according to the ICTR jurisprudence.<sup>360</sup> Moreover, the ICTY stated that:

*“... some acts establish per se the suffering of those upon whom they were inflicted [...] sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterisation as an act of torture.”*<sup>361</sup>

Furthermore, jurisprudence of the Extraordinary Chambers in the Courts of Cambodia indicates that religious or cultural humiliation can cause severe mental suffering and constitute torture and that it does not need to be combined with other techniques.<sup>362</sup> Similarly, the ICTY has found that psychological abuse and humiliation caused severe pain and suffering to detainees.<sup>363</sup> With respect to the requirement of serious suffering, it is recognized that the suffering experienced by a victim can be exacerbated by social and cultural conditions and that the specific social, cultural and religious background of the victims is

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<sup>355</sup> Leila Zerrougui, Situation of detainees at Guantánamo Bay, Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention; Leandro Despouy, the Special Rapporteur on the independence of judges and lawyers; Manfred Nowak, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; Asma Jahangir; the Special Rapporteur on freedom of religion or belief, and Paul Hunt, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, February 27, 2006, E/CN.4/2006/120 [hereafter UN Working Group on Arbitrary Detention 2006 GITMO report].

<sup>356</sup> *Ibid.*, p.25.

<sup>357</sup> *Elçi and others v. Turkey*, ECtHR, Application no. 23145/93 and 25091/94, 13 November 2003, para. 646.

<sup>358</sup> *Prosecutor v. Kunarac et al.*, *supra* note 317, para. 507.

<sup>359</sup> *Ibid.*

<sup>360</sup> *Prosecutor v. Jean-Paul Akayesu*, ICTR, Case No. ICTR-96-4-T, 2 September 1998, paras.597 and 688.

<sup>361</sup> *Prosecutor v. Kunarac et al.*, *supra* note 317, para. 150

<sup>362</sup> *Kaing Guek Eav*, Case 001, ECCC, E1888, 26 July 2010.

<sup>363</sup> *Prosecutor v. Kvočka et al.*, *supra* note 302, para.164.

relevant in assessing the severity of this type of conduct.<sup>364</sup>The nature and extent of the religious and sexual humiliation employed by UK Service Personnel in Iraq fulfills the requirements of the war crime of outrages upon personal dignity.

UK Service Personnel knew and intended that their conduct would cause severe sexual and religious humiliation for detainees.<sup>365</sup> Deliberate disrespect for the Qur'an illustrates the deliberate use of anti-religious actions to insult detainees.<sup>366</sup> Further, UK Service Personnel continued to use pornography as a tool of humiliation during the holy month of Ramadan, even when the religious implications were made known to them.<sup>367</sup>The humiliation was sufficient to cause severe or great mental pain or suffering to detainees, constituting war crimes of willfully causing great suffering and inhuman treatment or cruel treatment. The cultural and religious backgrounds of the detainees, and the severity and widespread nature of this type of conduct by UK Service Personnel, is highly relevant to the level of suffering inflicted. Where this pain or suffering was inflicted for the purpose of intimidation of detainees, this conduct also constitutes the war crime of torture.

#### *Beatings and Physical Exertion*

The use of physical violence and forced physical exertion by UK Service Personnel was widespread during all stages of arrest, detention and interrogation.<sup>368</sup> Examples of forced physical exertion include UK Service Personnel forcing detainees to run in zig zags, or deliberately running detainees into objects while they were blindfolded, hooded, goggled and ear muffed.<sup>369</sup> UK Service Personnel exacerbated the impact of beatings, by combining physical violence with sensory deprivation techniques. Detainees were unaware of who was

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<sup>364</sup> ICTY, *Prosecutor v. Limaj et al.*, ICTY, Case No.IT-03-66-T, 30 November 2005, para. 237.

<sup>365</sup> However, we note that for the purposes of proving outrages upon personal dignity, it is sufficient that the perpetrator would have been able to “perceive [humiliation] to be the foreseeable and reasonable consequence of [their] actions.” See *Prosecutor v. Zlatko Aleksovski*, ICTY, IT-95-14 / I-T, 24 March 2000, para. 56.

<sup>366</sup> See the case of XXX above at Chapter (IV)(D)(4)(v), p. 74.

<sup>367</sup> See the case of XXX above at Chapter (IV)(D)(4), pp. 75-6.

<sup>368</sup> Annex A1 provides evidence of numerous allegations of a range of different types of physical violence and forced physical exertion. See also for example the case of XXX above at Chapter (IV)(D)(2), pp. 53-54. He was elbowed, kicked and assaulted during transfer to a detention facility, causing blood to pour from his ear, as well as causing bleeding and bruising of his legs, eyes and nose. See also the case of XXX above at Chapter (IV)(D)(1), p. 46. He sustained more than 60 punches to his head and face, and extensive beating to the left side of his body during his arrest. He lost a tooth and continues to suffer pain in his head and on the left side of his body from his injuries.

<sup>369</sup> See e.g., the case of XXX above at Chapter (IV)(D)(3), p. 64 who endured kicking, forced exertion (running and zigzagging while hooded, goggled and cuffed to the rear), and being deliberately run into objects and obstacles. See also the case of XXX above at Chapter (IV)(D)(3), p. 58. He was forced to get up and run after long periods of forced stress positions.

inflicting the beatings and were unable to anticipate further blows. What is more, many detainees report that they could hear soldiers laughing during periods of physical exertion.<sup>370</sup>

Beyond the physical impact of beatings and forced exertion, the methods used were humiliating and served to induce anxiety and fear in detainees. The mental and physical impact of this conduct was sufficient to constitute severe or great physical and/or mental pain or suffering, amounting to war crimes of cruel treatment, inhuman treatment, willfully causing great suffering or serious injury to body and health and outrages upon personal dignity. In circumstances where the purpose of the infliction of the pain and suffering was punishment, intimidation, coercion, this conduct also constituted the war crime of torture.

#### *Environmental Manipulation and the Use of Temperature extremes*

Environmental manipulation refers to methods such as exposing a detainee to extreme heat or cold for prolonged periods. There is evidence that UK Service Personnel refused to provide detainees with sufficient bedding in extremely cold temperatures, while other detainees were held in small cells in extremely hot temperatures without ventilation. Through the deprivation of basic necessities, detainees suffered physical anguish, and the deterioration of mental capacity.<sup>371</sup>

Maintenance of the core body temperature is essential to human survival. Therefore, exposing a detainee to cold or heat can have serious health consequences including slowed heart function, decreased resistance to infection, amnesia, failure of major organs, loss of consciousness leading to a coma (in case of hypothermia), delirium, and convulsions.<sup>372</sup> A brief outline of some of the opinions of expert UN bodies is provided below.

In 2004, the UN Special Rapporteur on Torture denounced methods that have been “*condoned and used to secure information from suspected terrorists*” – including “*exposing them to extremes of heat and cold.*”<sup>373</sup> Further, he stated that “[t]he jurisprudence of both

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<sup>370</sup> See e.g, the cases of XXX above at Chapter (IV)(D)(1), p. 47; XXX above at Chapter (IV)(D)(4), p. 68; XXX above at Chapter (IV)(D)(4), p. 73.

<sup>371</sup> See for example the Witness Statements Annex B 15, 20, 22, 30 or 37.

<sup>372</sup> PHR, *Leave no Marks*, *supra* note 325, p. 16.

<sup>373</sup> Theo van Boven, Interim Report of the Special Rapporteur of the Commission of Human Rights on the Question of Torture, and other Cruel, Inhuman and Degrading Treatment or Punishment, E/CN.4/RES/2004/41, 1 September 2004, para. 17.



*international and regional human rights mechanisms is unanimous in stating that such methods violate the prohibition of torture and ill-treatment.*”<sup>374</sup>

In 2006, United Nations experts concluded, with respect to interrogation techniques employed at the US Guantánamo detention facility, that “[e]xposure to extreme temperatures, if prolonged, can conceivably cause severe suffering,” and that the severity of this suffering is increased when it is combined with other interrogation techniques.<sup>375</sup>

In 2007, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, noted that:

*“techniques involving physical and psychological means of coercion, including stress positions, extreme temperature changes, sleep deprivation and “waterboarding” [...] involve conduct that amounts to a breach of the prohibition against torture and any form of cruel, inhuman or degrading treatment.”*<sup>376</sup>

Clearly, the use of techniques involving temperature extremes, particularly when combined with other techniques, amounts to conduct causing severe or great physical or mental pain or suffering, meeting the requirements of war crimes of cruel treatment, inhuman treatment, and wilfully causing great suffering under the ICC Statute. As a form of punishment or coercion, this kind of environmental manipulation also constitutes torture.

### **c) Mental Requirements**

Although it is not a requirement at this stage of proceedings to establish the requisite level of knowledge and intention of individual perpetrators, we note that the manner in which UK Service Personnel engaged in the conduct detailed in this communication, and the context in which the crimes were committed, provide strong indications that these crimes were committed with the requisite knowledge and intent, in accordance with Article 30 of the ICC Statute and the Elements of Crimes. The individual criminal responsibility of commanders and superiors (Article 28 (a)(i) and (b)(i) of the ICC Statute ) is dealt with in section VI below.

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<sup>374</sup>*Ibid.*

<sup>375</sup>UN Working Group on Arbitrary Detention 2006 GITMO Report, *supra* note 355, paras. 51–2.

<sup>376</sup>Martin Scheinin, Report of the Special Rapporteur on the promotion and protection human rights and fundamental freedoms while countering terrorism, Mission to the United States of America, A/HRC/6/17/Add.3, 22 November 2007, para. 33.

At all points in time throughout their deployment, it can be assumed that UK Service Personnel were aware of the existence and type of armed conflict in which they were engaged, as well as the factual circumstances establishing the status of the victims.

#### **d) Conclusion**

In summary, pursuant to Article 53(1)(a) of the ICC Statute, there is a reasonable basis to believe that crimes within the jurisdiction of the court have been committed. The conduct of UK Service Personnel alleged in this communication took place in the context of, and was associated with, the armed conflict in Iraq between 2003 and 2008. Further, the evidence presented in this communication satisfies the non-mandatory threshold in Article 8(1) of the ICC Statute. The evidence provides a reasonable basis to believe that the war crimes committed by UK Service Personnel in Iraq were committed as part of “*a large-scale commission of such crimes*” and as part of a policy of abuse.

Finally, with respect to the particular war crimes alleged, it is clear that the UK trained and practiced coercive interrogation techniques in Iraq. Harshing, invasion of intimate space, “*get them naked*”, “*keep them naked if they won’t cooperate*”, disorientation techniques, sleep deprivation and environmental manipulation are intentionally designed to debilitate and disorientate a detainee. Such practices are fundamentally at odds with the prohibitions on coercion in Geneva Conventions III and IV and the general protections contained in common Article 3 of the Geneva Conventions.<sup>377</sup>

The use of these techniques by UK Service Personnel against detainees in Iraq involved the infliction and causation of severe or great physical or mental pain or suffering. Further, a number of techniques, particularly methods of sexual and religious humiliation, constituted severe humiliation, degradation and violations of the dignity of detainees. This is clear from evidence of the general impact of these techniques on physical and mental health, as well as

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<sup>377</sup> Geneva Convention (III), Article 17 provides that: “*No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted or exposed to unpleasant or disadvantageous treatment of any kind.*” Geneva Convention IV, Article 31 provides that: “*No physical or moral coercion shall be exercised against protected persons, in particular, to obtain information from them or from third parties.*”

the detailed evidence provided above in Chapter IV above as to the mental and physical pain and/or suffering and humiliation that individual detainees experienced.

What is striking about the evidence detailed in this communication, is the use of multiple techniques simultaneously and over prolonged periods of time against protected persons, in addition to forms of religious and sexual humiliation which deliberately exploited the cultural and religious backgrounds of the detainees. These factors exacerbated the severity of the physical and mental impacts on detainees, and are highly relevant to the assessment of the nature and level of pain and suffering inflicted and caused by UK Service Personnel in Iraq.

The use of the “five techniques” and other techniques by UK Service Personnel in Iraq between 2003 and 2008, individually or in combination, therefore constitute war crimes of willful killing (Article 8(2)(a)(i)), inhuman treatment (Article 8 (2)(a)(ii)), willfully causing great suffering (Article 8(2)(a)(iii)), and outrages upon personal dignity (Article 8(2)(b)(xxi)) in the context of an international armed conflict. Where these techniques were used to punish, intimidate or coerce a detainee, this conduct also constitutes torture (Article 8(2)(a)(ii)).

In the context of a non-international armed conflict, this conduct constitutes war crimes of murder (Article 8(2)(c)(i)), cruel treatment (Article 8(2)(c)(i)), and outrages upon personal dignity (Article 8(2)(c)(ii)). Where these techniques were used to punish, intimidate or coerce a detainee, this conduct also constitutes torture (Article 8(2)(c)(i)).

## **VI) CRIMINAL RESPONSIBILITY OF UK OFFICIALS**

As detailed above in Section V, there is a reasonable basis to believe that war crimes have been committed against Iraqi civilians by UK Services Personnel in Iraq from 2003-2008. This section details investigative leads into the criminal responsibility of those UK officials bearing the greatest responsibility for these crimes in accordance with Article 25 (individual criminal responsibility) and Article 28 (superior and command criminal responsibility) of the ICC Statute. The evidence presented in this communication provides strong indications of individual and superior or command criminal responsibility of high level civilian and military officials in the UK for war crimes. This evidence meets the requirements under Article 53(1)(a) of the ICC Statute for the OTP to open an investigation, and warrants further investigation by the OTP. Although we identify possible modes of criminal liability, the question of which particular mode of liability applies to each individual remains to be analysed following a formal investigation by the OTP.

In Part A, we identify those persons and groups of persons involved in the alleged crimes, and set out the requirements of Articles 25 and 28 of the ICC Statute. In Part B, we examine the chains of command relevant to the allegations contained in this communication. They include the general military chain of command, and the chains of command with respect to: Operation Telic; arrest and transfer practices; detention practices and detainee handling; and TQ and interrogation policy and training. In Part C, we examine in detail the potential criminal responsibility for detainee abuse within the military chain of command. We analyse the potential criminal responsibility of various individuals under Articles 25 and 28 of the ICC Statute for detainee mistreatment during arrest and transit, and during detention and interrogation. We identify those persons and groups of persons in charge of vague doctrines and policies, which enabled detainee abuse to occur, in addition to persons and groups of persons responsible for ordering and sanctioning prohibited techniques. With respect to interrogation, we focus particularly on the JFIT OC and his superior the Divisional J2X. We also consider the criminal responsibility of those individuals higher up the chain of command for the torture and ill treatment of detainees. In Part D, we discuss the criminal responsibility of civilian superiors under Article 28 of the ICC Statute, with particular focus on the former SSD, Geoffrey Hoon and the former Minister for the Service Personnel, Adam Ingram.

## **A) Legal Requirements**

**1) *The Persons Involved, If Identified, or a Description of the Persons or Groups Involved (Regulation 49(2)(c))***

Article 53(1)(a) of the ICC Statute provides that in deciding whether to initiate an investigation, the Prosecutor shall consider whether the information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed. Regulation 49(1)(a) of the Regulations of the Court provides that the Prosecutor shall include a reference to the crimes allegedly committed and a statement of the facts. The statement of facts shall indicate, as a minimum, the persons involved, if identified, or a description of the persons or groups of persons involved.<sup>378</sup>

In previous investigations initiated by the OTP *proprio motu*, the OTP identified the persons involved and described the persons or groups of persons involved as follows. In the *Situation of Kenya*, the OTP identified “gangs of young men armed with traditional weapons” as the main group of (direct) perpetrators.<sup>379</sup> The OTP also referred to lists of suspects compiled by the Kenya National Commission on Human Rights (KNCHR) and the Waki Commission, and findings by those Commissions that “persons in position of power appear to have been involved in the organization, enticement [sic] and/or financing of violence targeting specific groups”.<sup>380</sup> In the decision authorising an investigation, the Pre-Trial Chamber II characterised “the entity behind the initial attacks” as leaders, businessmen and politicians, with reference to reports by the United Nations Office for the High Commissioner for Human Rights (OHCHR) and Human Rights Watch.<sup>381</sup>

In the *Situation of Côte d’Ivoire*, the OTP identified various entities and command structures within the state and military as potential perpetrators. This included defence and security forces, battalions of the elite Service Personnel of the then national army, marines in the navy and the overall command by the Minister of Defence.<sup>382</sup> The OTP also identified the Minister of Interior (as a superior with respect to the police) and the Presidential Security Group.<sup>383</sup> In

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<sup>378</sup> Regulation 49(2)(c) Regulations of the Court, ICC Statute.

<sup>379</sup> OTP, Request for authorisation of an investigation pursuant to Article 15, 26 Nov. 2009, ICC-01/09, para. 74.

<sup>380</sup> *Ibid.*, para 75 and fn. 60.

<sup>381</sup> PTC II, Decision pursuant to Article 15 of the Rome Statute on the authorisation of an investigation into the situation in the Republic of Kenya, (ICC-01/09-19-Corr), *supra* note 239, , para 123.

<sup>382</sup> OTP, Request for authorisation of an investigation pursuant to Article 15, 23 Jun. 2011, ICC-02/11, para 70.

<sup>383</sup> *Ibid.*

the decision authorising an investigation, the Pre Trial Chamber III referred to UN and NGO reports.<sup>384</sup>

As is detailed below, we have identified the following persons and groups of persons as those persons bearing greatest responsibility for the perpetration of war crimes described in this communication:

- i. members of the UK MoD and the military chain of command, including members of JFIT under the command of OC JFIT, the Divisional J2X, and higher ranks of the chain of command leading to the Chief of Defence Staff; and
- ii. senior civil servants and ministers, such as the former SSD and the former Minister for the Service Personnel.

## **2) Article 25 of the ICC Statute – Individual Criminal Responsibility**

Relevant to this communication, Article 25 provides that a person shall be individually criminally responsible for a crime within the jurisdiction of the Court if that person:

- i. commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible (Article 25(3)(a)); or
- ii. order, solicits or induces the commission of such a crime which in fact occurs or is attempted (Article 25(3)(b); or
- iii. for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission (Article 25(3)(c); or
- iv. in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose[...] (Article 25(3)(d)).

A distinction can therefore be made between principal liability in Article 25(3)(a) and accessory liability in Article 25(3)(b)-(d). Article 25(3) effectively provides for a four-tier system of criminal liability from the highest level as principal (Article 25(3)(a)) to the lowest level - assisting the commission of a group crime (Article 25(3)(d)).

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<sup>384</sup>*PTC III*, Corrigendum to “Decision pursuant to Article 15 of the Rome Statute on the authorisation of an investigation into the situation in the Republic of Côte d’Ivoire”, 15 Nov. 2011, ICC-02/11, paras. 36-41.

## Principal Liability

*Joint perpetration or commission through another person* (Article 25(3)(a) of the ICC Statute)

The ICC has interpreted the concept of commission broadly. Commission encompasses leaders and organisers (who do not physically commit the criminal acts) as co-perpetrators where they have joint control or where they make an essential contribution to the commission of the crime.<sup>385</sup> Therefore the principals of a crime are not limited to those individuals who physically carry out the objective elements of the offence, but include those individuals who, in spite of being removed from the scene of the crime, control or mastermind its commission by deciding whether and how the offence will be committed.<sup>386</sup> Perpetration according to Article 25(3)(a) covers offenders who physically commit the crime (commission of the crime in person or direct perpetration); those who control the will of the physical perpetrators (commission through another person or indirect perpetration); and those who control the offence because of essential tasks assigned to them (commission of the crime jointly, or co-perpetration).<sup>387</sup> Co-perpetration requires the proof of two objective elements. First, the suspect must be part of a common plan or an agreement with one or more persons. Second, the suspect and other co-perpetrators must carry out essential contributions in a co-ordinated manner, which result in the fulfilment of the material elements of the crime in question.<sup>388</sup>

## Accessory Liability

*Encouragement – orders, solicits or induces the commission of a crime* (Article 25(3)(b) of the ICC Statute)

With respect to “orders” under Article 25(3)(b), an order assumes the existence of a typically military relationship of subordination between the person giving the order and the person receiving the order.<sup>389</sup> Without such a superior-subordinate relationship, it has to be demonstrated that the accused possessed at least the actual authority to order.<sup>390</sup> An order may

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<sup>385</sup>Schabas, *A Commentary on the Rome Statute*, *supra* note 256, pp. 427-428.

<sup>386</sup>*Ibid.*, p. 428, citing *Lubanga* (ICC-01/04-01/06), Decision on the Confirmation of Charges, 29 January 2007, para. 330.

<sup>387</sup>*Ibid.*, citing *Lubanga* (ICC-01/04-01/06), Decision on the Confirmation of Charges, 29 January 2007, para. 332.

<sup>388</sup>*Ibid.*, p. 429 citing *Bemba* (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, *supra* note 252, para. 350.

<sup>389</sup>Werle, *Principles of International Criminal Law*, *supra* note 281, para. 357.

<sup>390</sup>Schabas, *A Commentary on the Rome Statute*, *supra*, note 256, p. 432. Ordering the commission of an offence is closely related to command or superior responsibility, except that in the case of command or superior responsibility there is no need to prove that an actual order was given or that authority was exercised.

be explicit or implicit and its existence can be proven through circumstantial evidence.<sup>391</sup> It is not necessary that the order be given directly to the person who carries out the act, because “*what is important is the commander’s mens rea, not that of the subordinate.*”<sup>392</sup> The offender must be aware of the substantial likelihood that a crime will be committed in the execution of the order.<sup>393</sup>

There is no judicial interpretation of the term “*solicit.*” The statutes of the ad-hoc tribunals use the term “*instigate*” to convey a broadly equivalent concept. According to ICTY jurisprudence, instigating a crime means prompting another, by action or omission, to commit a crime against international law.<sup>394</sup> This can be through psychological or physiological pressure or inducement. A perpetrator who has already decided to act, can still be induced to act.<sup>395</sup> A crime is instigated if the conduct of the accused was a clear contributing factor to the conduct of the person who actually committed the crime. However, it is not necessary to show that the crime would not have occurred had it not been for the involvement of the accused.<sup>396</sup>

According to the Pre-Trial Chamber I in the *Harun* case, “*inducement*” is synonymous with incitement, encouragement and abetting.<sup>397</sup> Subjectively, criminal liability for inducing a crime requires that the perpetrator wished to “*provoke or induce*” the commission of the crime, or that he or she was aware of the “*substantial likelihood*” that the commission of the crime would result from his or her conduct.<sup>398</sup>

*Assistance – aid, abet or otherwise assist (Article 25(3)(c)), or in any other way contribute to the commission of such a crime(Article 25(3)(d))*

Criminal responsibility for aiding and abetting or otherwise assisting in the commission of a crime under Article 25(3)(c) requires that the assistance facilitated or had a direct and

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<sup>391</sup>*Ibid.*, citing *Blaskic* (IT-95-14-T), Judgment, 3 March 2000, para. 281.

<sup>392</sup>*Ibid.*, citing *Blaskic* (IT-95-14-T), Judgment, 3 March 2000, para. 282.

<sup>393</sup>*Ibid.*, p. 432.

<sup>394</sup>Werle, *Principles of International Criminal Law*, *supra* note 281, para. 358, fn.204, citing *Blaskic* (IT-95-14-T), Judgment, 3 March 2000, para.280 and *Krstic* (IT-98-33-T), Judgment, 2 August 2001, para. 601. See also Schabas, *A Commentary on the Rome Statute*, *supra* note 256, p. 432.

<sup>395</sup>*Ibid.*, para. 358 (see footnote 206) citing *Kvočka et al.*, (IT-98-30/1-T), Judgment, 2 November 2001, para. 252.

<sup>396</sup>Schabas, *A Commentary on the Rome Statute*, *supra* note 256, p. 433 citing *Kvoka et al.* (IT-98-30/1-T), Judgment, 2 November 2001, para. 252.

<sup>397</sup>*Ibid.*, p. 433 citing *Harun* (ICC-02/05-01/07), Arrest Warrant, 27 April 2007, pp. 5,12.

<sup>398</sup>Werle, *Principles of International Criminal Law*, *supra* note 281, para. 358 (see footnote 209) citing *Kvočka et al.*, (IT-98-30/1-T), Judgment, 2 November 2001, para. 252.



substantial effect on the commission of the crime.<sup>399</sup> The assistance need not be given at the location or at the time that the main crime is committed and it need not be causally connected to the crime.<sup>400</sup> While aiding generally refers to physical assistance in the commission of the crime, abetting relates to encouragement and other forms of moral persuasion and therefore there is a substantial overlap between abetting and ordering or inducing a crime under Article 25(3)(b).<sup>401</sup> Article 25(3)(c) requires evidence of a particular motive, namely the accused must act for the purpose of facilitating the commission of such a crime.<sup>402</sup> This purpose will be deduced from the acts of the accused.<sup>403</sup>

Article 25(3)(d) creates a residual form of accessory liability in cases in which the contribution to a crime cannot be characterised as joint perpetration, ordering, soliciting, inducing, aiding, abetting or assisting pursuant to Article 25(3)(a),(b) or (c).<sup>404</sup>

### 3) *Article 28 of the ICC Statute - Responsibility of Commanders and Other Superiors*

#### **Military Superiors**

With respect to military superiors, Article 28(a) provides that a military commander, or a person acting as a military commander, shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control, as a result of his or her failure to exercise control properly over such forces, where the military commander or person:<sup>405</sup>

- i. knew, or owing to the circumstances at the time, should have known that the forces were committing or were about to commit one or more of the crimes set out in Articles 6 to 8 of the Statute; and
- ii. failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission, or failed to submit the matter to the competent authorities for investigation and prosecution.

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<sup>399</sup> *Ibid.*, para. 362 (see footnotes 213-215). See also Schabas, *A Commentary on the Rome Statute*, *supra* note 256, p. 434, fn. 90.

<sup>400</sup> Werle, *Principles of International Criminal Law*, *supra* note 281, para. 362, fns.213, 217.

<sup>401</sup> Schabas, *A Commentary on the Rome Statute*, *supra* note 256, p. 434.

<sup>402</sup> *Ibid.*

<sup>403</sup> *Ibid.*, p. 436.

<sup>404</sup> *Ibid.*, citing *Lubanga* (ICC-01/04-01/06), Decision on the Confirmation of Charges, 29 January 2007, para. 337.

<sup>405</sup> See also *Bemba* (ICC-01/05-01/08), *supra* note 252, para. 407.

Indicators of a superior position of authority and effective control might include the official position of the individual, the power to issue or give orders, the capacity to ensure compliance with orders, the position within the military structure and actual tasks, the capacity to order forces to engage in hostilities, and the power to promote, replace, remove or discipline.<sup>406</sup>

With respect to the mental element, “*knew*” requires actual knowledge. The Pre-Trial Chamber II has stated that actual knowledge cannot be presumed but must be established through evidence.<sup>407</sup> Such evidence might include: the number of illegal acts, their scope, whether their occurrence is widespread, the time during which the prohibited acts took place, the type and number of forces involved, the means of available communication, the *modus operandi* of similar acts, the scope and nature of the superior’s position and responsibility in the hierarchical structure, the location of the commander at the time and the geographical location of the acts. Actual knowledge may also be proven, if, “*a priori, a military commander is part of an organised structure with established reporting and monitoring systems.*”<sup>408</sup>

The “*should have known*” standard requires the superior to have been negligent in failing to acquire knowledge of his or her subordinate’s illegal conduct and requires more of an active duty on the part of the superior to take the necessary measures to secure knowledge of the conduct of his Services Personnel and to inquire, regardless of the availability of information at the time, on the commission of the crime.<sup>409</sup>

With respect to causality, it is only necessary to prove that the commander’s omission increased the risk of the commission of the crimes charged in order to hold him or her criminally responsible under Article 28(a) of the ICC statute.<sup>410</sup>

Relevant factors in the assessment of the duty to prevent include: ensuring that the commander’s forces are adequately trained in international humanitarian law; securing reports that military actions were carried out in accordance with international law; issuing orders aiming at bringing the relevant practices into accord with the rules of war; and taking disciplinary measures to prevent the commission of atrocities by the Service Personnel under

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<sup>406</sup>Schabas, *A Commentary on the Rome Statute*, *supra* note 256, p. 461 citing *Bemba* (ICC-01/05-01/08), citing *Bemba* (ICC-01/05-01/08), *supra* note 252, para. 417.

<sup>407</sup>*Ibid.*, p. 462 citing *Bemba* (ICC-01/05-01/08), *supra* note 252, para. 429.

<sup>408</sup>*Ibid.*

<sup>409</sup>*Ibid.*, citing *Bemba* (ICC-01/05-01/08), *supra* note 252, para. 433.

<sup>410</sup>*Ibid.*, citing *Bemba* (ICC-01/05-01/08), *supra* note 252, para. 425.

the superior's command.<sup>411</sup> The duty to repress involves stopping ongoing crimes as well as punishing those that have been committed.<sup>412</sup> The duty to punish involves imposing measures directly or referring the case to the appropriate authorities.<sup>413</sup> The assessment of "*necessary and reasonable measures*" is made on the basis of the commander's *de jure* power as well as his or her *de facto* ability to take such measures.<sup>414</sup>

### **Civilian Superiors**

With respect to civilian superiors, Article 28(b) provides that a superior shall be criminally responsible for crimes committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

- i. the superior knew, or consciously disregarded information, which clearly indicated that the subordinates were committing or about to commit one or more of the crimes set out in Articles 6 to 8 of the Statute;
- ii. the crimes concerned activities that were within the effective responsibility and control of the superior; and
- iii. the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of such crime(s), or failed to submit the matter to the competent authorities for investigation and prosecution.

"*Consciously disregarding information,*" is similar to the concept of recklessness at common law.<sup>415</sup> "*To consciously disregard in reality means something more than simply ignoring something; it means deliberately to take no notice of, not to take into consideration despite the evidence from serious and substantial information.*"<sup>416</sup> In order to prove that a superior "*consciously disregarded information*" it must be shown that:

- i. information existed which clearly indicated a significant risk that the subordinates were committing or were about to commit the crime;

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<sup>411</sup>*Ibid.*, p. 464 citing *Bemba* (ICC-01/05-01/08), *supra* note 252, para. 437.

<sup>412</sup>*Ibid.*, citing *Bemba* (ICC-01/05-01/08), *supra* note 252, para.439.

<sup>413</sup>*Ibid.*, citing *Bemba* (ICC-01/05-01/08), *supra* note 252, para.440.

<sup>414</sup>*Ibid.*, citing *Bemba* (ICC-01/05-01/08), *supra* note 252, para.443.

<sup>415</sup>*Ibid.*, p. 463.

<sup>416</sup>Chantal Meloni, *Command Responsibility in International Criminal Law*, Ed. The Hague, the Netherlands: T.M.C. Asser 2010, p.187.

- ii. this information was at the superior's disposal; and
- iii. the superior knew about the existence of this information, but consciously disregarded it.<sup>417</sup>

We note that a failure to act might, in some circumstances, amount to more than a violation of Article 28 of the ICC Statute. It might in addition give rise to criminal responsibility under Article 25 of the ICC Statute.<sup>418</sup> Further investigations, following the opening of an investigation by the OTP, will enable the OTP to determine the appropriate modes of liability in each case.

## **B) Chains of Command**

The chains of command discussed below are represented in charts at Annex G.<sup>419</sup>

### ***General Military Chain of Command***

The SSD, his ministers and the CDS are based at the MoD in the MoD Main Building in Whitehall, London, UK. Here, politicians and civil servants coexist with the military CDS, the individual heads of each of the UK's three Military Services - the UK Army, the Royal Air Force, and the Naval Service (which includes the Royal Navy and the Royal Marines) - and their respective staffs. Beneath the CDS in the chain of command is the PJHQ, situated at Northwood, Middlesex, UK. The PJHQ is headed by the CJO, who is responsible "*for the planning and execution of UK-led joint, potentially joint and multinational operations, and for exercising operational command of UK Services Personnel assigned to multinational operations led by others.*"<sup>420</sup>

### ***Chain of Command for Operation Telic***

The CJO from the beginning of Operation Telic on 19 March 2003 until 23 July 2004 was Lt. Gen. Sir John Reith. His two deputies were responsible for Operations and Operation Support respectively. In addition, six Assistant Chiefs of Staff were responsible for nine branches:

- J1 Personnel Division

- J2 Operational Intelligence

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<sup>417</sup> *Ibid.*

<sup>418</sup> Schabas, *A Commentary on the Rome Statute*, *supra* note 256, p. 430.

<sup>419</sup> These charts are drawn from the Report of the Baha Mousa Inquiry, *supra* note 40, Chapter 3, available at [http://www.bahamousainquiry.org/f\\_report/vol%20i/Part%20I/Part%20I.pdf](http://www.bahamousainquiry.org/f_report/vol%20i/Part%20I/Part%20I.pdf).

<sup>420</sup> UK MoD, "PJHQ Organization," published 12 December 2012, available at <https://www.gov.uk/the-permanent-joint-headquarters>.

- J3 Current Operations
- J4 Logistics/Medical
- J5 Crisis and Deliberate Planning
- J6 Communications
- J7 Joint Training
- J8 Finance and Human Resources
- J9 Policy, Legal, Presentation

Below PJHQ, solely for the purpose of the period of hostilities of Operation Telic from 19 March 2003 until 30 April 2003, was the NCC, based in Qatar. The NCC was commanded by Air Marshal Brian Burridge, with a staff divided into similar branches as the PJHQ. During the phase of hostilities of Operation Telic, the NCC commanded Air, Land, Maritime and Joint Force Logistics components. The land contingent was the 1 (UK) Armoured Division, under the command of Maj. Gen. Robin Brims. Once Operation Telic 1 ended, the NCC left command and returned to the PJHQ at Northwood, UK on 8 May 2003. Around 12 May 2003, Maj. Gen. Robin Brims was succeeded by Maj. Gen. Peter Wall.

After the city of Basra (Iraq) was taken in early April 2003, the UK divisional headquarters was located at Basra Airport. Once the NCC was withdrawn the 1 (UK) Armoured Division fell under the direct command of Reith, as the CJO at PJHQ. In turn, the 1 (UK) Armoured Division commanded three UK Brigades. Within the Brigades were “*battlegroups*”, comprised of a number of regiments.<sup>421</sup> Furthermore, within each regiment were a number of companies. For example, 1QLR consisted of five companies. Within these companies were “*units*” of small groups of soldiers.

Throughout Iraq operations after the end of the armed hostilities, the commanding Division and the Brigades below it would rotate into Iraq on successive “*roulements*.” These roulements, known as Operation Telic 1-13, are detailed in Annex I. It should also be noted that during Operation Telic 1, and reflecting the expanded number of countries involved in the coalition after the first months, the MND (SE) was created. While the 1 (UK) Armoured Division comprised its largest contingent, MND (SE) also included staff officers from other

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<sup>421</sup>The relevant regiment in the Baha Mousa incident was 1 QLR.

troop-contributing countries. With the establishment of the MND (SE), the UK's area of operations was expanded from two provinces (Basra and Maysan) to four (Basra, Maysan, Al Muthanna and Dhi Qar).

### ***Chain of Command - Arrest and Transfer***

During the transportation of detainees to holding facilities, the OC of the relevant company or regiment or Battlegroup bore ultimate responsibility for the treatment of detainees. However, immediate responsibility for detainee treatment would often shift to those charged with guarding the detainees. In Iraq, these personnel were the Adjutant of the regiment; the provost staff within the regiment (the disciplinary team); the tactical questioners; and the BGIRO, making a quasi-judicial decision whether to transfer the detainees to the central UK internment/detention facility. Each of these individuals is potentially implicated in every instance of mistreatment and death in custody detailed above. Above these individuals is the OC. It is a primary function of an OC to ensure that those under his command obey his orders. The OC would have personal involvement in, and knowledge of, arrest and transfer operations, and therefore bears criminal command responsibility for the war crimes committed under his command.

### ***Chain of Command - Detention Practices and Detainee Handling***

The first “*key finding*” by the UK Army Inspector in its 2010 *Review into the Implementation of Policy, Training and Conduct of Detainee Handling*, was that “[d]etainee handling has been an issue that has received direct attention from commanders at all levels in the Army and MOD, from the Secretary of State downwards.”<sup>422</sup> At the top level are the government ministers, to whom policy chiefs, such as the DCDC<sup>423</sup> and its predecessors, as well as legal advisers in the MoD, report. Those ministers bear ultimate responsibility for the policies and high-level doctrine promulgated by the MoD and for responding to the facts on the ground that dictate whether or not those policies are functioning lawfully and effectively.

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<sup>422</sup>Brigadier RWH Purdy, “Army Inspectorate Review into the Implementation of Policy, Training and Conduct of Detainee Handling”, 15 July 2010, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/28120/20100721\\_detainee\\_handling\\_final\\_report\\_AI.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/28120/20100721_detainee_handling_final_report_AI.pdf).

<sup>423</sup> For further information on the DCDC, the MoD’s “think-tank,” and its predecessors, see the MoD website <https://www.gov.uk/Development-concepts-and-doctrine-centre>.

According to the MoD's policy statement of March 2010, the Minister of State for the Service Personnel is the ministerial focus for detention issues.<sup>424</sup> The Director-General Security Policy is the "owner" of the policy and the Assistant Chief of Defence Staff Development, Concepts and Doctrine is responsible for the provision of doctrine to fulfil the policy. Each individual military service - the Navy, Army, or Air Force - is responsible for training. The Chief of Joint Operations is responsible for ensuring that effective arrangements are in place for ensuring compliance with the policy, while the Provost Marshal (Army), who is the Competent Army Authority for Custody and Detention, is required to act as the defence subject matter expert for operational detention on overseas operations. In this capacity, the Provost Marshal (Army) (PM(A)) is responsible for the inspection and monitoring of all UK-run detention facilities in operational theatres.<sup>425</sup>

At this level, "joint doctrine" publications exist which govern detainee handling for all three military services, and which are not specific to any particular theatre of operation. At the start of the Iraq conflict, the relevant "joint doctrine" document was known as JWP1-10.<sup>426</sup> At the time of Operation Telic 1 and 2, the "joint doctrine" contained no reference to the ban on the use of the five techniques.<sup>427</sup>

The top level theatre and operation specific instructions regarding detainee handling were promulgated by those commanding the Brigade. These included the rules of engagement, formulated with the UK MoD, and detailed instructions on detainee handling. SOI-390 was the name of the principal instruction in Iraq for much of the applicable period.

Down the chain of command in theatre were those officers at the level of individual battlegroups promulgating Fragmented Orders. Fragmented Orders are sent to a large number of companies and regiments within the battlegroup. Below this level are the OCs of individual companies and regiments, who may give their own written and unwritten orders.

### ***Chain of Command - TQ and Interrogation Policy and Training***

Although the allegations of war crimes requiring investigation do not relate exclusively to TQ and interrogation, the majority of the thousands of allegations relate to the treatment of

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<sup>424</sup>Brigadier RWH Purdy, "Army Inspectorate Review into the Implementation of Policy," *supra* note 422, p. 35, para. 109

<sup>425</sup>It appears highly likely that, in practice, the PM(A) did not inspect JFIT in Iraq.

<sup>426</sup>MoD, Prisoners of War Handling - Joint Warfare Publication 1-10, March 2001, available at [http://ids.nic.in/UK%20Doctrine/UK%20\(7\).pdf](http://ids.nic.in/UK%20Doctrine/UK%20(7).pdf). The "joint doctrine" was amended and renamed JDP1-10 in 2006. It was further revised in 2008, and has now been re-issued as JDP1-10 (2<sup>nd</sup> Edition). See Report of the Baha Mousa Inquiry, *supra* note 40, para. 16.35-16.36.

<sup>427</sup>Report of the Baha Mousa Inquiry, *supra* note 40, para. 16.34

detainees whilst in the custody of JFIT or whilst being tactically questioned at facilities before transfer to JFIT.<sup>428</sup> The tactical questioners and interrogators were trained at the same facility, in broadly similar techniques. Despite changes of units, companies, regiments, divisions and brigades, from roulement to roulement (Operation Telic 1 to Operation Telic 13), standards of detainee treatment in theatre did not improve. The constant in this detention chain was maintained by those responsible for policy, training, strategic direction and command.

The Minister of State for the Service Personnel, the Director General Security Policy and the Assistant Chief of Defence Staff Development, Concepts and Doctrine were responsible for promulgating and implementing policies and training within the UK MoD. The Chief of Joint Operations and the Provost Marshal (Army) were responsible for promulgating and implementing policies and training in the Service Personnel.

During the relevant period, TQ and interrogation policies and training were promulgated through the Services Personnel joint-forces facility for the training of interrogation and TQ, the DISC and the JSIO, based in Chicksands, Bedfordshire, UK. The Chicksands facility ran a course for Tactical Questioners as well as interrogators.

Responsibility therefore attaches to those responsible for the interrogation and TQ course at Chicksands, Bedfordshire. This includes the OC F Branch, as well as his immediate superiors at Chicksands: the OC of 3 Training Company JSIO and, above him, the OC of Chicksands.<sup>429</sup> The OC of Chicksands would himself report to the DGIC and through him to the CDI, who is a three star military officer reporting to the CDS.<sup>430</sup>

Responsibility also attaches to individual instructors below these individuals in the chain of command, and the legal advisers responsible for auditing the training to ensure its lawfulness. There had been no legal audit of interrogation training prior to the deployment of JFIT in

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<sup>428</sup> See above, Chapter IV(D).

<sup>429</sup> In relation to the BMI, responsibility would attach to Witness 'S021' as the OC F Branch, to Witness 'S001' as the OC of 3 Training Company JSIO, and Witnesses S045 and S046 as the OC of Chicksands. See Witness Statement of 'S012' to the BMI, supra note 83. See also Witness Statement of 'S045' to the BMI, BMI07289, 28 February 2010, available at [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_050510/bmi07289.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_050510/bmi07289.pdf).

<sup>430</sup> MoD, "Defence Intelligence – Overview", 12 December 2012, available at <http://www.mod.uk/defenceinternet/aboutdefence/whatwedo/securityandintelligence/dis>.



theatre.<sup>431</sup> It appears that the first time such a legal audit was carried out was publicly during the BMI in 2010.

In May 2004, the MOD's most senior lawyer decided not to ask the Attorney General for legal advice as to whether the use of hooding in Iraq was lawful. A military lawyer had asked senior legal advisors whether the Attorney General should be asked about the legality of hooding. The MOD's deputy legal advisor, replied; 'I would not be in favour of asking the AG at this point.'<sup>432</sup> The most senior MOD lawyer, Martin Hemming, said he had agreed with the decision not to approach the Attorney General on this 'academic question' and that the Attorney General was 'a very busy'<sup>433</sup> man. It was later conceded that the Attorney General was not consulted as he may have informed them that hooding was unlawful and would have banned the use of hoods.<sup>434</sup>

### **C) Criminal Responsibility of Members of the Military**

In this section, we discuss the investigative leads into the criminal responsibility of members of the military chain of command for detainee abuse during arrest and transit, and detention and interrogation.

#### ***1) Arrest and Transit***

The responsibility of senior officers for allegations of mistreatment during the arrest and transit of detainees is diverse. In any one case, responsibility may attach all the way up the chain of command to the Chief of Defence Staff, as described above.

The available evidence strongly indicates that the unlawful treatment of detainees during arrest and transit operations was systemic. This is apparent from the continuity of abusive and degrading treatment by UK Services Personnel despite changes of personnel on the ground (see the list of Roulements at Annex I. The inescapable conclusion is that senior members of

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<sup>431</sup> Regarding the individual criminal responsibility for direct mistreatment of detainees at JFIT see below at Chapter VI.

<sup>432</sup> Email from Ari Sambei to Vivien Rose, Evidence Presented to the Baha Mousa Inquiry, MOD 020228, available at [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_130510/mod020228.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_130510/mod020228.pdf)

<sup>433</sup> Transcript of the BMI, 10 June 2010, p. 45, paras. 19-22, available at [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/hearings/transcripts/20101006day103fulldayws.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/transcripts/20101006day103fulldayws.pdf)

<sup>434</sup> Transcript of the BMI, 13 May 2010, p. 12, paras. 14-23, available at [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_130510/2010-13-05-day93fullday.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_130510/2010-13-05-day93fullday.pdf)

the chain of command bear responsibility for allowing and enabling such ill treatment to occur. Further, the allegations made by 412 PIL clients and the methods used by UK Services Personnel during the arrest and transit of detainees provide serious concerns that arrest and transit operations were carried out in such a way as to maintain and exploit the “shock of capture,” as part of a deliberate policy of “conditioning” detainees.

Almost all of the 412 PIL clients were detained (and in most cases subsequently interned for interrogation) following strike operations to arrest Iraqi males. In the vast majority of these cases, victims make similar allegations of the brutality of the operations.<sup>435</sup> These allegations provide an overall picture of the approach of UK Services Personnel to Iraqi civilians during arrest and transit operations. For example, the allegations highlight patterns during arrest operations of brutality, the destruction of objects and possessions, the removal of valuable possessions, Iraqi males being dragged from their beds and beaten, cuffed, hooded and dragged outside, homes left open to the elements, and the traumatising of women and children.<sup>436</sup> Medical notes disclosed during court proceedings in the UK corroborate victims’ allegations of mistreatment during arrest and transit.<sup>437</sup> Further, there is evidence that UK Services Personnel in Iraq used sight deprivation as a standard operating procedure during arrest and transit until as late as 2009 (even after the death of Baha Mousa).<sup>438</sup> The BMI Chairman also noted the use of stress positions during detainee handling training exercises and underlined the failure to prohibit these techniques at the point of capture. Further, the BMI Chairman noted that the use of hooding at the point of capture during training exercises created a risk that Service Personnel would be misled about what was acceptable practice at later stages of the detainee handling chain.<sup>439</sup> The failure to treat detainees with humanity and dignity during arrest and transit is further illustrated by the evidence of a CO of the BPF to the RMP. He recalled that on a couple of occasions people would be naked when they initially arrived at the BPF.<sup>440</sup>

PIL has analysed material disclosed in contested Judicial Review cases that details how arrest operations were authorised. UK Services Personnel appear to have had a rolling programme

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<sup>435</sup> See Chapter IV, Part D.

<sup>436</sup> A useful summary of some of the allegations of mistreatment and abuse by UK forces during arrest and transit is contained in Annex D2, Philip Joseph Shiner, Third Witness Statement in *Ali Zaki Mousa*, *supra* note 76, pp. 26-28.

<sup>437</sup> *Ibid.*, pp. 28-29.

<sup>438</sup> Annex D3, Philip Joseph Shiner, Fifth Witness Statement filed on behalf of the claimant in *Ali Zaki Mousa v The SSD*, 21 October 2010, p. 8, para. 16.

<sup>439</sup> Report of the Baha Mousa Inquiry, *supra* note 40, para. 6.57-6.64.

<sup>440</sup> Annex D2, p.28.

of strike operations, with each separate raid allocated a sequential number. Each operation was authorised by the relevant commanders (presumably at Divisional HQ) and would have potentially required legal advice before authorisation was granted. It is inconceivable that each and every UK operation in Iraq should not have been the subject of a proper authorisation process involving legal advisers and others. Further, reporting and feedback systems following operations must have provided clear information to military staff as to how arrest and transit operations were being conducted on the ground. Further, troubling questions arise as to who signed off on covert UK operations, now coming to light, regarding the operation of Special Forces in Iraq and the existence of certain secret sites not known even to the Head of Army Legal (for example, Lieutenant Colonel Nicholas Mercer who was Head of Army Legal to 1st UK Armoured Division during Operation Telic 1).<sup>441</sup>

The OTP must therefore investigate, pursuant to Article 25 of the ICC Statute, to what extent “*conditioning*” and other prohibited techniques were sanctioned and authorised in the conduct of arrest and transit operations, and by which members of the chain of command. The OTP must also investigate whether specific orders were given with respect to the treatment of “*high value*” detainees during and subsequent to their arrest. Further, the OTP must investigate, pursuant to Article 28 of the ICC Statute, the extent to which members of the chain of command were aware of detainee abuse, and the sanctioning of illegal conduct during arrest and transit, and failed to repress, prevent or punish the commission of war crimes. In particular, the criminal responsibility of OCs of arresting companies and the battle groups to which they belong, and those individuals at Brigade and Divisional level with responsibility for oversight of arrest and transfer operations warrant investigation by the OTP.

## **2) *Detention and Interrogation***

In this section, we discuss individual criminal responsibility for abusive detention and interrogation practices in Iraq, which arose as a result of inadequate doctrine and policy, and training. With respect to interrogation, we also discuss potential criminal responsibility for the ordering and sanctioning of prohibited practices, and for cruel, inhuman and degrading treatment that resulted as a consequence of “*force drift*”. Finally we highlight a number of issues with respect to interrogation practices at JFIT that require further investigation by the

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<sup>441</sup> See for example the death in custody of XXX, referred to above at pp. 103-4, which took place in transit to a “*black site*” in Western Iraq.

OTP and discuss the criminal responsibility of the JFIT OC, his or her superior - the Divisional J2X - and individuals higher up in the chain of command.

**a) Detention**

*(1) Doctrine and Policy*

As mentioned above, at the start of the Iraq conflict, the relevant “*joint doctrine*” publication (governing prisoner handling for all three military services) was known as JWP1-10.<sup>442</sup> At the time of Operation Telic 1 and 2, the “*joint doctrine*” contained no reference to the ban on the use of the five techniques.<sup>443</sup> With respect to doctrine on prisoner of war handling, BMI Chairman Sir William Gage stated:

*“I do not accept the MoD’s submission that it is only with the benefit of hindsight that one can conclude that the doctrine on prisoner of war handling ought to have been more prescriptive. On the contrary, not only was the need for prisoner of war doctrine to be brought into line with the prohibitions and constraints in Part I of the 1972 Directive foreseeable, it was actually foreseen by the Vice Chief of the General Staff in 1973.”*<sup>444</sup>

The OTP must therefore investigate the extent to which individuals in the chain of command are criminally responsible, under Article 25 of the ICC Statute, for prisoner handling doctrine and policy, which was both vague and which failed to explicitly mention the ban on the five techniques. The highly predictable result of such vague doctrines and policies was the torture and cruel, inhuman and degrading treatment of detainees in theatre.

*(2) Training*

Likewise, there is evidence that training with respect to detention practices was vague and general thereby leaving open the possibility for detainee abuse, and the further use of “conditioning” techniques to maintain the “shock of capture.”

The BMI Report noted the teaching of unlawful techniques, inadequacies and inconsistencies in prisoner handling training, a preference for unwritten instructions, and a strained

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<sup>442</sup>MoD, Prisoners of War Handling-Joint Warfare Publication, *supra* note 426.

<sup>443</sup>Report of the Baha Mousa Inquiry, *supra* note 40, para. 16.34

<sup>444</sup>*Ibid.*, para. 5.111.

interpretation of prohibitions.<sup>445</sup> With respect to training on the Law of Armed Conflict generally, the Chairman of the BMI stated:

[...]6.56 *I conclude that those who deployed on Op Telic 1 and 2 would have benefited significantly from LOAC and prisoner handling training which was more specific and gave more relevant and meaningful examples of behaviour on operations which was inhumane and forbidden, including the five techniques [...]*<sup>446</sup>

[...] 6.72 *Both the MoD and the Treasury Solicitor put forward variants of the argument that it cannot be said that it was a lack of LOAC training which led soldiers who witnessed or committed abuse in the TDF not to realise that the abuse was wrong. That argument has some merit, but it is not a complete answer to the training deficiencies. Nor do I accept that training deficiencies played no causative part in the events leading to the abuse of Baha Mousa and the other Detainees in the TDF. The MoD and the Treasury Solicitor are clearly right to the extent that any Service Personnel who saw the Detainees being punched, kicked or otherwise beaten must have known that it was wrong and inhumane treatment. I accept that every soldier or officer in that position had enough training to know that they had to treat detainees humanely and that beating them was entirely unacceptable.*<sup>447</sup>

Reports produced by the PM(A) also noted the “*lack of formal training in, and detailed understanding of, custody matters at the TDF*” and that this facility “*appeared more focused on maximising the ‘shock of capture’ and conditioning in advance of TQ rather than the humane handling of detainees.*”<sup>448</sup>

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<sup>445</sup> See *Ibid.*, para 6.52, in relation to stress positions; paras 6.219-222 in relation to sleep deprivation and exposure to noise; paras. 6.223-6.224 in relation to “harshing,” exploiting pressures on a prisoner, the shock of capture and “conditioning.”

<sup>446</sup> *Ibid.*, para. 6.56.

<sup>447</sup> Report of the Baha Mousa Inquiry, *supra* note 40, para. 6.72.

<sup>448</sup> Annex D2, para. 36. See also paras. 34-35. The April 2006 report also referred to the lack of shelter from the sun and rain for detainees within the TDF; detainees being seated on coarse stones; the use of blindfolds and ear protectors throughout time in the processing areas; and the fact that: “*taken in combination, the discomfort and sensory deprivation of internees may be interpreted as deliberate conditioning.*” A report dated June 2007 noted that: “*PM(A) considers the concurrent deprivation of both senses (sight and hearing) to be unnecessary and that this may be interpreted as deliberate conditioning, in order to maximise vulnerability and ‘shock of capture’...Deprivation of both senses of sight and hearing should not take place concurrently – this practice should cease. This was commented on strongly in the April 06 inspection report and again in the follow-up inspection report of Oct-06. It is surprising and disappointing that remedial action has not been taken.*”

It is also clear that inadequate training affected those individuals who might otherwise have been expected to sound the alarm regarding mistreatment. In relation to the medical officers, the BMI Report found that:

*“Keilloh was the senior medical officer within 1 QLR. He had not received any training or instructions in respect to prisoner handling, in general, or relating to his medical function in the prisoner handling process[...] Keilloh rightly conceded that the procedure in place before Baha Mousa’s death for examining and recording results of the examination of detainees was inadequate. He ought to have realized this and changed the position before Baha Mousa’s death.”*<sup>449</sup>

An investigation is therefore warranted into those individuals within the military chain of command who were responsible for training materials and courses that enabled or sanctioned the use of prohibited techniques in order to condition detainees for subsequent interrogation.

## **b) Interrogation**

### *(1) Doctrine and Policy*

It is also clear that methods of “conditioning” were part of the Intelligence Corps doctrine, employed at JFIT facilities. During the course of the court-martial of Corporal Payne and others, Colonel Mendonca confirmed that before the death of Baha Mousa, “hoods, handcuffs and stress positions did feature in the conditioning process,”<sup>450</sup> while another officer added that sleep deprivation was also part of “conditioning.”<sup>451</sup> These methods of “conditioning” “were all part of Intelligence Corps doctrine for Tactical Questioning and interrogation.”<sup>452</sup> During the court-martial it also emerged that “certain techniques long outlawed were in fact regarded as acceptable.”<sup>453</sup>

The BMI examined many failings with respect to the JFIT facility, beginning shortly after the invasion of Iraq in March 2003. During the BMI, the MoD conceded that:

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<sup>449</sup> Report of the Baha Mousa Inquiry, *supra* note 40, p.1313, paras.185-186. It should also be noted that Dr Keilloh was struck off the GMC’s Medical Register in December 2012 following a Fitness to Practice hearing that found him guilty of various incidences of professional misconduct for his failings in the Baha Mousa incident.

<sup>450</sup> REDRESS, “UK Army in Iraq: Time to Come Clean on Civilian Torture,” *supra* note 235, p. 119.

<sup>451</sup> *Ibid.*, p. 6, fn.22 quoting the transcript of the court martial proceedings of 17 October 2006, p.30.

<sup>452</sup> *Ibid.*, p. 6.

<sup>453</sup> *Ibid.*, pp. 6-7.

[...] it is clear that the result of the 1997 Policy for Interrogation and Related Activities which was approved at Ministerial level ought, if applied, to have resulted in a detailed directive for Operation TELIC which addressed interrogation in detail and which incorporated legal advice. Admittedly that did not happen.<sup>454</sup>

Further, the Corporate Submissions of the MoD to the BMI concede systemic failings.<sup>455</sup> The MoD stated that it “accepts that the evidence in respect of the JFIT in the early days of its operation give cause for concern.”<sup>456</sup> In relation to JFIT’s use of hooding, including double hooding and the use of plastic sandbags, sometimes in combination with forcing detainees to kneel in the sun with their hands cuffed behind them, the MoD stated that “the use of hooding at the JFIT was totally unacceptable.”<sup>457</sup> Similarly, it admitted that “the same is clearly true for the use of sleep deprivation as an aid to interrogation at the facility.”<sup>458</sup>

Other evidence before the BMI confirms that there was a notable lack of limits on coercive interrogation techniques. For example, Andrew John Haseldine (Captain in the Intelligence Corps in Iraq in 2003) gave evidence before the BMI about interrogation training he had undertaken in 1998. With respect to the use of implied threats of physical violence, these were “limited only by your imagination” and such threats were used on a daily basis throughout the interrogation training course that he attended.<sup>459</sup> He also gave evidence that there were no directions or constraints with respect to racial or other taunts and that with regards to the use of insults “anything goes.”<sup>460</sup>

The OTP must therefore investigate those individuals who were responsible for interrogation doctrine and policy and who may be criminally liable pursuant to Article 25 of the ICC Statute for ordering or encouraging the commission of war crimes. Consideration must also be given to the criminal responsibility of individuals higher up in the chain of command (including senior civil servants and lawyers within the MoD) who knew or should have known that war crimes were being committed by UK Services Personnel and failed in their

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<sup>454</sup>MoD, Closing Written Submissions to the BMI, *supra* note 74, p.158, para. 11.2.

<sup>455</sup>*Ibid.*

<sup>456</sup>*Ibid.*, p.109, para. 7.1.

<sup>457</sup>*Ibid.*, p. 109, para. 7.2.

<sup>458</sup>*Ibid.*

<sup>459</sup> Witness Statement of Andrew Haseldine to the BMI, *supra* note 81, p. 78, line 12 and p. 79, line 79.

<sup>460</sup>*Ibid.*, p. 10, line 4, 16-19.

responsibility to repress, prevent or punish such crimes, pursuant to Article 28 of the ICC Statute.

### *(2) Training of Interrogators Included Unlawful Techniques*

Evidence that interrogators were trained in the use of unlawful techniques must also be investigated by the OTP. Individuals within the chain of command who were responsible for such training may bear criminal responsibility pursuant to Article 25 of the ICC Statute for ordering or encouraging the commission of war crimes by UK Services Personnel.

For example, as discussed above, on 25 October 2010, following the leak of UK interrogation training materials, *The Guardian* reported that training materials used by the UK military instructed the use of various techniques, designed to provoke *inter alia* humiliation, insecurity and fear in detainees during questioning.<sup>461</sup> These materials included instructions on stripping detainees before questioning, enforced nakedness, sensory deprivation and harshing.

Finally, in relation to the training of JFIT personnel at Chicksands, the Chairman of the BMI noted the belated disclosure of a PJHQ document from 2003/04, which appeared to record that Chicksands taught the use of hooding.<sup>462</sup>

### *(3) Orders and Sanctions*

There is also significant and concerning evidence that the use of hoods and stress positions to maintain the “shock of capture” was sanctioned, at least at Brigade level. During the court martial in relation to the death of Baha Mousa, the prosecution accepted evidence that the use of hoods and stress positions as a means of maintaining the “shock of capture” had been sanctioned at Brigade level. With respect to this issue, the BMI found that Major Royce (the BGIRO from June 2003 to August 2003) had raised the issue of hooding and stress positions with Major Clifton (the Brigade’s legal advisor superior) and Major Mark Robinson (head of the Brigade intelligence cell), and had received assurances that hooding and stress positions for the purpose of “conditioning” detainees was permissible.<sup>463</sup> Significantly, the Judge Advocate in the court-martial relating to the death of Baha Mousa accepted the defence

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<sup>461</sup>Ian Cobain, “Humiliate, Strip, Threaten,” *supra* note 108.

<sup>462</sup>Report of the Baha Mousa Inquiry, *supra* note 40, paras. 6.321, 6.324.

<sup>463</sup>*Ibid.*, paras. 13.77 - 13.93. See also N. Rasiah, “The Court-martial of Corporal Payne and the Future Landscape of International Criminal Justice”, *Journal of International Criminal Justice*, 7 (2009), pp. 177-199 at p. 185. See also A.T. Williams, “A Very UK Killing: The Death of Baha Mousa” (London: Vintage Books, 2013), p. 246-251. Andrew Williams is a professor of law and Director of the Centre for Human Rights in Practice at the University of Warwick.



submission that, given the sanction, the OC Colonel Mendonca was entitled to say that he had satisfied himself that the “conditioning” process did not contravene the Law of Armed Conflict. What is more, there are numerous and concerning allegations relating to the authorisation of prohibited interrogation practices at JFIT from 2003-2008.<sup>464</sup>

The OTP should therefore investigate which individuals were responsible for sanctioning, at least at Brigade level, the use of hoods and stress positions (and potentially other forms of mistreatment) and their potential criminal responsibility pursuant to Article 25 of the ICC Statute for ordering or encouraging the commission of war crimes. An investigation is also warranted into whether such techniques were sanctioned or ordered at higher levels in the chain of command (also giving rise to responsibility under Article 25 of the ICC Statute). Finally, the OTP must investigate whether senior individuals in the chain of command are criminally responsible pursuant to Article 28 of the ICC Statute on the basis that they were aware of the sanctioning and practice of such techniques and failed in their duty to repress, prevent and punish the commission of war crimes by UK Services Personnel.

#### *(4) Force Drift*

The authorisation of vague and inadequate policies and training regarding detainee handling and interrogation and, *a fortiori*, the training and authorisation of prohibited abusive techniques, meant that “*force drift*” was a foreseeable and predictable consequence in Iraq. The phenomenon of “*force drift*” was explained in 2004 by Alberto J. Mora, former General Counsel of the U.S. Navy with respect to detainee abuse during interrogation at Guantanamo Naval Base. Mora noted that:

*“once the initial barriers against the use of improper force had been breached, a phenomenon known as ‘force drift’ would almost certainly begin to come into play. This term describes the observed tendency among interrogators who rely on force. If some force is good, these people come to believe, then the application of more force must be better. Thus, the level of force applies against an uncooperative witness tends*

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<sup>464</sup>A summary of some of these allegations is set out in Annex D1, Philip Joseph Shiner, First Witness Statement, paras. 38-39.

*to escalate such that, if left unchecked, force levels, to include torture, could be reached.*”<sup>465</sup>

Thus, where improper and forcible practices are authorised or enabled by the State, there is a tendency for those implementing these practices on the ground to go beyond the authorised limits. This is a result of a number of factors. First, the fact that legal and moral standards have already been lowered leads individuals on the ground to think “*what is wrong with a little more.*” Second, the boundaries of what illegal practices are in fact authorised are no longer clear. For example, if hooding is banned except for security reasons, this allows an individual soldier to make a subjective decision in the heat of the conflict that for whatever reason, he is entitled to put a sandbag or two on a man’s head for some unspecified period for as long as he thinks there is an ongoing justification related to security. Further, where male Muslims are to be stripped naked at the outset of internment prior to interrogation, purportedly for medical examination, it is only a short extension for interrogators to routinely use nudity as a means of “*softening up*” an internee prior to interrogation and for interrogators to be encouraged to keep un-cooperative detainees naked for as long as possible. Training manuals leaked to The Guardian refer to an authorised and trained practice at Chicksands of “*get them naked...and*” “*keep them naked if they do not follow commands.*”<sup>466</sup> Such “*force drift*” is encouraged through the culture of an expectation of impunity - there is no expectation that individual interrogators will be punished for inhumane treatment in circumstances where other unlawful means of treatment have been sanctioned by the State.<sup>467</sup>

The approval, acceptance and failure to repress methods of interrogation in Iraq that were degrading and abusive, led to the use of ever more degrading methods of detainee treatment. This involved the drift from authorised techniques (for example disorientation for security reasons) to excessive and violent prolongation of authorised techniques and the improvisation of more severe techniques in theatre. The effects of “*force drift*” can be clearly seen and understood through a viewing of interrogation training videos and videos of interrogation

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<sup>465</sup>Department of the Navy, General Counsel of the Navy Albero J. Mora, “*Memorandum for Inspector General, Department of the Navy – Statement for the Record: Office of General Counsel Involvement in Interrogation Issues,*” 7 July 2004, available at <http://www.newyorker.com/images/pdfs/moramemo.pdf>.

<sup>466</sup>Ian Cobain, “*Humiliate, Strip, Threaten,*” *supra* note 108.

<sup>467</sup>See Annex D2, Philip Joseph Shiner, Third Witness Statement, para. 19.

sessions in Iraq, which show shouting, foul language, abuse, insults and attacks on the religious beliefs of detainees.<sup>468</sup>

The OTP must therefore investigate the criminal responsibility of those individuals who bear the greatest responsibility for vague and general doctrine and policies, and the sanctioning of illegal techniques. This led to the increasing use of cruel, inhumane and degrading treatment of detainees in Iraq by UK Services Personnel and is consistent with the “*force drift*” phenomenon. Subject to further investigation, those individuals may be criminally liable on the basis of principal or accessory liability pursuant to Article 25 of the ICC Statute. Further, the OTP should investigate whether and to what extent individuals higher up the chain of command were aware of the circumstances giving rise to “*force drift*” and failed in their duty to repress, prevent or punish the commission of war crimes. This would give rise to criminal responsibility under Article 28 of the ICC Statute.

(5) *JFIT*

Finally, the evidence of the use of coercive techniques during interrogation at JFIT must be investigated by the OTP to determine exactly what techniques were sanctioned or ordered and by which individuals in the chain of command. Many of the allegations of mistreatment and abuse during questioning and interrogation of detainees in Iraq by UK Services Personnel relate to interrogation at JFIT. The majority of the 412 PIL cases including the victims’ accounts in section IV above, involve Iraqis being detained and interned at the JFIT facility for interrogation. It is clear from these accounts that particular coercive interrogation and “*conditioning*” techniques, involving *inter alia* sexual abuse and humiliation, were developed, evolved and consistently used at JFIT.

The existence of policies and training mandating the mistreatment of detainees during interrogation at JFIT is clear, not only from the victims’ testimonies summarised in this communication, but also in the video recordings of interrogation sessions carried out by the JFIT personnel, mentioned above. Whilst it is known that many such recordings have gone missing, many thousands remain. In a statement made during the *Ali Zaki Mousa* proceedings in the UK, Geoff White, the head of IHAT (discussed below) stated that there are

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<sup>468</sup>*Ibid.*, with reference to exhibit PJS12 – a CD containing four videos. The first video is a training video disclosed in the BMI and available on the BMI website under reference BMI 02687. The second video is the third of thirteen video-taped interrogation sessions disclosed by the SSD in the *Kammash* proceedings. It refers to Claimant 3 in those proceedings, XXX. Cross reference to videos in supporting bundle

currently over 3,500 available recordings. As of 26 June 2012, 3,186 sessions had been viewed and saved. It is known to PIL that a considerable amount of the recorded sessions contain prohibited or offending behaviour.<sup>469</sup>

There are also numerous allegations by victims of the use of sleep deprivation at JFIT. In addition, evidence from a number of sources, disclosed in proceedings against the SSD, raises serious concerns that sleep deprivation was an authorised practice.<sup>470</sup> This evidence includes Daily Occurrence Books and Watchkeeper Logs, detailed above, which record the instruction and use of sleep deprivation.<sup>471</sup> In statements to the RMP, some soldiers also refer to the use of sleep deprivation at JFIT and during TQ:

- i. *“The sleep deprivation techniques used [...] may have been directed by JFIT, but it is certainly not something the MPS do or direct to do. I do not know anything about blankets being thrown over his head, again, this may have been a JFIT technique”.*
- ii. A Military Provost Staff guard in the DTDF (not JFIT) distinguishes JFIT’s practices from the internment facility: *“I had no concerns apart from once, we had to remind the Tactical Questioning crew that my guys (i.e. Guard Force) were not in place to carry out their action and that once the detainee was passed back to us then he would be allowed to sleep and rest as necessary. The TQ guys accepted this and had no problems.”*<sup>472</sup>

Finally, the victims’ accounts of insults, threats, violence and sexual and religious humiliation during interrogation sessions are consistent with what appears to be an internal JFIT document titled “Draft Field Exploitation Team Standing Operating Procedures,” dated 19 September 2006. This document, outlined above, provides that the style of questioning may include *“a harsh approach”* in order to maintain the “shock of capture”.<sup>473</sup>

Against this background, we now discuss in greater detail those individuals responsible for such conduct and the operation of JFIT. In particular, we discuss the criminal responsibility of the OC JFIT, and his or her immediate superior, the Divisional J2X.

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<sup>469</sup>The source of this information is the subject of a strict confidentiality obligation. PIL understands that the Office of the Prosecutor may wish to access the original source of this information. PIL is happy to guide the Office of the Prosecutor in this regard.

<sup>470</sup> Annex D2, Philip Joseph Shiner, Third Witness Statement paras. 26-28.

<sup>471</sup> See above at Chapter IV (E)(2) - Documents Disclosed by the UK Government.

<sup>472</sup> Annex D2, Philip Joseph Shiner, Third Witness Statement, para. 28.

<sup>473</sup> See above at Chapter IV(E)(2) - Documents Disclosed by the UK Government::

### ***(1) Criminal Responsibility of the OC JFIT***

Responsibility must lie, to some considerable degree, with the respective OC JFIT, the most senior officer permanently based at JFIT. It is the OC JFIT who was in direct contact with, and responsible for the supervision (i.e. by remote video monitoring) and control of, JFIT interrogators. The OC JFIT commanded and exercised effective authority and control over a relatively small number of JFIT personnel. Further investigation by the OTP is warranted to establish the extent of the OC JFIT's knowledge of operations and personnel. The authors of this communication are not aware of the precise number OCs of JFIT between 2003 and 2008. This should be examined by the OTP.

The BMI heard evidence from one OC JFIT given the cipher S040, who was deployed to Iraq as the OC JFIT at Camp Bucca from 2 March 2003 until 6 June 2003. In this capacity, S040 was “*responsible for overseeing all aspects of the operation of the JFIT facility until responsibility for it passed to US forces in early April.*”<sup>474</sup> He had been appointed to DISC in 1998, at which point he was given training on interrogation techniques.<sup>475</sup> He was the JSIO Reserves Wing OC, which was principally formed of three reserve companies: HMS Ferret, 22 Military Intelligence (Volunteer) Company and 7630 (Intelligence) Squadron of the Royal Auxiliary Air Force.<sup>476</sup> One of the roles of this Reserves Wing was “*to provide Reserves personnel who were proficient in languages, Tactical Questioning, Interrogation and, in some cases, Debriefing.*”<sup>477</sup>

S040 was recorded by another officer, Lt Col Ridge, as expressing the view that “*the value of interrogation may be such that from a political viewpoint it outweighs the legal considerations.*”<sup>478</sup> In minutes submitted to the BMI outlining the “*Preliminary Results*” of an Interrogation Requirements Study from 1999, S040 elaborated on this theme, stating that “*once politicians become aware of the value of intelligence obtained by interrogating enemy PW [Prisoners of War] they will stretch their own rules to allow it in some form or*

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<sup>474</sup>Witness Statement of “S040” to the Baha Mousa Inquiry, *supra* note 57, para. 11.

<sup>475</sup>*Ibid.*, para. 14.

<sup>476</sup>Witness Statement of “S040” to the Baha Mousa Inquiry, *supra* note 57, paras. 4-6.

<sup>477</sup>*Ibid.*

<sup>478</sup>JSIO DISC Chicksands, “Request for Clarification of Legal Status of Interrogation in Situations other than General War” (MOD028356), para.12, available at [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_160310/mod028352.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_160310/mod028352.pdf).

another.”<sup>479</sup> Further, in an email sent to HUMINT in July 2002, S040 discussed a meeting held at the Military Corrective Training Centre in Colchester:

*It was attended by about 20 people from [...] who chaired the meeting down to Captains various, and there was a US Army MP Captain who told us all about what they were doing in Bagram and Guantanamo, and an Aussie Major who is attached to Army Legal Services. Whilst I can't say that we would have missed much by not attending, it did enable me to remind the assembled crowd of the need to approach PH [prisoner handling], TQ [Tactical Questioning], Interrogation and PWHO [prisoner of war holding organisation] holistically and not to get too wound up in prisoners' rights at the expense of int. [intelligence]. They in turn were very reassuring that there would be no interference in TQ of interrogation activities and that the proposed TA MOD Provost Service unit would not be involved with us but were there to advise/train the Commander and the PWHO on prisoner handling.*<sup>480</sup>

S040 had obtained advice in November 1999 from Lt Col S.K. Ridge of the Army Legal Service (the providers of legal advice to the Army on all aspects of operations including International Humanitarian Law and Human Rights Law), who was in a position of superior rank to S040. The advice emphasized the application of at least English criminal law and human rights law.<sup>481</sup>

This evidence makes clear that the most senior officer permanently based at JFIT from March 2003 until June 2003 was fully aware that his interrogation approach conflicted with legal norms. He was also aware of the abuse of detainees by US forces in Iraq and Guantanamo, and the illegality of such treatment. S040 explicitly contemplated stretching the rules on the basis that the value of interrogation and intelligence might be such as to outweigh legal considerations. This combined with the evidence of detainee abuse and mistreatment within the JFIT facility under his command, raises concerning questions about what orders S040

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<sup>479</sup>Extract from ‘Interrogation requirements study – preliminary results,’ Evidence submitted to the BMI, 15 March 2010 (Day 67) Afternoon Session, MOD028335-MOD028339, available at [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_150310/mod028335.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_150310/mod028335.pdf).

<sup>480</sup>Extract from Email – Dist List for DHWG 03/07/02, Evidence submitted to the BMI, 15 March 2010 (Day 67) Afternoon Session, MOD037459, available at [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_150310/mod037459.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_150310/mod037459.pdf).

<sup>481</sup>Report of the Baha Mousa Inquiry, *supra* note 40, para. 5.35.

gave to forces under his command, and/or to what extent his approach to interrogation at least encouraged the commission of war crimes by those forces. Arguably, this evidence strongly suggests that S040 knew and intended, or at the very least was aware of a substantial likelihood, that war crimes would be committed by forces under his control at JFIT in accordance with his approach to interrogation. Thus his individual criminal responsibility pursuant under Article 25 of the ICC Statute is engaged, either as a principal or ancillary perpetrator. His conduct also warrants investigation with respect to potential criminal liability under Article 28 of the ICC Statute.

## ***(2) Criminal Responsibility of Divisional J2X***

The JFIT OC had a separate chain of command to all other units within the detention facilities at which JFIT operated. The JFIT OC reported directly to the “*Divisional J2X.*”<sup>482</sup> The Divisional J2X was entrusted with effective command and control, in that the officer had “*the material ability to prevent and punish*” the commission of crimes or repress or “*submit the matter to the competent authorities.*”<sup>483</sup> It is clear from evidence before the BMI that the Divisional J2X had authority over JFIT and knew or should have known of the techniques practiced by JFIT. An investigation is therefore warranted into the potential criminal responsibility of the Divisional J2X at all material time, pursuant to Article 28 of the ICC Statute. Further, an investigation is also warranted into the potential criminal responsibility of the Divisional J2X at all material time, under Article 25 of the ICC Statute. The evidence outlined above with respect to the attitude and approach of the OC JFIT towards interrogation gives rise to questions as to whether this approach was ordered or otherwise encouraged by the Divisional J2X (the immediate superior to the OC JFIT).

The BMI heard evidence from a Major (now a Colonel) given the cipher S002 who was the Divisional J2X during Operation Telic 1 and Operation Telic 2 from 19 March 2003 until 28 December 2003.<sup>484</sup> The BMI’s findings in respect of S002 included that:

- i. S002 knew that hooding was being used at JFIT.<sup>485</sup>

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<sup>482</sup>*Ibid.*, para. 8.21.

<sup>483</sup>*Bemba* (ICC-01/05-01/08), *supra* note 252, para. 415.

<sup>484</sup>Witness Statement of “S002” to the Baha Mousa Inquiry, 6 November 2009, BMI05823, available at [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_220410/bmi05823.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_220410/bmi05823.pdf).

<sup>485</sup>Report of the Baha Mousa Inquiry, *supra* note 40, para. 8.476.

- ii. S002 “believed that hooding for security purposes had been deemed acceptable on legal advice” but also that “he knew that [hooding] may also have had the side benefit or effect of preserving the shock of capture.”<sup>486</sup>
- iii. S002 had a “strong recollection” of being told by the OC JFIT that hooding had a side benefit of prolonging the ‘shock of capture.’<sup>487</sup>
- iv. “[...] not least from his own first visit to the JFIT, S002 was aware from an early stage that prisoners were hooded for protracted periods and were being kept awake pending initial interrogation by being gently nudged.”<sup>488</sup>
- v. On 6 April 2003, S002 attended a meeting with the ICRC regarding concerns about the UK’s treatment of those detained, at which a UK army legal officer, Nicholas Mercer (*Commander Legal at HQ 1<sup>st</sup> (UK) Armoured Division*), who was of the view that sight deprivation was in most circumstances unlawful, was instructed not to speak.<sup>489</sup> On 28 March 2003, Colonel Mercer had seen detainees at JFIT kneeling and squatting, cuffed and hooded, with a generator operating nearby to the interrogation tent.<sup>490</sup> Colonel Mercer raised concerns that this treatment was in violation of the Third Geneva Convention with his General OC in a written note.<sup>491</sup> S002 responded by way of memorandum indicating that such treatment was in accordance with UK doctrine on TQ.<sup>492</sup> In oral evidence before the BMI, Colonel Mercer stated that with respect to what he saw at JFIT: “it’s a bit like seeing a picture of Guantanamo Bay for the first time. It is quite a shock”.<sup>493</sup>

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<sup>486</sup> *Ibid.*, para. 8.476.

<sup>487</sup> *Ibid.*, para. 8.469.

<sup>488</sup> *Ibid.*, para. 8.478.

<sup>489</sup> *Ibid.*, paras. 8.495-8.496.

<sup>490</sup> *Ibid.*, para. 8.62.

<sup>491</sup> *Ibid.*, para. 8.63.

<sup>492</sup> *Ibid.*, para. 8.162, offers a copy of the memorandum. The memorandum notes that hooding was used only as a security precaution when moving prisoners to the JFIT area; was maintained for the shortest time possible; and was not intended to intimidate, cause distress, or damage sensory capability. The memorandum also refers to the use of sleep deprivation and stress positions and distinguishes between sitting and kneeling and “other more extreme stress positions.”

<sup>493</sup> *Ibid.*, para. 8.66. See also para. 8.62.



- vi. After an Order by General Brims banning hooding in early April 2003,<sup>494</sup> detainees continued to arrive at JFIT in hoods and S002 was made aware of this by OCJFIT.<sup>495</sup>

S002 and those individuals who subsequently held the position as the Divisional J2X bear responsibility for the actions of JFIT on the basis that they had authority over JFIT and knew or should have known of the practices employed within JFIT to extract information from detainees. They represented JFIT to external bodies, for example the ICRC. The preliminary conclusion, which warrants further investigation by the OTP, is that the Divisional J2X officer who was in charge during Operation Telic 1 and Operation Telic 2, had been made fully aware of the fact that detainees were still being hooded despite the ban on hooding in early April 2003. He accordingly failed in his command responsibility to stop and prevent the abuses, or to refer them to the appropriate authorities, thereby engaging his responsibility under Article 28 of the ICC Statute. The responsibility of Divisional J2X officers during the latter period of Operation Telic in Iraq also warrant further investigation by the OTP as it is clear that despite the ban on hooding in April 2003, hooding and other forms of ill treatment were employed at JFIT after this time.

### ***(3) Criminal Responsibility of Individuals Higher up in the Chain of Command***

The OTP must also investigate the potential criminal liability of those individuals above Divisional J2X officers for the ill treatment of detainees at JFIT. The Divisional J2X reported to the Chief of Staff of the relevant Division in Iraq (in 2003, this was 1 UK Armoured Division) and to the Commander of Joint Operations at PJHQ in the UK, who then reported to the CDS.<sup>496</sup> The CDS reported to the SSD.<sup>497</sup> The CDS is the professional head of the UK Services Personnel and the most senior uniformed military adviser to the SSD and the Prime Minister. The CDS is based at the MoD and works alongside the Permanent Under Secretary, who is the MoD's senior civil servant. In 2003, at the time of the invasion of Iraq, Admiral Michael Cecil Boyce was CDS. He was succeeded shortly thereafter by General Sir Michael Walker. From 2006 until 2009, Air Chief Marshal Graham Eric "Jock" Stirrup held the

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<sup>494</sup>*Ibid.*, para. 8.490.

<sup>495</sup>*Ibid.*, para. 8.499.

<sup>496</sup>See diagram of JFIT Chain of Command at Annex G3. See also, for example, a Post-Operational Tour Report, Land Command Component for JFIT, MOD04189, available at [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_150310/mod041849.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_150310/mod041849.pdf):

<sup>497</sup> Report of the Baha Mousa Inquiry, *supra* note 40, reproduced at Annex L.

position of CDS. Further, the role of senior MoD civil servants and lawyers needs careful examination as documentation and evidence analysed in the BMI suggests that they too had a potential criminal liability in respect of the matters the subject of this communication.

The OTP is also requested to investigate the role of senior military officers in relation to the matters raised in this complaint, as they bear, *prima facie* command responsibility pursuant to Article 28 of the ICC Statute. This is in relation to the evident systemic failings that occurred in relation to detainees in Iraq at all stages of operations from arrest and transfer to detention and interrogation. The OTP is also requested to investigate and consider whether these senior military officers are criminally liable pursuant to Article 25 of the ICC Statute where there is evidence that they ordered or encouraged the commission of war crimes by UK Services Personnel in Iraq.

#### **D) Criminal Responsibility of Civilian Superiors - the SSD and the Minister for the Service Personnel**

At the top of the above chains of command, in relation to policies and training, and detention operations including JFIT are senior civil servants, including Secretaries of State and Ministers of State. The member of government with ultimate responsibility for the UK Services Personnel is the SSD. The SSD is a Cabinet Minister and is in charge of the MoD. The Secretaries of State for Defence during operations in Iraq were:

- 1) Geoffrey Hoon – 11 October 1999 to 6 May 2005
- 2) John Reid – 6 May 2005 to 5 May 2006
- 3) Des Browne – 5 May 2006 to 3 October 2008
- 4) John Hutton – 3 October 2008 to 5 June 2009

The Minister of State for the Service Personnel is directly subordinate to the SSD. The Ministers of State for the Service Personnel during operations in Iraq were:

- 1) Adam Ingram – 7 June 2001 to 29 June 2007
- 2) Bob Ainsworth – 29 June 2007 to 5 May 2009

As the highest civilian commanders of UK Services Personnel, the SSD, and the Minister of State for the Service Personnel have primary responsibility for ensuring that military and civilian personnel act in accordance with the law. Although it is a matter warranting further investigation by the OTP, we submit that the SSD and the Minister of State for the Service Personnel:

- (i) had effective command or authority and control over their subordinates committing crimes within the jurisdiction of the Court; and
- (ii) knew or consciously disregarded information which clearly indicated that their subordinates were committing such crimes; and
- (iii) the crimes concerned activities that were within the effective responsibility and control of the superior; and
- (iv) failed to take all necessary and reasonable measures within their power to prevent or repress their commission, or to submit the matters to the competent authorities thereby engaging their criminal responsibility as superiors under Article 28(1)(b) of the ICC Statute.<sup>498</sup>

#### ***Effective Authority and Control Over Subordinates***

According to the ICC Pre-Trial Chamber II “*effective control*” is “*the material ability to prevent and punish*” the commission of crimes or repress or “*submit the matter to the competent authorities.*”<sup>499</sup> Such control was exercised by Former SSD, Geoffrey Hoon, and former Minister of State for the Service Personnel, Adam Ingram.

According to the statement of Geoffrey Hoon, Secretary of State from 2003-2005, to the BMI (emphasis added):

*4. I [...] regularly consulted the Chief of the Defence Staff and the Chief of the General Staff. Discussions and consultations with other members of the military took*

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<sup>498</sup>See Cross-Examination of Geoffrey Hoon, by Rabinder Singh QC for the Iraqi Core Participants in the BMI on 10 June .2011, pp 216 – 226, on the issue of what he knew about the ICRC’s concerns about the UK’s use of systematic hooding in the light of his assurances to Parliament and MP’s that there was no evidence of systematic hooding available at

[http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/hearings/transcripts/20101006day103fulldayws.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/transcripts/20101006day103fulldayws.pdf).

<sup>499</sup>*Bemba* (ICC-01/05-01/08), *supra* note 252, para. 415.

place as and when particular issues arose. In addition, Martin Hemming, the Legal Adviser to the MoD, regularly provided guidance on numerous matters.

5. Adam Ingram took the lead on a day to day basis for issues relating to the Service Personnel including the proper treatment of Prisoners of War and detainees in Iraq. I asked him to do so as part of the division of ministerial duties...because Mr Ingram undertook the majority of work and attended the majority of meetings on the issue, I did not usually deal directly with advisors on these matters. However, I was ultimately responsible for the decisions taken and became involved as and when it was considered necessary. Further, Mr Ingram consulted me on a regular basis and we discussed issues frequently.

6. I also had a number of staff in the Private Office who provided advice. Peter Watkins was my principal Private Secretary during Op Telic 1 and 2 and Martyn Williams was the military representative who was seconded from the Royal Navy. They were also involved in discussions on prisoner handling matters.<sup>500</sup>

On this basis of the evidence, it is clear that the SSD was ultimately responsible for decisions taken regarding the Services Personnel treatment of detainees in Iraq. It is also clear that the Minister of State for the Services Personnel took responsibility for these issues on a day to day basis, at the request of the SSD in accordance with the division of ministerial duties. Their relationship was one of discussion and supervision on all relevant matters.

Interrogations were authorised at the ministerial level. On 3 March 2003, a submission was put to the then SSD, Geoffrey Hoon, seeking approval for HUMINT operations (interrogation and TQ) in Iraq.<sup>501</sup> Hoon sought approval from the Foreign Secretary and that approval was given on 10 March 2003.<sup>502</sup> Mr Hoon stated to the BMI:

9. *I sought approval from the Foreign Secretary [Jack Straw] for the conduct of such [UK HUMINT (interrogation)] operations as is apparent from my letter to him dated*

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<sup>500</sup>Witness Statement of Geoffrey Hoon to the BMI, 21 May 2010, BMI08251, available at [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_100610/bmi08521.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_100610/bmi08521.pdf).

<sup>501</sup>See Report of the Baha Mousa Inquiry Report, *supra* note 40, para. 7.180, which offers a reproduction of the letter.

<sup>501</sup>*Ibid.*

<sup>502</sup>*Ibid.*, paras. 7.186-7.188.

3 March 2003. I do not specifically recall seeing the reply from him, though I am confident that he granted such approval [WORDS REDACTED].<sup>503</sup>

It is clear from Hoon's letter to the Foreign Secretary that interrogation and TQ matters were being considered and overseen by the highest levels of responsibility. The letter stated:

*[...] Interrogation will be carried out by appropriately trained personnel and all prisoner handling will be managed in accordance with agreed UK-US guidelines and the Geneva Convention [...]*

*[...]An In-Theatre Management Board will be formed to direct and control HUMINT [interrogation] operations [...] The Board, which will meet at the National Component Headquarters in Qatar, will include the UK Chief of Staff/Assistant Chief of Staff Operations, MoD's Political Adviser in Qatar, Legal Adviser, [REDACTED] and the head of HUMINT planning. The Management Board will meet at least monthly. It will provide a report to PJHQ and MOD HQ after every meeting and will refer contentious or sensitive issues to the MoD Supervisory Authority (see below) as necessary. [REDACTED]*

*MOD. An MOD Supervisory Authority will be established to provide high-level oversight and guidance for all Op [REDACTED] HUMINT operations. It will comprise representatives from various sections of MOD with knowledge and experience of HUMINT operations, as well as MOD Legal Adviser [REDACTED] The Supervisory Authority will instruct the In-Theatre Management Board on an ad hoc basis as required, but will meet formally to review operations every quarter. The Supervisory Authority would refer to Ministers where authorisation outside of Op [REDACTED] is required.<sup>504</sup>*

Hoon indicated to the BMI that he had a basic, peripheral knowledge of the *Ireland v UK* case and therefore the unlawfulness of the five techniques: "I was generally aware from my general knowledge that hooding was part of a set of practices that had been banned in the 1970s, arising out of investigations in Northern Ireland".<sup>505</sup> However, beyond the reference to the Geneva Conventions, it is unclear how this knowledge impacted, if at all, on his

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<sup>503</sup>Witness Statement of Geoffrey Hoon, *supra* note 500, para. 9.

<sup>504</sup> See Report of the Baha Mousa Inquiry, *supra* note 40, para. 5.25.

<sup>505</sup>Witness Testimony of Geoffrey Hoon to the BMI, 10 June 2010, p. 184, line 5 available at [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/hearings/transcripts/20101006day103fulldayws.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/transcripts/20101006day103fulldayws.pdf).

authorisation of interrogation operations. Further, it is concerning that Hoon stated that he was not aware of the use of hooding in Iraq until after the death of Baha Mousa, and that even after the death of Baha Mousa, he still believed hooding to be lawful in certain circumstances:

*8. It was not until after the death of Baha Mousa that I became aware both of the use of hooding in Iraq and the circumstances in which it had been employed. As a result of the information that I received, my understanding of hooding was (and remained) as follows: Hooding was only lawful where there were clear operational security reasons for the deprivation of sight; and this was generally whilst the prisoner was in transit. Once the security concerns ceased, hooding was no longer permissible. It was also clear that hooding was not, in any circumstances, lawful as an aid to the questioning of a prisoner.*<sup>506</sup>

A substantial amount of material, detailed below, came to the attention of the former SSD Geoffrey Hoon and the former Minister of State for Services Personnel Adam Ingram. This material clearly demonstrated that interrogations and detainee handling were not being conducted in compliance with the Geneva Conventions. The precise extent of their knowledge of offences being committed in Iraq by UK Services Personnel requires further investigation.

#### ***Knowledge of Detainee Abuse by Hoon and Ingram***

There were a significant number of revelations concerning deaths of detainees while in UK custody and ill treatment of detainees by UK Services Personnel. These revelations related to incidents occurring immediately following the commencement of combat operations and during the early stages of the occupation of Iraq. The nature and extent of these revelations provide strong evidence to show that the Secretaries of State for Defence and the Ministers of State for Services Personnel during the relevant periods, knew or consciously disregarded information which clearly indicated that UK Services Personnel were conducting detention and interrogation operations in an unlawful manner. The sequence of events highlights a clear failure to monitor and address standards of detainee treatment. It also highlights a failure to ensure the implementation of appropriate standards (for example by ensuring the implementation of the ban on the five techniques, including hooding) in circumstances where credible allegations of detainee mistreatment were brought to the attention of civilian and military superiors, and were widely published in international media over a period of many

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<sup>506</sup> Witness Statement of Geoffrey Hoon, *supra* note 500.

months. Despite two verbal bans on hooding, hooding continued in practice. These revelations are detailed below.

1. On either 31 March 2003 or 1 April 2003, representatives from the ICRC observed the hooding of detainees at JFIT. On 1 April 2003, the ICRC representative in Qatar verbally informed the political advisor of the Commander of the UK Services Personnel at the Coalition Forces Central Command in Doha about methods of ill-treatment, particularly hooding, used by military intelligence personnel to interrogate persons deprived of their liberty in the internment camp of Umm Qasr.<sup>507</sup> According to a note made by the same political advisor a year later, the ICRC representative referred to the use of hooding, cuffing, kicking, and stress positions, and detainees being made to sit in the sun as punishment for disruptive and violent behaviour.<sup>508</sup> The BMI Report considered it “*likely that the ICRC’s concerns were raised via other routes as well as by the ICRC representative in Qatar telephoning SO34.*”<sup>509</sup>
2. Between 1 and 3 April 2003, Air Marshal Burridge (NCHQ Commander) and OC Brims (OC of 1<sup>st</sup> (UK) Armoured Division) issued verbal orders banning hooding in theatre.<sup>510</sup> Despite this, the use of hooding continued. The BMI declined to investigate in detail the extent to which hooding continued after the verbal bans, and was therefore unable to make any findings on how widespread the practice of hooding was after those dates. Nonetheless the BMI found that hooding “*was not fully and effectively stopped as a result of the oral orders in early April.*”<sup>511</sup> The BMI Report notes evidence of: the continued use of hooding at JFIT;<sup>512</sup> detainees arriving at JFIT/TIF having been hooded by capturing units;<sup>513</sup> the continued use of hooding by 1 Black Watch (the BG that handed over to 1 QLR);<sup>514</sup> the use of hooding during an arrest operation on 4 April 2003, footage of which was broadcast in the UK by ITN on 5 April 2003 (detailed below);<sup>515</sup> and the hooding of detainees aboard Chinook

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<sup>507</sup>Report of the Baha Mousa Inquiry, *supra* note 40, para. 8.195.

<sup>508</sup>*Ibid.*, para. 8.189.

<sup>509</sup>*Ibid.*, para. 8.190. See also paras. 8.191- 8.192.

<sup>510</sup>*Ibid.*, para. 8.199.

<sup>511</sup>*Ibid.*, paras. 8.316-8.318.

<sup>512</sup>*Ibid.*, paras. 8.319-8.324.

<sup>513</sup>*Ibid.*, paras. 8.325-8.336.

<sup>514</sup>*Ibid.*, para 8.337.

<sup>515</sup>*Ibid.*, paras. 8.338-8.350.

helicopters while in the custody of the RAF Regiment during an operation in theatre on 11 April 2003 (also detailed below).<sup>516</sup>

3. On 5 April 2003, the television station ITN broadcast footage in the UK of a UK arrest operation in Iraq, conducted on 4 April 2003.<sup>517</sup> The footage showed detainees arrested in their homes and hooded and cuffed with plastic ties; detainees hooded and squatting; one detainee is hooded with a plastic bag; and a number of detainees hooded in the back of an open top lorry.<sup>518</sup> It would be extraordinary if such sensitive footage of UK operations, broadcast nationally in the UK, did not come to the attention of senior officials within the MoD, including the SSD and Minister of State for the Services Personnel, or if it showed practices that were not already known to them. The evidence of former SSD Geoffrey Hoon at the BMI was that he had no recollection of seeing the video, although he went on to say: *I can't say anyone who viewed that film would particularly like what they saw. I think, having seen it, I might have taken the same view that I think General Brims probably took when he saw groups of prisoners, that this was not something that – unless it could be strongly justified for operational security reasons – was acceptable.*<sup>519</sup> Similarly, the former Minister of State for the Service Personnel Adam Ingram claimed he did not know whether he viewed the footage, but agreed that he would have been shocked at its contents.<sup>520</sup> Ingram did not disagree that it would have been surprising if it had not been brought to his attention.<sup>521</sup> The BMI Report considered it more likely that on the balance of probabilities the footage did not come to the attention of Hoon or Ingram at the time of the broadcast.<sup>522</sup> However, Sir William Gage noted that the ITN footage “*generated ministerial correspondence in the UK.*”<sup>523</sup> This correspondence is discussed below.
  
4. The use of hoods and other issues relating to the mistreatment of detainees was again discussed during a meeting between NCC and the ICRC on 6 April 2003.<sup>524</sup>

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<sup>516</sup>*Ibid.*, paras. 8.351-8.352.

<sup>517</sup>*Ibid.*, paras. 8.338-8.343.

<sup>518</sup>*Ibid.*, paras. 8.338-8.339.

<sup>519</sup>*Ibid.*, para. 8.342.

<sup>520</sup>*Ibid.*, para. 8.344.

<sup>521</sup>*Ibid.*

<sup>522</sup>*Ibid.*, para. 8.346.

<sup>523</sup>*Ibid.*, para. 8.341.

<sup>524</sup>*Ibid.*, paras. 8.297, 8.301.



According to oral evidence before the BMI, at this meeting a UK representative (Major Davies) indicated that “*the use of hoods was not illegal per se but [...] that the use of hoods was perhaps not the best approach.*”<sup>525</sup> The same representative told the BMI that he then decided that a blanket ban on the use of hoods was in fact necessary, and he advised the meeting that the use of hooding at the camp would stop from that point and that only blacked out goggles would be used, where blindfolding was necessary.<sup>526</sup>

5. Media reports indicate that during a coalition force operation on 11 April 2003, the RAF Regiment transported detainees on Chinook helicopters. The detainees were hooded while in RAF custody and one of the prisoners later died. Although the circumstances of the detainee’s death were beyond the terms of reference of the BMI, the BMI Report notes that, as a result of the death, allegations regarding the hooding of detainees and the death of one detainee were reported in the media.<sup>527</sup> Further, the BMI Report notes that: “*this incident should have been a clear warning that the hooding ban had not been adequately received and implemented.*”<sup>528</sup>
6. As noted above, during April 2003, the MoD received letters from Members of Parliament, on behalf of their constituents, expressing concerns about the treatment of Iraqi detainees.<sup>529</sup> One of the letters reproduced in the BMI Report refers to an email from a constituent regarding “*concerning footage he saw on the television last weekend.*”<sup>530</sup> The BMI Report concluded that this reference to television footage is “*highly likely*” to have been the ITN News footage on 5 April 2003.<sup>531</sup> The letters were answered by the Minister of State for the Service Personnel, Adam Ingram, although some letters had been addressed in the first instance to the SSD, Geoffrey Hoon.<sup>532</sup> The responses to these letters were inaccurate. For example, draft responses stated that: “*there were a couple of occasions at the start of the conflict where prisoners were hooded for short periods – this practice has now been stopped*”.<sup>533</sup> In the final

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<sup>525</sup>*Ibid.*, para. 8.301.

<sup>526</sup>*Ibid.*, para. 8.301.

<sup>527</sup>*Ibid.*, para. 8.501. See also paras. 8.351-8.352.

<sup>528</sup>*Ibid.*, para. 8.501.

<sup>529</sup>*Ibid.*, para. 8.415.

<sup>530</sup>*Ibid.*, para. 8.417.

<sup>531</sup>*Ibid.*, para. 8.418.

<sup>532</sup>*Ibid.*, para. 8.415.

<sup>533</sup>*Ibid.*, para. 8.419.

response, “*a couple of occasions*” had been amended to “*a small number of occasions*.”<sup>534</sup> In fact, hooding was standard procedure and was extended for periods of time in excess of twenty-four hours.<sup>535</sup> Further, the draft response and the final response downplayed the concerns and complaints of the ICRC, stating that: “*We have worked very closely with the ICRC who had expressed themselves content with the way we have treated prisoners and detainees throughout the conflict.*”<sup>536</sup> Ingram must have been aware of the existence and possibly also the content of the ITN footage at least by the time he signed off on the letters to constituents. Where a letter to a Minister, received just weeks after the commencement of operations in Iraq, refers specifically to concerning television footage and the treatment of detainees by UK Services Personnel, it seems unlikely that the Minister would not have been briefed by his Department on the existence and contents of that footage, prior to signing the letters.

7. The Camp Breadbasket abuse occurred only weeks later on 15 May 2003. The incident received significant public attention during the court-martial in 2005. Lieutenant Colonel Nicholas Mercer, the most senior lawyer of the UK Army in Iraq in 2003, gave public evidence at the court-martial, that “*there had been a number of allegations*” of ill-treatment of Iraqi civilians while in custody, and that he had issued an order stating that detained people should not be assaulted.<sup>537</sup> If the most senior lawyer of the UK Army in Iraq was aware of allegations of such ill treatment, it clearly merits closer investigation by the OTP whether such allegations were known to the higher levels of the civilian and military chains of command and what steps, if any, they took in response.
8. On 20 May 2003, just five days after the Camp Breadbasket abuse, Lieutenant Colonel Nicholas Mercer distributed the “*Fragmented Order*” number 152 (referred to above), which indicated that a “*number of deaths in custody*” had already occurred at that date. Fragmented Orders were widely circulated throughout the 1 UK Armoured Division in Iraq and the Battlegroups comprised within it, and would therefore have reached

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<sup>534</sup>*Ibid.*, para. 8.422.

<sup>535</sup>*Ibid.*, para. 8.420.

<sup>536</sup>*Ibid.*, para. 8.422.

<sup>537</sup>BBC News, “‘Abuse’ Soldier ‘Obeyed Orders,’” 19 January 2005, available at [http://news.bbc.co.uk/2/hi/uk\\_news/4187789.stm](http://news.bbc.co.uk/2/hi/uk_news/4187789.stm).

senior army officers and civil servants. Whether the Order or the fact that the Order was made also reached ministers is a matter that warrants investigation, given the serious nature of its subject matter. The Order put the Army on notice that detainee abuse leading to deaths had been occurring, and demanded that UK Services Personnel treat detainees humanely and in accordance with the Geneva Conventions and UK Military Law. Despite this, the abusive treatment of detainees, and the use of illegal interrogation methods continued.

9. Further public revelations of ill-treatment were published in a report by Amnesty International, dated 29 May 2003 and titled “*Preliminary findings by Amnesty International alleging abuses at the hands of UK military personnel in Iraq.*”<sup>538</sup> The report addressed allegations of abuses in custody, security and policing, and the death in custody of one civilian.<sup>539</sup> The report referred to four cases of abuse in custody, which occurred between 9 and 11 April 2003. In all four cases, it was alleged that UK Service Personnel had hooded detainees, and in three of those cases, it was alleged that hoods had been used in a custodial setting, rather than at the point of capture or during transit. This occurred despite the oral ban on hooding issued just days earlier. The report also included allegations of punching, kicking and beating with rifle butts.<sup>540</sup> Both the Foreign and Commonwealth Office and the MoD had direct knowledge of this report, if not at the time of publication, at the latest by 29 May 2003, when representatives from both organisations met with an Amnesty delegation.<sup>541</sup> As the BMI Report notes:

*“A perceptive and astute reading of the Amnesty report, against the known background that hooding had been banned in theatre, might have led to questions being asked about an apparent pattern of the ongoing use of hoods. The Amnesty report was in that sense a missed opportunity to detect that Brims’ hooding ban had not filtered down to all front line soldiers in theatre. I do not overlook the fact that by means of FRAGO 152, there was in any event a written order prohibiting the covering of prisoners’ faces, following Brims’ oral order.”*<sup>542</sup>

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<sup>538</sup>See Report of the Baha Mousa Inquiry, *supra* note 40, para. 8.446.

<sup>539</sup>*Ibid.*, paras. 8.444-8.445.

<sup>540</sup>*Ibid.*, paras. 8.444-8.446.

<sup>541</sup>*Ibid.*, para. 8.447.

<sup>542</sup>*Ibid.*, para. 8.453.

10. Baha Mousa's death, caused by 93 separate injuries sustained while in UK custody, occurred on 15 September 2003, very early on in the occupation of Iraq. As early as 16 September 2003, ministers were notified of Baha Mousa's death.<sup>543</sup> Further to that notification, the former Minister of State for the Service Personnel Adam Ingram asked to see the guidelines in place for the use of hoods and restraint of prisoners.<sup>544</sup> On 11 October 2003, the Times Online UK reported that a UK soldier was under investigation in relation to the death of Baha Mousa, and that two other detained Iraqis had been injured.<sup>545</sup> The article reported that a spokesman for the UK Services Personnel in Basra said that the incidents were being treated seriously and that the matter was being thoroughly investigated by the RMP. By May 2004, Baha Mousa's death was the subject of domestic litigation and investigation.<sup>546</sup> Therefore by May 2004 at the very latest, the SSD and the Minister of State for the Services Personnel must have been aware of the circumstances of Baha Mousa's death and the ill-treatment of the nine men detained with him, which included hooding, stress positions, deprivation of food and water and sleep deprivation.

11. A further Amnesty International Report dated 18 March 2004 and titled '*Iraq – one year on the human rights situation remains dire*' also complained of standards of treatment including various deaths in custody.<sup>547</sup> The Report also noted that "*Many detainees have alleged they were tortured and ill-treated by US and UK troops*".<sup>548</sup> The UK MoD was aware of the existence of this report and its allegations and issued a formal response.<sup>549</sup>

12. During April and May 2004 and again in March 2006, various media outlets published further high profile revelations of detainee abuse in Iraq. For example, on 28 April 2004, CBS broadcast details of the torture and mistreatment of detainees at Abu

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<sup>543</sup> *Ibid.*, para. 14.32.

<sup>544</sup> *Ibid.*, para. 14.35.

<sup>545</sup> Times Online U.K., "UK soldier questioned over captive's death", 11 October 2003, available at <http://www.timesonline.co.uk/article/0,,7374-841188,oo.html>.

<sup>546</sup> See at first instance *R (Al-Skeini and others) v SSD*, *supra* note 9.

<sup>547</sup> Amnesty International, "Iraq One Year On and the Human Rights Situation Remains Dire," *supra* note 273.

<sup>548</sup> *Ibid.*, p. 11.

<sup>549</sup> MoD, "Iraq: UK MoD Response to Amnesty International", 30 June 2004, available at [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_020610/mod007522.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_020610/mod007522.pdf).

Ghraib.<sup>550</sup> Just days later, on 4 May 2004, the Wall Street Journal published the ICRC Report of February 2004.<sup>551</sup> Hoon confirmed in his evidence before the BMI that he was familiar with the contents of the ICRC Report, however claimed he was only aware of it at the time it was leaked in May 2004. Hoon told the inquiry: “*I certainly was well aware of its contents. I am not sure that I read every single word of it.*”<sup>552</sup>

13. Finally on 14 May 2004, ITV Tonight with Trevor Mc Donald broadcast an interview with a soldier from the QLR, who confirmed that detainees were “*punched, slapped, kicked and pushed around. Sandbags zipped tight.*”<sup>553</sup> The issue of detainee abuse was highlighted again on 6 March 2006 by the BBC News in an article on a recent Amnesty International report titled “*Beyond Abu Ghraib: Detention and Torture in Iraq.*”<sup>554</sup> The article reported that interviews conducted by Amnesty with ex-inmates across Iraq showed that the lessons of the Abu Ghraib jail scandal appeared to have been ignored, at the same time that the US and the UK insisted that detainees were being treated according to international standards.

With respect to Hoon’s knowledge and awareness of the use of hooding, it is significant that on 12 October 2004, Hoon assured the UK Parliament that: “*Prisoners held in UK detention facilities in Iraq have not, at any time, been routinely hooded. Hooding was discontinued in Iraq when there was no longer a military justification for continuing the practice*”.<sup>555</sup> Hoon’s statement to the UK Parliament was incorrect.<sup>556</sup> So much was already clear from the ICRC report, referred to above. In their report, the Parliamentary Committee stated:

*“Lieutenant General Brims’ assertion that ordinary Service Personnel would recognise that techniques such as hooding were prohibited is not supported by Brigadier Aitken’s findings or the events surrounding the death of Baha Mousa. Nor does Mr Ingram’s [the Service Personnel Minister] claim that the training of interrogation personnel took full account of the prohibition on the use of the five*

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<sup>550</sup> *60 Minutes II* [Television broadcast]. New York: CBS. 28 April 2004

<sup>551</sup> David S. Cloud et al, “Red Cross Found Widespread Abuse of Iraqi Prisoners,” *The Wall Street Journal*, 4 May 2004, available at <http://online.wsj.com/news/articles/SB108384106459803859>

<sup>552</sup> Witness Testimony of Geoffrey Hoon to the BMI, *supra* note 500, p. 217.

<sup>553</sup> ITV Tonight [Television broadcast]. London, UK: ITV. 14 May 2004

<sup>554</sup> *BBC News*, “Amnesty attacks ‘dire’ Iraq abuse,” 6 March 2006, available at [http://news.bbc.co.uk/2/hi/middle\\_east/4777214.stm](http://news.bbc.co.uk/2/hi/middle_east/4777214.stm)

<sup>555</sup> See UK Parliament, House of Commons, Debate Transcript, 12 October 2004, <http://www.publications.parliament.uk/pa/cm200304/cmhansrd/vo041012/text/41012w02.htm>.

<sup>556</sup> Report of the Baha Mousa Inquiry Report, *supra* note 40, paras. 15.120-15.125.

*conditioning techniques seem consistent with the facts which have now come to light.*<sup>557</sup>

The evidence above suggests that the Secretaries of State for Defence and Ministers of State for the Service Personnel knew or consciously disregarded information about the abuse of Iraqi detainees by UK Services Personnel in Iraq. That is, that they either knew or recklessly and deliberately took no notice of information regarding serious ill treatment, and in some cases deaths, of detainees, despite credible and substantial evidence that war crimes had been committed and evidence which demonstrated that there was a significant risk that war crimes were about to be committed.

***The Crimes Concerned Activities That were Within the Effective Responsibility and Control of Hoon and Ingram***

It is clear that the crimes being committed by UK Services Personnel in Iraq during this period concerned activities that were within the effective responsibility and control of Hoon and Ingram, given their respective positions as SSD and Minister of State for the Services Personnel, and the subject matter responsibilities that attach to those positions. For example, as noted above, according to the MoD's policy statement of March 2010, the Minister of State for the Services Personnel is the ministerial focus for detention issues.<sup>558</sup>

***Failure of Hoon and Ingram to Prevent, Repress or Report***

Despite publicly available documentation and high-profile incidents of detainee mistreatment, such as the Baha Mousa incident in 2003 and the ICRC report in 2004, which were brought to the attention of the highest echelons of the UK Services Personnel, the pattern of abusive treatment by UK Services Personnel in Iraq continued over the course of almost six years of military operations in Iraq. Former SSD Geoffrey Hoon and former Minister of State for the Service Personnel Adam Ingram should have been seriously alarmed, by September 2003 at the latest, about what was happening in Iraq. Their knowledge and awareness of detainee abuse required that they take all necessary and reasonable measures to ensure the cessation, prevention and investigation or referral, where appropriate, of illegal conduct. Regarding

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<sup>557</sup> See UK Parliament, Twenty-Eight Report of the Joint Committee on Human Rights, available at <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/157/15703.htm#a3>.

<sup>558</sup> See UK Army Inspector, Review into the Implementation of Policy, Training and Conduct of Detainee Handling, 15 July 2010, p. 35, para. 109, available at [http://www.mod.uk/NR/rdonlyres/C5BA469F-FF5B-45B3-90D5-3C631E821C51/0/20100721\\_detainee\\_handling\\_final\\_report\\_AI.pdf](http://www.mod.uk/NR/rdonlyres/C5BA469F-FF5B-45B3-90D5-3C631E821C51/0/20100721_detainee_handling_final_report_AI.pdf)

omissions under command responsibility, the Pre-Trial Chamber II found that “*it is only necessary to prove that the commander’s omission increased the risk of the commission of the crimes.*”<sup>559</sup> The failure by Hoon and Ingram to halt the abusive treatment of detainees, to prevent such treatment, and to investigate or refer criminal conduct to the appropriate authorities, can properly be characterised as an omission. Further, their omissions did directly increase the risk of more crimes being perpetrated. Their failure to follow up and ensure accountability for illegal methods and practices meant that such methods and practices were enabled or implicitly sanctioned, contributing to their recurrence over a substantial period of time.

The information presented in this communication merits investigation by the OTP into the criminal responsibility of Hoon and Ingram and their successors under Article 28 of the ICC Statute.

## **E. Conclusion**

In summary, UK military commanders with responsibility for detainee handling during arrest, detention and interrogation, knew or should have known that forces under their effective command and control or effective authority and control were committing or about to commit war crimes in Iraq. Civilian superiors knew or consciously disregarded information at their disposal, which clearly indicated that UK Services Personnel were committing war crimes in Iraq. Further, both military commanders and civilian superiors failed to take all the necessary and reasonable measures within their power to prevent or repress the commission of such crimes or to submit allegations of abuse to the competent authorities for investigation and prosecution.

The regular pattern of abuse and the systematic ill-treatment over the course of many years provide sufficient grounds to allege that the ill-treatment of detainees must have been known about by high-level individuals ascending the relevant UK military and civilian chains of command. From the early stages of Operation Telic, the abuse of detainees by UK Services Personnel was brought to the attention of military commanders and civilian superiors by external commentators, such as the ICRC, as well as through public and official channels. Those individuals had a responsibility to immediately issue clear and prohibitive doctrines and policies on detainee treatment and interrogation techniques, in accordance with domestic

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<sup>559</sup> Schabas, *A Commentary on the Rome Statute*, supra note 256, p. 462 citing *Bemba* (ICC-01/05-01/08), paras. 421-423.

and international legal standards. Further, they had a clear responsibility to prevent further detainee abuse by ensuring that such doctrines and policies were implemented in theatre. Finally, they had a responsibility to refer cases of alleged mistreatment to the appropriate authorities for investigation. The evidence presented in this communication justifies further investigation by the OTP into the criminal responsibility under Article 28 of the ICC Statute of senior individuals within the UK military and government.

An investigation by the OTP is also warranted into the criminal responsibility of individuals within the military chain of command for the commission of war crimes in Iraq pursuant to Article 25 of the ICC Statute. The OTP should consider their potential liability as principals (pursuant to Article 25(3)(a)) or as accessories, for example on the basis of ordering or inducing the commission of war crimes (pursuant to the various modes of encouragement under Article 25(3)(b)-(d)). The OTP should investigate whether prohibited techniques that were sanctioned and ordered at Brigade level were sanctioned and ordered at higher levels within the chain of command. The OTP should also investigate to what extent such techniques were enabled through intentional gaps in policy and training and the authorisation of vague doctrines on prisoner handling and interrogation. Finally, the question of force drift should be considered by the OTP, in circumstances where the acceptance and approval of improper and degrading techniques, and the authorisation of insufficiently prescriptive policies on detainee treatment, lead to the use of ever more degrading methods of treatment in Iraq.

The information and evidence detailed above provide a reasonable basis to believe that crimes within the jurisdiction of the Court have been committed, justifying the initiation of an investigation by the OTP in accordance with Article 53(1)(a) of the ICC Statute. Consistent with the requirements (at this stage of proceedings) of Regulation 49(1)(a) of the Regulations of the Court, the above section sets out the relevant chains of command for investigation by the OTP, thereby identifying or describing the persons or groups involved.

The section above also contains *prima facie* evidence against the different groups of perpetrators. The two most senior positions within the UK chain of command are those of the SSD and the Minister of State for the Service Personnel. Investigations with respect to superior responsibility under Article 28 of the ICC Statute must focus on individuals holding these positions from 2003 until 2008. Regarding the senior level in the theatre and acts of mistreatment in interrogation centres, an investigation is warranted into the relevant JFIT OCs



as well as their superior Divisional J2X staff officers. With respect to mistreatment during arrest and transfer, investigations must include the Officers Commanding the acting units as well as those in charge of guarding the detainees. In all phases of arrest and detention, senior military levels such as the Division's Chief of Staff, the Commander of Joint Operations at Permanent Joint Headquarters and the Chief of Defence Staff may also bear command responsibility over the conduct exercised by their subordinates.

Investigations regarding policies and training which led to detainee abuse in Iraq must focus on a number of officials in the MoD and Service Personnel hierarchy. Besides the Minister of State for the Service Personnel, the Director General Security Policy and the Assistant Chief of Defence Staff Development, Concepts and Doctrine were in charge of promulgating and implementing the policies and trainings within the UK MoD, the Chief of Joint Operations and the Provost Marshal (Army) in the Service Personnel. Their criminal liability under Article 25 (ordering or inducing the commission of crimes, or other forms of principal or accessory liability) and Article 28 (superior responsibility) should also be considered.

## VII) JURISDICTION

The conduct alleged in this communication occurred on the territory of Iraq. Iraq is not a State Party to the ICC Statute. However, in accordance with Article 12(2)(b) of the ICC Statute, the Court has jurisdiction over conduct which occurred on the territory of a non-State Party, where the accused person is a national of a State that has accepted jurisdiction. The UK ratified the ICC Statute on 4 October 2001. Accordingly, the ICC has jurisdiction over acts amounting to crimes under the ICC Statute that were committed by UK citizens after the entry into force of the ICC Statute on 1 July 2002. With respect to jurisdiction *ratione temporis*, the allegations in this communication cover the period from 2003 until 2008. With respect to jurisdiction *ratione materiae*, we refer to the allegations and legal analysis provided in Sections IV and V above.

## VIII) ADMISSIBILITY

In the next section, we address the admissibility requirements of gravity (see Part A) and complementarity (see Part B) in Article 17 of the ICC Statute.

The ICC Statute “*enshrines the idea that a change of circumstances allows (or even, in some scenarios, compels) the Court to determine admissibility anew.*”<sup>560</sup>In *Kony*, the Pre-Trial Chamber stated that:

*“admissibility is meant to be an ongoing process throughout the pre-trial phase, the outcome of which is subject to review depending on the evolution of the relevant factual scenario.”*<sup>561</sup>

Where a situation is found to be admissible in accordance with Article 17 of the ICC Statute, the OTP may still decline to initiate an investigation where there are substantial reasons to believe that an investigation would not serve the interests of justice in accordance with Article 53(1)(c) of the ICC Statute. This is a countervailing consideration and does not require a determination that an investigation is in the interests of justice. Rather, the OTP will proceed unless there are specific circumstances which provide substantial reasons to believe that the interests of justice are not served by an investigation at that time.<sup>562</sup>

### A) Gravity (Article 17(1)(d) of the ICC Statute)

#### 1) *Legal Requirements*

Article 17(1)(d) of the ICC Statute provides that the Court shall determine that a case is inadmissible, if “*the case is not of sufficient gravity to justify further action by the Court.*” Although Article 17(1)(d) refers to “*a case*”, the Pre-Trial Chamber II has determined that:

*“although an examination of the gravity threshold must be conducted, it is not feasible that at the stage of the preliminary examination it be done with regard to a concrete ‘case’. Instead, gravity should be examined against the backdrop of the*

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<sup>560</sup>*Kony et al.* (ICC-02/04-01/05), Decision on the admissibility of the case under Article 19(1) of the Statute, 10 March 2009, para. 28.

<sup>561</sup>*Ibid.* See also Schabas, *A Commentary on the Rome Statute*, *supra* note 256, p. 365.

<sup>562</sup>OTP, *Policy Paper on Preliminary Examinations*, *supra* note 14, p.16, para. 67.

*likely set of cases or 'potential case(s)' that would arise from investigating the situation.*<sup>563</sup>

The Pre-Trial Chamber II defined the parameters of a potential case by way of reference to:

- i. *“the groups of persons involved that are likely to be the object of an investigation for the purpose of shaping the future case(s).”*<sup>564</sup> This involves *“a generic assessment of whether such groups that are likely to form the object of investigation capture those who may bear the greatest responsibility for the alleged crimes committed. Such assessment should be general in nature, and compatible with the pre-investigative stage into a situation;”*<sup>565</sup> and
- ii. *“the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s).”*<sup>566</sup> This mainly concerns *“the gravity of the crimes committed within the incidents, which are likely to be the focus of the investigation, and there is interplay between the crimes and the context in which they were committed (the incidents). Thus the gravity of the crimes will be assessed in the context of their modus operandi.”*<sup>567</sup>

The ICC Statute does not provide further criteria for determining whether a case is of sufficient gravity. The various interpretations of the gravity requirement by the OTP, the Pre-Trial Chamber and the Appeals Chamber are set out below.

### ***Situation in Iraq - OTP Letter to Senders (9 February 2006)***

In 2006, the OTP declined to open a preliminary examination into the *Situation in Iraq*, on the basis of gravity.<sup>568</sup> The OTP found quantitative criteria - in particular the numbers of victims - to be a *“key consideration”* in the assessment of gravity.<sup>569</sup>

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<sup>563</sup>ICC Pre-Trial Chamber II, *Decision Pursuant to Article 15 of the ICC Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya* (ICC-01/09-19-Corr), *supra* note 239, para. 58.

<sup>564</sup>*Ibid.*, para. 59.

<sup>565</sup>*Ibid.*, para. 60.

<sup>566</sup>*Ibid.* para. 59.

<sup>567</sup>*Ibid.* para. 61.

<sup>568</sup> This decision has not been reviewed by the Chambers of the Court because decisions by the Prosecutor when acting *proprio motu* are not reviewable.

<sup>569</sup>Office of the Prosecutor, *Letter to Senders Re Iraq*, *supra* note 11.

***Situation in the Democratic Republic of the Congo - Decision of the Appeals Chamber (13 July 2006)***

In 2006, the Appeals Chamber in the *Situation of the Democratic Republic of the Congo*, rejected an overly restrictive and formulaic approach to the assessment of gravity developed by Pre-Trial Chamber I, and overturned the Pre-Trial Chamber I decision on admissibility on the basis of errors of law.<sup>570</sup> The Pre-Trial Chamber I had determined that the gravity threshold in Article 17(1)(d) of the ICC Statute was met where the conduct was systematic or large-scale; caused social alarm to the international community; and where the relevant person fell within the category of most senior leaders suspected of being most responsible.<sup>571</sup>

With respect to conduct that is “*systematic or large-scale*,” the Appeals Chamber found that:

*“in requiring conduct that is either systematic or large-scale, the Pre-Trial Chamber introduces at the admissibility stage of proceedings criteria that effectively blur the distinction between the jurisdictional requirements for war crimes and crimes against humanity that were adopted when defining the crimes that fall within the jurisdiction of the Court. [...] Indeed, it would be inconsistent with article 8 (1) of the Statute if a war crime that was not part of a plan or policy of a large-scale commission could not, under any circumstances, be brought before the International Criminal Court because of the gravity requirement of article 17 (1) (d) of the Statute.”*<sup>572</sup>

With respect to “*social alarm*”, the Appeals Chamber considered that there is no basis for this criterion in the ICC Statute, and that such a criterion depended upon “*subjective and contingent reactions to crimes rather than their objective gravity*.”<sup>573</sup> Finally, the Appeals Chamber rejected the limitation of “*the most senior leaders suspected of being most responsible*” as an unduly narrow understanding of the Court’s role and deterrent effect.<sup>574</sup>

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<sup>570</sup>*Situation in the Democratic Republic of the Congo* (ICC-01/04), Judgment on the Prosecutor’s appeal against the decision of the Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest Article 58,” 13 July 2006.

<sup>571</sup>*Ibid.*, paras. 56, 68

<sup>572</sup>*Ibid.*, paras. 70-71.

<sup>573</sup>*Ibid.*, para. 72.

<sup>574</sup>*Ibid.*, paras. 73-79.

***Situation in Darfur, Sudan (Abu Garda) - Decision of the Pre-Trial Chamber I (8 February 2010)***

The Pre-Trial Chamber I in the *Abu Garda* case in 2010 noted that “*many other factors other than the sheer number of victims should be relevant*”<sup>575</sup> to an assessment of gravity, and both quantitative and qualitative factors should be taken into account.<sup>576</sup> The Chamber agreed with the Prosecution’s submission that in assessing the gravity of a case, “*the issues of the nature, manner and impact of the [alleged] attack are critical.*”<sup>577</sup> The Chamber also found that certain factors listed in rule 145(1)(c) of the Rules, relating to sentence, can serve as useful guidelines for the assessment of gravity. These factors include “*the extent of the damage caused, in particular the harm caused to victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime.*”<sup>578</sup> It is relevant to note that this case involved, *inter alia*, allegations of the killing of twelve peacekeepers, and the attempted killing of eight peacekeepers. Despite the scale of the crimes (in purely quantitative terms) the case was found to meet the gravity threshold, upon consideration of the range of relevant factors, detailed above.

***Situation in the Republic of Kenya - Decision of the Pre-Trial Chamber II (31 March 2010)***

The Pre-Trial Chamber II in the *Situation of Kenya* confirmed that gravity may be assessed following a quantitative and qualitative approach and that “*it is not the number of victims that matter but rather the existence of some aggravating or qualitative factors attached to the commission of crimes, which makes it grave.*”<sup>579</sup> The Chamber also noted that the sentencing factors listed in rule 145(1)(c) and (2)(b)(iv) of the Rules could provide useful guidance in an examination of gravity of the crime(s), including the:

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<sup>575</sup> *Abu Garda* (ICC-02/05-02/09), Decision on the Confirmation of Charges, 8 February 2010, para. 31, fn. 58, quoting Williams and Schabas.

<sup>576</sup> *Ibid.*, para. 31.

<sup>577</sup> *Ibid.*, para. 31, fn. 57 referring to ICC-02/05-02/09-21-Conf, para. 7.

<sup>578</sup> *Ibid.*, para. 32.

<sup>579</sup> *ICC Pre-Trial Chamber II, Decision Pursuant to Article 15 of the ICC Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, *supra* note 239, para. 62, fn. 58 referring to Schabas, ‘Prosecutorial Discretion and Gravity’, in C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Surrey, UK: 2009), pp. 245-246.

- i. scale of the alleged crimes (including an assessment of the geographical and temporal intensity);
- ii. nature of the unlawful behavior or of the crimes allegedly committed;
- iii. means employed for the execution of the crimes (i.e. the manner of their commission);  
and
- iv. impact of the crimes and the harm caused to victims and their families. The victims' representations will be of "*significant guidance*" for the Chamber's assessment.<sup>580</sup>

***Regulations of the Office of the Prosecutor 2009 and the Policy Paper on Preliminary Examinations 2013***

At the preliminary examination stage, the OTP assesses the gravity of each potential case that would likely arise from an investigation of the situation.<sup>581</sup> Regulation 29(2) of the *Regulations of the Office of the Prosecutor* provides that in order to assess the gravity of the crimes allegedly committed in the situation, the OTP "*shall consider various factors including their scale, nature, manner of commission, and impact.*"<sup>582</sup> The *Draft Policy Paper on Preliminary Examinations 2013* notes that the assessment includes both qualitative and quantitative considerations, based on the prevailing facts and circumstances.<sup>583</sup> The non-exhaustive factors that guide the OTP's assessment include:

- i. the scale of the crimes. This may be assessed in light of, *inter alia*, the number of direct and indirect victims, the extent of the damage caused by the crimes, in particular the bodily or psychological harm caused to the victims and their families, and their geographical or temporal spread;<sup>584</sup>
- ii. the nature of the crimes. This refers to the specific elements of each offence such as killings, rapes and other crimes involving sexual or gender violence;<sup>585</sup>
- iii. the manner of commission of the crimes. This may be assessed in light of, *inter alia*, the means employed to execute the crimes, the degree of

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<sup>580</sup> *Ibid.*, para. 62.

<sup>581</sup> OTP, *Paper on Preliminary Examinations 2013*, *supra* note 14, para. 59.

<sup>582</sup> ICC, *Regulations of the Office of the Prosecutor*, 2009 ICC-BD/05-01-09.

<sup>583</sup> OTP, *Paper on Preliminary Examinations 2013*, *supra* note 14, para. 61.

<sup>584</sup> *Ibid.*, para. 62.

<sup>585</sup> *Ibid.*, para 63.

participation and intent in their commission, the extent to which the crimes are systematic or result from a plan or organised policy or otherwise result from the abuse of power or official capacity, and elements of particular cruelty, including the vulnerability of the victims or motives involving discrimination,<sup>586</sup> and

- iv. the impact of the crimes. This may be assessed in light of, *inter alia*, the sufferings endured by the victims and their increased vulnerability; the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities.<sup>587</sup>

## Summary

In summary, in the 2006 decision on the *Situation in Iraq*, the OTP found quantitative criteria - in particular, the numbers of victims - to be a “*key consideration*” in the assessment of gravity.<sup>588</sup> However, consideration of Regulation 29(2), the *Draft Policy Paper on Preliminary Examinations*, the submissions of the Prosecutor (with whom the Pre-Trial Chamber agreed) in the *Abu Garda Case*, and subsequent decisions of the Court (detailed above) indicate that other factors are also relevant in the assessment of gravity. Further, quantitative criteria such as the number of victims, are not determinative in this assessment. The scale, nature, manner of commission and impact of the crimes, detailed above, are relevant factors. The assessment of gravity, based on the prevailing facts and circumstances detailed in this communication, must be in accordance with this line of authority.

### 2) *Analysis*

In light of the gravity requirements detailed above, in this section we briefly discuss the decision of the OTP in 2006 not to initiate an investigation into the *Situation in Iraq*, and detail the current facts and circumstances regarding the situation in Iraq, which clearly support a finding of sufficient gravity.

### OTP Decision on the *Situation in Iraq* 2006

The OTP stated in its 2006 Letter to Senders *re Iraq*, that “*there was a reasonable basis to believe that crimes within the jurisdiction of the Court had been committed,*” however the

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<sup>586</sup>*Ibid.*, para. 64.

<sup>587</sup>*Ibid.*, para. 65;.

<sup>588</sup>Office of the Prosecutor, *Letter to Senders Re Iraq*, *supra* note 11.



scale of the crimes did not meet the gravity threshold.<sup>589</sup> Thus, the OTP prevented the Court from exercising jurisdiction over a crime under the ICC Statute, by giving too much weight to the gravity threshold as an admissibility criterion and blurring the distinction between admissibility criteria and the material elements of the crimes. The initiation of an investigation would have revealed the existence of a much larger number of incidents. However, without investigating allegations and by blocking such investigations at a very early phase, the extent of the crimes did not emerge. Even if the scale of the crimes were to be considered a determining factor in assessing gravity, this present communication provides evidence of allegations of relevant crimes on a far greater scale, in quantitative terms, than the communication considered by the OTP in 2006.

### **Facts and Circumstances Supporting a Finding of Sufficient Gravity in Accordance with Article 17(1)(d)**

#### ***Persons Likely to Be in the Focus of Future Investigations***

There is substantial evidence, set out in Section VI above, which indicates that those persons and groups of persons who are likely to be the object of an investigation are those who bear the greatest responsibility for the crimes alleged in this communication.<sup>590</sup> As detailed above, such persons include individuals at the highest levels of the UK Army, former Secretaries of State for Defence, former Ministers for the Service Personnel, and senior MoD civil servants and lawyers. These are positions of moral leadership and authority, which carry with them the responsibility of ensuring respect for domestic and international laws.

#### ***Scale***

The comprehensive analysis of the detainee experiences of the first 85 PIL cases, described in this communication (see Part IV, Section D), is an exemplary rather than an exhaustive account of the alleged ill-treatment experienced by Iraqi detainees while in UK custody between 2003 and 2008. These 85 cases alone give rise to 2,193 separate allegations by 109

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<sup>589</sup> *Ibid.*, pp. 7-9.

<sup>590</sup> We note that it is not a requirement in the assessment of gravity, that the persons likely to form the object of an investigation be the most senior leaders suspected of being most responsible. This is clear from the decision in the *Situation in the Democratic Republic of the Congo* (ICC-01/04), Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58," 13 July 2006, paras. 73-79. Rather, we note this for the purpose of defining the parameters of the likely set of cases or potential cases that would arise from investigating the situation. See: ICC Pre-Trial Chamber II, *Decision Pursuant to Article 15 of the ICC Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, *supra* note 239, paras. 49-50, 58-60.

victims of torture and mistreatment. PIL is currently instructed by an additional 303 victims (total of 412 victims) alleging ill-treatment by UK Services Personnel in Iraq, amounting to war crimes of torture, inhuman, cruel, degrading, or humiliating treatment, as well as wilfully causing great suffering, or serious injury. The total number of allegations will therefore likely total more than ten thousand.

Furthermore, given the practical difficulties associated with Iraqi civilians accessing and instructing UK lawyers, it is likely that the large number of Iraqi civilians who have raised claims of torture and ill-treatment at the hands of UK Services Personnel while in custody in Iraq between 2003 and 2008, represents a relatively small proportion of the entire number of civilians detained and subjected to such treatment. An investigation by the ICC would undoubtedly reveal a much larger number of victims of war crimes. The geographical and temporal scale of the use of illegal methods of detention and interrogation is substantially larger than the scale considered by the OTP in 2006. This is evidenced by the patterns of abuse throughout Iraq from 2003 until 2008, detailed above in Section IV and in the attached tables.

#### ***Nature of the Alleged crimes and the Manner of Their Commission***

With respect to the nature of the alleged crimes, this communication details evidence of the widespread commission of war crimes of torture and cruel, inhuman and degrading treatment, some of which involved sexual abuse and sexual and religious humiliation. With respect to the manner of commission of the crimes, this communication details evidence of the systematic use of brutal violence, that at times resulted in the death of detainees, while in the custody of UK Services Personnel. Further, there is evidence of brutality combined with cruelty and forms of sadism, including sexual abuse, and sexual and religious humiliation. The use of sexual acts and sexually-oriented humiliation at the JFIT interrogation facility at the DTDF cannot have been anything other than a carefully designed system targeting male Muslims. This is demonstrated by the themes that emerge from the specific analysis of sexual matters in Table 5 (Annex I). The collegial ways in which the crimes were carried out, and the enjoyment apparently derived by the perpetrators from their commission are especially stunning. Many of the testimonies included in this communication refer to soldiers “*laughing*” together while assaulting, insulting, depriving, or humiliating detainees under their control. The infamous “*choir*” in the Baha Mousa incident, whereby soldiers tried to re-create a singing choir by hitting detainees in succession to force them to groan or cry out in

pain in concert, captures the sadism which was permitted to emerge from the UK's approach to detainee treatment.<sup>591</sup>

It is also relevant to note the repetition and combination of detention and interrogation techniques, which meant that on many occasions several war crimes (including torture, inhuman treatment, wilfully assaulting and inflicting serious injuries, and outrages upon dignity) were committed against one person in a single incident. The severity of the cumulative consequences of the breaches cannot be underestimated.

### ***Impact of the Crimes***

The impact of the crimes alleged in this communication on the local and international community is serious. The impact on the local community (including victims and their families) as a result of widespread torture and mistreatment at the hands of UK Services Personnel over a number of years is highly significant. There is evidence of serious and long term physical impacts on individual victims including scarring, disfiguration, and ongoing pain from injuries, in some cases requiring surgery or walking aids. In one case, a pregnant woman suffered a miscarriage after being kicked in the back during the arrest of her husband. As is detailed throughout, victims are severely traumatised as a result of their treatment. The egregious crimes of torture, mistreatment and unlawful detention can result in severe damage which becomes extremely deep-rooted within the individual as well as the community. Given the systematic nature of the abuse and the systemic issues involved it would not surprise the OPT to note that the majority of PIL client victims in detention cases have suffered (and continue to suffer) serious psychological damage<sup>592</sup>.

There are numerous medical and psychological studies which document the long lasting physical and psychological impact of torture. Doctor Abigail Seltzer<sup>593</sup> has identified

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<sup>591</sup>See also the evidence of the surviving detainees in this incident that they were forced to dance "like Michael Jackson," Excerpt from Witness Testimony of XXX, *supra* note at 88, and the sadism evident in the Camp Breadbasket photographs discussed below-

<sup>592</sup> As part of the Ali Zaki Mousa (2) proceedings, Phil Shiner has submitted a lengthy statement documenting the psychological harm which PIL's clients have suffered from and continue to suffer from. The statement documents these complaints as well as relevant medical supporting evidence. Currently this witness statement is not in the public domain but as soon as PIL is able to disclose it, it will be sent to the OPT to accompany this communication.

<sup>593</sup>On 17 April 2012 the Al Sweady Inquiry, chaired by Sir Thayne Forbes, heard from an expert in the field of torture, Doctor Abigail Selzer, a Consultant Psychiatrist in Camden and Islington Trust, who has worked with Freedom from Torture since 2001 and with the Helen Bamber Foundation since 2010. Her talk to the Al Sweady

potential psychological symptoms which include; thoughts and plans of suicide, self-harm, experiencing despair and hopelessness, guilt and shame, extreme bouts of anxiety and/or anger and hyperarousal<sup>594</sup>. PIL is aware that many of their client victims are experiencing these symptoms and struggle with dealing with them on a regular basis. In fact there have been suicide attempts and instances of self-harm by PIL client victims in recent weeks. For the majority of PIL's clients, no formal psychological assessment has ever been made so the impact of their treatment cannot be properly assessed or treated<sup>595</sup>. The ongoing deep-rooted psychological trauma of PIL's client victims cannot be overstated.

The psychological symptoms noted by Doctor Abigail Seltzer are consistent with the contents of the "Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", which is known popularly as "the Istanbul Protocol"<sup>596</sup>. The Istanbul Protocol contains internationally recognised standards and procedures on how to recognise and document symptoms of torture so the documentation may serve as valid evidence in court. The Istanbul Protocol was drafted by more than 75 experts in law, health and human rights during three years of collective effort involving more than 40 different non-governmental organisations.

The Istanbul Protocol acts as a guide on how to approach complaints of torture from interviewing, conducting forensic medical examinations and presenting evidence in court. It offers clear systematic guidance for lawyers, medical doctors and psychologists. For the OPT it will offer assistance, for the purpose of criminal prosecution, on how to investigate and document physical and psychological evidence of torture.

As the introduction to the Istanbul Protocol states,

*"torture is a profound concern of the world community. Its purpose is to destroy deliberately not only the physical and emotional well-being of individuals but also, in some instances, the*

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Inquiry and accompanying overheads will be disclosed as part of Phil Shiner's witness statement in Ali Zaki Mousa (2).

<sup>594</sup>Hyperarousal is a symptom which includes: irritability, disturbed sleep, difficulty concentrating, hypersensitivity to noise, exaggerated startle response, being easily frightened, hypervigilance, nervousness, increased watchfulness

<sup>595</sup> Phil Shiner's witness statement on psychological harm to Ali Zak iMousa(2) includes excerpts from some of PIL's client Psychological Medico-Legal Reports.

<sup>596</sup> The Istanbul Protocol can be downloaded here: <http://www.irct.org/investigation---documentation/the-istanbul-protocol/read-the-protocol.aspx>

*dignity and will of entire communities. It concerns all members of the human family because it impugns the very meaning of our existence and our hopes for a brighter future*<sup>597</sup>”.

It must be understood that the existing failure to provide justice for the victims of these crimes further aggravates the impact these crimes already have on the victims, their families and the wider community in Iraq.

The impact of the crimes on the international community is heightened by the circumstances in which the crimes were committed, and the national identity of the perpetrators. UK Services Personnel committed acts of torture and cruel, inhuman and degrading treatment (often involving elements of sexual and religious humiliation) against the very population they were obliged under IHL to protect. Specifically, the crimes were committed against predominantly Muslim detainees in the context of the invasion and subsequent occupation and Security Council mandated operation of Iraq by the UK and coalition forces, contrary to international law. What is more, the crimes were committed during operations which were mandated by the UNSC to bring freedom and democracy to Iraq, and to ensure respect for the fundamental human rights of the Iraqi people. Finally, there is overwhelming evidence of serious concern that despite the ban on the five techniques, and undertakings by the UK Government in the 1970s, some of these techniques were ordered, sanctioned and employed by UK Services Personnel in Iraq between 2003 and 2008.<sup>598</sup>

The UK is a country with the necessary means (including foresight, planning, training, discipline and resources) to ensure respect for international human rights law and international humanitarian law during and post armed conflict. Further, there is an expectation that the UK, as a member of the European Union and a permanent member of the United Nations Security Council, will comply with its legal obligations with respect to the treatment of protected persons during and post armed conflict. The failure of the UK to abide by such obligations has serious consequences for the international community. Such behaviour undermines domestic and international instruments and agreements which mandate

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<sup>597</sup> *Ibid*, p. 1

<sup>598</sup> See also the evidence of Colonel Mercer in his statement to the BMI. Mercer stated that when he raised concerns about hooding and stress positions with a Major or Captain conducting interrogations in JFIT, he was assured that this was permissible. Report of the Baha Mousa Inquiry, *supra* note 40, para. 8.62.

the humane treatment of civilians and detainees during and post armed conflict. Significantly, this kind of conduct seriously undermines the widely accepted prohibition against torture.<sup>599</sup>

Finally, the impact of these crimes is aggravated by the lack of investigation into, and accountability for, those who bear the greatest responsibility for the war crimes perpetrated in Iraq by UK Services Personnel. The persistence of impunity enabled the perpetuation of abuse and the widespread commission of serious crimes by UK Services Personnel in Iraq for a period of more than five years.

### **3) *Conclusion with Respect to Gravity***

The facts and circumstances presented in this communication clearly meet the gravity threshold for the opening of a preliminary examination. The gravity of the crimes alleged to have been committed is demonstrated by:

- i. the scale of the alleged crimes in both qualitative and quantitative terms;
- ii. the serious nature of the alleged crimes and the brutal, cruel and degrading manner in which they were committed; and
- iii. the impact of the alleged crimes on the local and international community.

Further, those persons and groups of persons who are likely to be the object of an investigation are those who bear the greatest responsibility for the crimes alleged in this communication, and include individuals at the highest levels of the UK Army, former Secretaries of State for Defence and former Ministers for the Service Personnel, and senior MoD civil servants and lawyers.

## **B) Complementarity (Article 17(2) and (3) of the ICC Statute)**

### **1) *Legal Requirements***

The ICC Appeals Chamber in the *Katanga case* established a two step test for complementarity under Article 17.<sup>600</sup> The test considers the action or inaction of the relevant State and the motive behind this action or inaction:

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<sup>599</sup>It is noteworthy that despite repeated reminders to the UK by the Committee against Torture that UNCAT had extra-territorial effect in Iraq the UK refuses to accept the extra-territorial application of UNCAT. This has ongoing implications in the light of its membership of ISAF in Afghanistan.

1. are there on-going investigations or prosecutions, or have investigations been carried out and a decision made not to prosecute?; and
2. is the State unwilling or unable to carry out investigations or prosecutions to the required standard? This requires the OTP to consider the nature and quality of the proceedings. The OTP is guided by the considerations set out in Article 17(2) and (3) of the ICC Statute.

The absence of national proceedings is sufficient to make the case admissible and the question of unwillingness or inability does not arise.<sup>601</sup>

Where there are or have been national investigations or prosecutions, the OTP shall examine whether such proceedings relate to potential cases being examined by the OTP and in particular, whether the focus is on those most responsible for the most serious crimes committed. If so, the OTP shall then assess whether such national proceedings are vitiated by an unwillingness or inability to genuinely carry out proceedings.<sup>602</sup>

The Pre-Trial Chamber has observed that:

*“Although the two limbs of the test are distinct, they are inextricably linked. Therefore evidence put forward to substantiate the assertion of ongoing proceedings covering the same case that is before the Court may also be relevant to demonstrate their genuineness. Evidence related, inter alia, to the appropriateness of the investigative measures, the amount and type of resources allocated to the investigation, as well as the scope of the investigative powers of the persons in charge of the investigation are relevant for both limbs since such aspects, which are significant to the question of whether there is no situation of inactivity at the national level, are also relevant indicators of the State’s willingness and ability genuinely to carry out the concerned proceedings.”<sup>603</sup>*

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<sup>600</sup> See the two-step test set out in *Katanga* (ICC-01/04-01/07-1497), Judgement on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, para. 78. The two-step test was also referred to by the Pre-Trial Chamber I in the *Situation in Libya*, (ICC-01/11-01/11), Decision on the Admissibility of the Case against Abdullah Al-Senussi, 11 October 2013, para.26. See also : ICC Pre-Trial Chamber II, *Decision Pursuant to Article 15 of the ICC Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, *supra* note 239, paras. 53,70.

<sup>601</sup>OTP, *Policy Paper on Preliminary Examinations*, 2013, *supra* note 14, para.47.

<sup>602</sup>*Ibid.*, para.49.

<sup>603</sup>*Situation in Libya*, (ICC-01/11-01/11), Decision on the Admissibility of the Case against Abdullah Al-Senussi, para. 2010, cited in OTP, *Policy Paper on Preliminary Examinations*, 2013, *supra* note 14, para.49.

State investigations and/or prosecutions do not necessarily prevent the ICC from prosecuting a case, or conducting prosecutions in parallel with State efforts. For example, in the Democratic Republic of the Congo, the ICC investigated alleged perpetrators, usually at the higher level, whom the State was unable or unwilling to prosecute. Even where a State is found to be “*genuinely*” conducting investigations and prosecutions, a case may still be admissible before the ICC where the State efforts focus only on lower level perpetrators. Finally, investigations and trials conducted by a State must be in accordance with international principles with respect to due process in order to render a case inadmissible before the ICC.<sup>604</sup>

In section 2 below, we detail the investigations and prosecutions undertaken in the UK relevant to the crimes alleged in this communication. We emphasize at this stage that the UK has not conducted any investigations or prosecutions with respect to those individuals who bear the greatest responsibility for the war crimes alleged in this Communication. Efforts to date have been confined to a limited number of lower level perpetrators.

First, we outline the investigation and prosecution procedures that are available in the UK (section (a)). Second, we discuss the investigations and prosecutions carried out by the UK to date with respect to lower level offenders (section (b)).

In section 3 below, we assess the quality of the investigations and proceedings carried out by the UK to date. In particular, we discuss: (i) the poor quality of investigations and prosecutions; (ii) the lack of independence and impartiality in proceedings; (iii) proceedings undertaken to shield those bearing the greatest responsibility from criminal responsibility; and (iv) unjustified delay. We conclude that there is compelling evidence that the UK is unwilling to genuinely investigate and prosecute those individuals who bear the greatest responsibility for war crimes committed in Iraq between 2003 and 2008.

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<sup>604</sup>Article 17(2) of the ICC Statute. See also Lawyers Without Borders (Canada), “The Principle of Complementarity in the ICC Statute and the Colombian Situation: a Case that Demands More than a ‘Positive’ Approach,” 29 May 2012, p. 9, available at [http://www.asfcanada.ca/uploads/publications/uploaded\\_asfc-rapport-complementarite-anglais-2012-05-29-pdf-34.pdf](http://www.asfcanada.ca/uploads/publications/uploaded_asfc-rapport-complementarite-anglais-2012-05-29-pdf-34.pdf).



2) *Ongoing Investigations and Prosecutions or Investigations Carried Out and a Decision Made not to Prosecute*

a) **Investigation and Prosecution Procedures Available in the UK for War Crimes**

*Applicable Domestic Law*

UK criminal law clearly prohibits the types of conduct described above. Until 2006, the discipline and criminal conduct of Service Personnel was governed by the respective Service Discipline Acts - the *Army Act 1955*, the *Air Force Act 1955* and the *Naval Discipline Act 1957*. Each of these Acts provided that a person subject to military law committed an offence through any act or omission that was either punishable by the law of England or, if committed in England, would have been punishable by that law.<sup>605</sup> In 2006, the *Service Personnel Act 2006* replaced the three separate systems of service law with a “single harmonised system governing all members of the Service Personnel.”<sup>606</sup> The Act applies to all members of the Services Personnel, wherever they are serving, and includes both disciplinary and criminal offences. Under section 42 of the Act, criminal offences are acts done anywhere in the world which, if done in England and Wales, would be offences against the civilian criminal law.

Offences of specific relevance to the present communication are contained in:

- the *Geneva Conventions Act 1957*, which criminalises grave breaches of the Geneva Conventions by any person of any nationality acting within or outside the UK;
- the *International Criminal Court Act 2001*, which came into force on 1 September 2001 and criminalises *inter alia* crimes against humanity and war crimes, as defined in the ICC Statute, as well as ancillary acts, committed outside the UK by UK nationals, UK residents and persons subject to UK service jurisdiction; and
- section 134 of the *Criminal Justice Act 1988*, which criminalises torture in the following terms:

*“a public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the UK or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties.”*

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<sup>605</sup> See for example, section 70 of the *Army Act 1955*.

<sup>606</sup> See the *Service Personnel Act 2006*, “Explanatory Notes,” available at <http://www.legislation.gov.uk/ukpga/2006/52/notes/division/2>. The Act came into force on 31 October 2006 and also provides for procedures including military police investigations, service prosecutions and courts martial.

## *Prosecution Authorities*

***Crown Prosecution Service:*** The CPS is the Government Department responsible for prosecuting criminal cases investigated by the police in England and Wales. The CPS, which was created by the *Prosecution of Offences Act 1985*, is headed by the DPP who is the most senior public prosecutor in England and Wales. The DPP has responsibility for the CPS staff and all of the prosecutions made by the CPS. The DPP operates under the superintendence of the Attorney-General who is accountable to Parliament for the CPS. As the principal prosecuting authority in England and Wales, the CPS is responsible for: advising the police on cases for possible prosecution, reviewing cases submitted by the police, determining any charges in more serious or complex cases, preparing cases for court and presenting cases at court.<sup>607</sup>

***Service Prosecution Authority:*** The Military Justice System is separate from the civilian Courts Service and aims to ensure the maintenance of justice and discipline within the Armed Services. The Service Prosecution Authority (SPA) reviews military discipline cases referred to it by the Service Police or Chain of Command and prosecutes cases at a Court Martial or a Service Civilian Court, where appropriate. The SPA was formed on 1 January 2009 following the incorporation of the Navy Prosecution Authority, Army Prosecuting Authority and Royal Air Force Prosecuting Authority. The SPA is headed by the DSP. The Deputy Director of Service Prosecutions is an Army Brigadier. The SPA and the DSP act under the general superintendence of the Attorney-General and remain fully independent of the Military Chain of Command.<sup>608</sup> Under the *Service Personnel Act 2006*, more serious cases must be notified to the Service Police, and once investigated, be passed directly to the DSP for a decision on whether to prosecute. In other cases, the OC will consider whether to deal with the matter summarily or to refer the case to the DSP with a view to proceeding to a trial by the Court Martial. In the latter case, the DSP makes the decision to prosecute and determines the charge(s). In most cases, this power is delegated to Prosecuting Officers serving within the SPA.<sup>609</sup>

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<sup>607</sup> See the Home Page of the Crown Prosecution Service, available at <http://www.cps.gov.uk/index.html>.

<sup>608</sup> See the Home Page of the Service Prosecution Authority, available at <http://spa.independent.gov.uk/index.htm>.

<sup>609</sup> See the website of the Service Prosecution Authority, "Background and Change," available at [http://spa.independent.gov.uk/test/about\\_us/index.htm](http://spa.independent.gov.uk/test/about_us/index.htm).

Where a person is facing charges with which a CO intends to deal summarily, they have a right to elect trial by Court Martial or to consent to being dealt with summarily by the CO. Any person convicted at Summary Hearing has the unqualified right to appeal to the Summary Appeal Court to appeal against finding or sentence or both. The Summary Appeal Court consists of a panel of two Service members and a Judge Advocate and is a ECtHR compliant court. Any person convicted at the new single Court Martial also has the unqualified right to appeal to the Courts Martial Appeal Court against finding or sentence, or both. The Courts Martial Appeal Court consists of a panel of civilian Judges who would normally sit in the Court of Appeal.<sup>610</sup>

### ***Court-martial***

The court-martial is a standing court with similar sentencing powers and procedures to the civilian Crown Court. The function of a court-martial is to investigate and prosecute crimes committed by individuals during military duty and it has jurisdiction to try any Service offence. All persons subject to Service law and civilians subject to Service discipline (some civilians serving in support of UK Services Personnel overseas) may be tried by the court-martial for all criminal conduct offences (all criminal offences under the law of England & Wales). In addition, persons subject to Service law may be tried by the court-martial for all disciplinary offences, while civilians subject to Service discipline may be tried by the court-martial for a restricted list of disciplinary offences.<sup>611</sup> Service Personnel are subject to the jurisdiction of Service police, prosecutors and courts martial under the *Service Personnel Act* 2006. In a standard court-martial, the trial is run by a Judge Advocate (a civilian lawyer or judge) who decides on matters of law and admissibility, summarises the evidence and directs the board. The board is comprised of senior military officers. Ordinarily, the Prosecuting and Defence lawyers are also serving military lawyers. The board determines issues of fact and makes findings as to guilt.<sup>612</sup> The court may bring charges for war crimes pursuant to the *International Criminal Court Act* 2001, as was the case in *R v Payne*,<sup>613</sup> a court-martial relating to Baha Mousa's death. The court-martial in relation to the conduct of UK Services Personnel in Iraq is detailed below.

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<sup>610</sup> *Ibid.*

<sup>611</sup> See the website of the Service Prosecution Authority, "Military Criminal Justice System" at [http://spa.independent.gov.uk/test/about\\_us/military\\_criminal\\_ju.htm](http://spa.independent.gov.uk/test/about_us/military_criminal_ju.htm).

<sup>612</sup> Rasiah, *The Court-martial of Corporal Payne*, *supra* note 463, pp. 177-199.

<sup>613</sup> *Proceedings of a General Court-Martial held at Military Court Centre Bulford in the case of Corporal Donald Payne and others*, 7 September 2006 to 30 April 2007.

## ***Public Inquiries and Royal Commissions***

Public inquiries tend to have narrow mandates and specific terms of reference. As per Lord Justice Clark, there are “*two purposes of a public inquiry, namely ascertaining the facts and learning lessons for the future.*”<sup>614</sup> The role of a public inquiry is to address failings in the role of government and public servants with respect to specific incidents of public importance.<sup>615</sup> Public inquiries are charged with “*restoring confidence in the State*”<sup>616</sup> – a purpose wholly outside the consideration of criminal responsibility for war crimes.

Unlike a royal commission, a public inquiry is conducted as far as possible, publicly. Hearings (including oral evidence) are open to public viewing and findings are published. A public inquiry has the power to compel witnesses to attend hearings and to provide evidence. However, a public inquiry does not have the power to require attendance for interview. With respect to criminal liability, section 2 of the *Inquiry Act 2005*, entitled “*No determination of liability*” provides that: “*an inquiry panel is not to rule on, and has no power to determine, any person’s civil or criminal liability.*” A public inquiry is also unable to recommend individuals for prosecution. Further, a public inquiry has the power to grant certain forms of immunity, which prevents the prosecution of offenders.

Royal commissions have broader mandates to consider matters of public policy and make recommendations on policy issues. Royal commissions are initiated by a Head of State and the terms of reference are set in a restrictive manner in recognition of the inability of Parliament to influence or stop the process once it has begun. There have been no royal commissions with respect to the subject matter of this communication.

A common feature of public inquiries and royal commissions is that Parliament has the discretion to disregard the final report and recommendations of the inquiry or commission.

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<sup>614</sup>Thames Safety Inquiry, Final Report of Lord Justice Clark, Presented to Parliament by the Secretary of State for the Environment, Transport and the Regions by Command of Her Majesty, January 2000, available at <http://www.epcollege.com/EPC/media/MediaLibrary/Knowledge%20Hub%20Documents/F%20Inquiry%20Reports/Marchionness-Clarke-%282000%29.pdf?ext=.pdf>.

<sup>615</sup> A list of some of the major public inquiries held in the U.K. is available at [http://www.publicinquiries.org/introduction/a\\_brief\\_history\\_of\\_public\\_inquiries](http://www.publicinquiries.org/introduction/a_brief_history_of_public_inquiries).

<sup>616</sup> See “Public Inquiries,” available at [http://www.publicinquiries.org/introduction/a\\_pivotal\\_part\\_of\\_public\\_life](http://www.publicinquiries.org/introduction/a_pivotal_part_of_public_life).

## **b) Overview of Investigations and Prosecutions Carried out by the UK in Respect of the Alleged Crimes**

The UK has conducted a very limited number of prosecutions in relation to incidents of mistreatment by UK Services Personnel in Iraq. These have been conducted through military based mechanisms, resulting in only four courts-martial, discussed below. This is the UK Government's sole *ex-officio* response to incidents of mistreatment by UK Services Personnel in Iraq. The additional efforts described further below have been undertaken by the UK Government only in response to court decisions following litigation by victims. UK courts do not have the power to compel criminal investigations and prosecution of offenders.

### ***RMP Investigations***

The RMP (RMP) was the body responsible for investigating allegations raised during the UK involvement in Iraq. Although the exact number is unknown, the RMP and other service police forces in Iraq investigated some deaths in custody within a short period following the deaths. According to a 2008 report by the Army, the Service Police investigated only six cases concerning allegations of deliberate abuse, involving either the death or injury of Iraqi civilians who had been arrested or detained by members of the Services Personnel between 2003 and 2008.<sup>617</sup> These investigations followed either a death in custody, or were instigated following widespread media reporting of incriminating evidence, suggesting that their sole purpose was damage limitation. There has not been any *ex-officio* investigation into all instances of deaths in custody or of any of the many instances of mistreatment and abuse detailed in this Communication. Of particular relevance for this Communication is the failure of the RMP to investigate higher ranking officials.

### ***Courts-martial***

RMP investigations relating to all UK operations in Iraq from 2003 until 2008 resulted in only four courts-martial.

- i. At a court-martial in 2005 relating to the serious abuse of Iraqi detainees by UK soldiers at 'Camp Breadbasket', four soldiers were found guilty on various charges and sentenced to military prison terms. Their terms ranged from 140 days to two

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<sup>617</sup>“The Aitken Report – An Investigation into Cases of Deliberate Abuse and Unlawful Killing in Iraq in 2003 and 2004,” 25 January 2008, at paras.2-3, available at [http://mod.uk/NR/rdonlyres/7AC894D3-1430-4AD1-911F-8210C3342CC5/0/aitken\\_rep.pdf](http://mod.uk/NR/rdonlyres/7AC894D3-1430-4AD1-911F-8210C3342CC5/0/aitken_rep.pdf).

years.<sup>618</sup> The proceedings related to graphic photographs (released to the media in January 2005)<sup>619</sup> taken by soldiers showing Iraq detainees, including a child, being forced into simulated oral and anal sex positions, being stood on, being forced to work and being suspended from the raised fork of a forklift truck. Despite compelling documentary evidence, a further three soldiers were acquitted on war crimes charges and convicted of lesser offences including assault, disgraceful conduct of a cruel kind and prejudicing good order and military discipline. It is significant and concerning that during the court martial, defence lawyers claimed that their clients were following orders, on the basis of evidence that the soldiers had been ordered to bring suspects into the camp with the intention of “working them hard” and on the basis that their superior’s conduct, in allowing Iraqis to be physically hurt, had been “infecting” them.<sup>620</sup> Further, a number of soldiers claimed that they did not report the abuse because they felt that the chain of command had “broken down.”<sup>621</sup>

- ii. On 11 May 2003, XXX, an Iraqi civilian, died after being assaulted by UK soldiers. Seven soldiers were charged with his murder but the charges were dismissed by a court-martial in November 2005.<sup>622</sup> The Judge Advocate directed not guilty verdicts in all cases, despite also concluding that there might be sufficient evidence to show that Abdullah had died as a result of an assault carried out by the Section of which all seven defendants were members.<sup>623</sup> The court martial decided that the evidence was too “weak or vague” to secure a conviction and that because the prosecution was unable to identify any single defendant who applied unlawful force, there was no case

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<sup>618</sup>Audrey Gillan, “Seniors’ behaviour ‘infected’ soldiers,” *The Guardian UK*, 11 February 2005, available at <http://www.guardian.co.uk/uk/2005/feb/11/iraq.military>.

See also *The Guardian UK*, “Iraq Camp Breadbasket Abuse Case”, *The Guardian*, <http://www.guardian.co.uk/Iraq/breadbasket/0,15804,1419469,00.html>

<sup>619</sup>“The Aitken Report,” *supra* note 617, at p. 3.

<sup>620</sup> Audrey Gillan, “Senior’s behaviour ‘infected’ soldiers,” *supra* note 618.

<sup>621</sup>*The Times Online UK*, “Corporal denies destroying Iraqi abuse photos,” 11 February 2005, available at <http://www.timesonline.co.uk/article/0,,2-1480136,00.html>

<sup>622</sup>*BBC News*, “Iraq murder trial charges dropped,” 3 November 2005, available at [http://news.bbc.co.uk/2/hi/uk\\_news/4403264.stm](http://news.bbc.co.uk/2/hi/uk_news/4403264.stm). Owen Bowcott and Richard Norton-Taylor, “Paratroopers cleared of murdering Iraqi after judge say that there is no case to answer,” *The Guardian UK*, 4 November 2005, available at <http://www.guardian.co.uk/uk/2005/nov/04/military.iraq>.

<sup>623</sup>“The Aitken Report,” *supra* note 617, at para. 4.

to answer against any of the defendants.<sup>624</sup> The court martial also noted that the RMP investigation was “inadequate,” and suffered from “serious omissions.”<sup>625</sup>

- iii. On 8 May 2003, XXX, an Iraqi civilian, was pushed into the Shatt-al-Arab river by UK soldiers and died. Four soldiers were found not guilty of his murder by court martial in May and June 2006.<sup>626</sup> The court martial found that the use of “wetting”, submerging looters in canals and rivers to encourage them to go home, constituted minimum use of force in the circumstances.<sup>627</sup>
- iv. In September 2003 Baha Mousa, an Iraqi civilian, died while in UK custody. In 2007 in the case of *R v Payne and Others* (“the Payne case”)<sup>628</sup> seven soldiers were tried on charges relating to the death of Baha Mousa and the treatment of those detained with him. One soldier, Donald Payne, pleaded guilty to the war crime of inhumane treatment and was sentenced to 12 months imprisonment. The remaining six soldiers pleaded not guilty to all charges and were acquitted of various charges including assault, negligent performance of duty and the war crime of inhumane treatment. In three cases, the Judge Advocate ruled there was no case to answer.

Significantly, in the case of Colonel Mendonca (the OC), his defence to the charge of negligently performing a duty was put on the basis that he had genuinely believed that the Brigade had sanctioned the use of stress positions and hooding to maintain the “shock of capture” for TQ. The evidence of Major Royce (1QLR’s BGIRO from June 2003 to August 2003) was that the use of stress positions and hooding to maintain the “shock of capture” had been cleared with Brigade Headquarters via the chain of command and legal advice.<sup>629</sup> The Judge Advocate accepted the defence submission

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<sup>624</sup> Bowcott and Norton-Taylor, “Paratroopers cleared of murdering Iraqi,” *supra* note 622.

<sup>625</sup> T Harding, T., “The Iraqi lies that put the Paras in court,” *The Telegraph*, 4 November 2005, available at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2005/11/04/nirq104.xml&sSheet=/news/2005/11/04/ixnewstop.html>.

<sup>626</sup> Vikram Dodd, “Soldiers arrested after Iraqi beaten and drowned,” *The Guardian*, 26 August 2004, available at <http://www.guardian.co.uk/world/2004/aug/26/iraq.military>.

<sup>627</sup> *The Guardian UK*, “Soldiers cleared of Iraqi boy’s death,” 6 June 2006, available at <http://www.guardian.co.uk/Iraq/Story/0,,1791630,00.html>.

<sup>628</sup> Proceedings of a General Court-Martial held at Military Court Centre Bulford in the case of Corporal Donald Payne and others, 7 September 2006 to 30 April 2007 (unpublished transcripts, on file with author). The proceedings will be referred to as ‘the court-martial of Corporal Payne and others.’

<sup>629</sup> Rasiah, *The Court-martial of Corporal Payne*, *supra* note 463, p. 185. The understanding, at Brigade level, of authorised methods of detainee treatment is detailed by A.T. Williams in *A Very UK Killing: The Death of Baha Mousa*, London: Vintage Books (2013) at p. 246-251. Andrew Williams is a professor of law and Director of the Centre for Human Rights in Practice at the University of Warwick. The evidence of Major Royce was that he had taken over from the Black Watch regiment and that he had seen them hood detainees. He sought guidance from a Brigade intelligence officer and a Major in the legal team and was told that hooding was acceptable. He

that, given the sanction, Colonel Mendonca was entitled to say that he had satisfied himself that the conditioning process did not contravene the Law of Armed Conflict of the Geneva Conventions.<sup>630</sup> In the remaining two cases, the soldiers were acquitted following a trial.

Following the publication of the BMI Report in 2011, complaints were made by PIL to the DPP with respect to twenty-five individuals:

1. Lieutenant Colonel Jorge Mendonca, 21 September 2011
2. Major Michael Peebles, 21 September 2011
3. Corporal Donald Payne, 23 September 2011
4. Captain Craig Rodgers, 23 September 2011
5. Major Christopher Suss-Francksen, 27 September 2011
6. Captain George Briscoe, 27 September 2011
7. Sergeant Charles Colley, 27 September 2011
8. Lieutenant Colonel Richard Englefield, 29 September 2011
9. Captain Mark Moutarde, 3 October 2011
10. W02 Christopher Roberts, 3 October 2011
11. Corporal Adrian Redfearn, 5 October 2011
12. W02 Joel Huxley, 11 October 2011
13. Major Anthony Royce, 11 October 2011

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also sought guidance from two Majors in Brigade legal (Majors Clifton and Robinson) in relation to the shock of capture and was told that it was to be used for detainees who were to be tactically questioned and could involve hooding and stress positions in order to continue the disorientation and unease of the prisoner. Major Royce informed Colonel Mendonca that the methods had been given clearance and then briefed the incoming BGIRO accordingly. Major Clifton, a senior member of the legal team at Brigade Headquarters gave evidence that his understanding was that hooding was forbidden, but stress positions could be used for Tactical Questioning. Major Robinson gave evidence that hooding was not the subject of a specific policy and he knew it was not allowed for sensory deprivation but it would be acceptable for a brief period for security reasons. He considered stress positions were unacceptable and that sleep deprivation might be acceptable as a consequence of the shock of capture or if prisoners were being moved, but would otherwise be outlawed. Major Robinson gave evidence that he was aware of the Northern Ireland ruling and the ban on the use of the five techniques, as a result of a training course in 1998.

<sup>630</sup> Rasiah, *The Court-martial of Corporal Payne*, *supra* note 463, p. 185.



14. Major Mark Robinson, 11 October 2011
15. Colour Sergeant Robert Livesey, 11 October 2011
16. Corporal Claire Vogul, 11 October 2011
17. Derek Keilloh, 10 November 2011
18. Sergeant Ian Goulding, 10 November 2011
19. Corporal Stephen Winstanley, 10 November 2011
20. Father Peter Madden, 30 November 2011
21. S014, 5 December 2011
22. S040, 5 December 2011
23. Major Mark Kenyon, 5 December 2011
24. Sergeant Ray Smulski, 5 December 2011
25. W02 Mark Davies, 5 December 2011

The criminal offences complained of include offences contrary to the *International Criminal Court Act 2001* (ICCA). For instance in respect of Lt. Col. Jorge Mendonca, complaints were made of conspiracy to commit a grave breach of the Geneva Conventions, namely torture or inhuman treatment contrary to section 52 and section 55 (1)(c) of the ICCA, and aiding, abetting, counselling or procuring a grave breach of the *Geneva Conventions*, namely torture or inhuman treatment contrary to section 52 of the ICCA (read with section 65 and section 55). Other complaints of war crimes pursuant to the ICCA were also raised. On 30 March 2012, in a letter to PIL, the DPP wrote that the matters complained of are not, in his view, matters “*which should be dealt with by the Crown Prosecution Service*” and that he was satisfied that the SPA (the body within the MoD responsible for considering cases referred by the Service Police) “*is in my view the correct prosecutor in cases of this type*”. The DPP also indicated that he was satisfied that “*there is no longer any concern in relation to the further investigation of these matters.*”

Even if the SPA is indeed the correct prosecution agency for these types of cases, the result is that ten years after the death of Baha Mousa, the appropriate prosecution agency has failed to

take up these cases. What is more, the only investigations currently being conducted are through IHAT, which has been the subject of serious further delays and inadequate investigations.<sup>631</sup> Thus, even though the 3 volumes of the BMI Report provided compelling evidence of criminal misconduct by those 25 individuals listed above there has been apparently no progress made in the SPA's prosecutorial role. It seems highly unlikely that there will be further prosecutions. PIL are being kept almost entirely in the dark.

The approach by the UK in respect to lower level officers in the context of the torture and manslaughter (if not murder) of an innocent Iraqi civilian reflects a general reluctance to genuinely investigate and prosecute these officers. Furthermore, there has been a total failure to investigate the criminal responsibility of those higher up in the chain of command.

### ***Other Investigative Mechanisms***

The UK has also conducted investigations into allegations of detainee abuse in Iraq through various mechanisms including Army investigations and reports, public inquiries, and other commissions of inquiry. All of these mechanisms have been limited in scope and are not at all comparable to criminal proceedings that address individual criminal responsibility for war crimes.

### ***Army Investigations and Reports***

***The Aitken Report 2008:*** Brigadier Robert Aitken was mandated to investigate cases of deliberate abuse and unlawful killings that occurred in Iraq in 2003 and 2004. He had to consider measures necessary to safeguard and improve the operational effectiveness of the army in view of allegations of abuse in Iraq and criticism in the Defence Select Committee. An interview with Aitken revealed that "*he would have liked to include issues of "command climate" in the various units and formations under scrutiny but was prevented from doing so.*"<sup>632</sup> As a result, the Aitken Report released in January 2008 did not explore whether, and to what extent, UK Services Personnel were authorized to use the previously banned five techniques in conditioning prior to TQ and interrogation. The Report also failed to address issues of accountability. In a memorandum to the UK MoD, REDRESS criticised the limits of the investigation and noted:

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<sup>631</sup>See discussion below at pp. 226 – 233.

<sup>632</sup>David Benest, "A Liberal Democratic State and COIN: The Case of Britain, or Why Atrocities Can Still Happen," Civil Wars, 19 Mar 2012, at p.44, footnote 80.

“what is still totally unclear is why the assurance by Prime Minister Heath in the House of Commons [in 1972] that hooding, wall standing, sleep and food deprivation, and the use of noise, would never again be used by UK Services Personnel as an aid to interrogation, without a ministerial statement, was ignored by the current Government, as well as by the Army. ... It is perhaps telling that the Report offers no such assurances that the doctrine in 2003 was in compliance with international and domestic law.”<sup>633</sup>

**The Purdy Report 2010:** The UK Army Inspector Brigadier Purdy issued a final report in 2010 into the *Implementation of Policy, Training and Conduct of Detainee Handling*.<sup>634</sup> Purdy was instructed by the MoD Chief of the General Staff to assess progress since the Aitken Report in the area of abuse of civilians in UK detention.<sup>635</sup> Purdy found that “*there has been much change since the Aitken report*” and that there was compliance with applicable international law.<sup>636</sup>

### ***The Baha Mousa Inquiry (BMI)***

The history and scope of the Baha Mousa Inquiry is detailed above.<sup>637</sup> Notably, the Chairman of the Inquiry obtained an undertaking from the Attorney-General and the CPS that no evidence a person may give before the Inquiry would be used in evidence against *that* person in any criminal proceedings, or for the purpose of deciding whether to bring such proceedings.<sup>638</sup> This undertaking does not prevent evidence given by any witness to the Inquiry from being used against any other witness to the Inquiry in any criminal proceedings, and does not extend to the use of that evidence in foreign criminal proceedings.<sup>639</sup> The

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<sup>633</sup>REDRESS, ‘Memorandum to the UK MoD on the Aitken Report: An investigation into cases of deliberate abuse and unlawful killing in Iraq 2003 and 2004’, 31 January 2008, available at <<http://www.redress.org/downloads/publications/Memo%20on%20Aitken%20Report%2031%20Jan%2008.pdf>>. See also *BBC News*, “In quotes: Army report reaction,” 25 January 2008, available at [http://news.bbc.co.uk/2/hi/uk\\_news/7209522.stm](http://news.bbc.co.uk/2/hi/uk_news/7209522.stm).

<sup>634</sup>Final Report by the Army Inspector, “Army Inspectorate Review into the Implementation of Policy, Training and Conduct of Detainee Handling,” 15 July 2010, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/28120/20100721\\_detainee\\_handling\\_final\\_report\\_AI.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/28120/20100721_detainee_handling_final_report_AI.pdf)

<sup>635</sup>*Ibid.*, p. 1.

<sup>636</sup>*Ibid.*, p. 4.

<sup>637</sup>See Chapter IV, Part A.

<sup>638</sup>The Baha Mousa Inquiry, Ruling of 6 January 2009 (First Directions Hearing). Copies of the undertakings are at Annexure A (Letter from Kristin Jones, Attorney General’s Office to Duncan Henderson, The Baha Mousa Public Inquiry, dated 31 December 2008) and Annexure B (Letter from Chris Newell, Principal Legal Advisor, Crown Prosecution Service, London to The Rt Hon Sir William Gage, Chairman of the Baha Mousa Public Inquiry, dated 5 January 2009). Note that this undertaking does not apply to prosecutions relating to the provision of false evidence before the Inquiry.

<sup>639</sup>The Baha Mousa Inquiry, Ruling of 6 January 2009, *supra* note 638, Annexures A-F, paras. 26, 27, 43-50.

Chairman of the Inquiry also obtained undertakings from the MoD and the Army, Navy and Air Force to ensure that individuals in those organisations would not be the subject of administrative or disciplinary action should they give evidence indicating that they had previously failed to disclose or had previously provided false information of misconduct.<sup>640</sup>

After three years, the BMI Report concluded that in respect of the lower ranks (from Privates to Staff Sergeants), nineteen individuals bore responsibility for assaults ranging from slapping, enforcing stress positions, enforcing sleep deprivation, kicking, punching, gratuitous assaults, gouging of eyes, karate chopping and demonstrations of “*the choir*.”<sup>641</sup> What is more, the BMI Report also criticised members of the higher chain of command for negligence. The MoD accepted all of the BMI recommendations, except for the recommendation on the abolition of the practice of harshing.<sup>642</sup>

### ***The Al-Sweady Public Inquiry (ASI)***

In November 2009, the UK Government established the ASI, in response to Judicial Review proceedings brought by Iraqis complaining of a failure by the UK Government to investigate in accordance with its obligations under the ECHR.<sup>643</sup> The Inquiry is charged with investigating allegations of abuse of Iraqi nationals by UK Services Personnel near Majar al Kabir in 2004. Hearings commenced in March 2013. Oral hearings for Iraqi witnesses and a number of expert witnesses are now complete. Oral hearings for the military witnesses commenced on 2 September 2013. Similarly to the BMI, the Attorney-General, in consultation with the CPS, provided an undertaking to the Inquiry that no evidence a person may give before the Inquiry would be used in evidence against *that* person in any criminal proceedings, or for the purpose of deciding whether to bring such proceedings.<sup>644</sup> Judicial Review proceedings are stayed until the outcome of the Inquiry is made public. Given the length of time such processes usually take; the fact that the Inquiry lacks power to make decisions on individual civil or criminal liability, or to rule on or award compensation; the

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<sup>640</sup> The Baha Mousa Inquiry, Ruling of 6 January 2009, *supra* note 638, Annexures C, D, E and F.

<sup>641</sup> The Report of the Baha Mousa Inquiry, *supra* note 40, Vol. I, Pt. 2, Ch. 20, p. 323-326.

<sup>642</sup> UK Ministry of Defense, “Publication of the Baha Mousa Inquiry Report,” 8 September 2001, available at <https://www.gov.uk/government/news/publication-of-the-baha-mousa-inquiry-report>.

<sup>643</sup> The Inquiry was announced by the SSD through a written Ministerial Statement on 25 November 2009. See website of the Al-Sweady Public Inquiry, “Background” available at <http://www.alsweadyinquiry.org/index.htm>.

<sup>644</sup> Letter from Kevin McGinty, Attorney-General’s Office to Jillian Glass, Solicitor to the Al-Sweady Public Inquiry dated 18 January 2011 available at [http://www.alsweadyinquiry.org/linkedfiles/alsweadyinquiry/key\\_documents/110118undertakingtowitnessesfromattorneygeneral.pdf](http://www.alsweadyinquiry.org/linkedfiles/alsweadyinquiry/key_documents/110118undertakingtowitnessesfromattorneygeneral.pdf). Note that this undertaking does not apply to prosecutions relating to the provision of false evidence before the Inquiry.

immunities from prosecution enjoyed by witnesses with respect to evidence that they may give to the Inquiry; and the limited geographical and temporal scope of the Inquiry, this would clearly not prevent the OTP from opening an investigation on the basis of the principle of complementarity.<sup>645</sup>

### ***The Ali Zaki Mousa Proceedings and the Iraq Historic Allegations Team (IHAT)***

On 5 February 2010, PIL commenced an application for judicial review in *Ali Zaki Mousa v SSD (Ali Zaki Mousa No.1)*.<sup>646</sup> The application challenged the ongoing RMP investigations at that time as woefully ineffective in light of the UK Government's obligations under Articles 2 and 3 of the ECHR, and demanded a single public inquiry into all instances of killing and mistreatment in Iraq, which the SSD refused.

On 1 March 2010, in response to the application and following repeated failures by the RMP to conduct effective investigations,<sup>647</sup> the Minister of State for the Service Personnel established IHAT. IHAT was tasked with investigating allegations of ill-treatment arising out of UK operations in Iraq, and (as acknowledged later by the Court of Appeal) "*fell short of a public inquiry.*"<sup>648</sup> IHAT is a criminal investigative body and was originally comprised of RMP and civilian investigators. A civilian head reported to the PM(A), who was ultimately responsible for directing the conduct of investigations.

In November 2011, the Court of Appeal found that IHAT was not sufficiently independent to conduct investigations for the purposes of Articles 2 and 3 of the ECHR, because of the inclusion of RMP personnel in the investigation of matters where the RMP had been involved in Iraq.<sup>649</sup> On 26 March 2012, the Minister of State for the Service Personnel announced that RMP personnel were to be removed from IHAT and replaced by members of the RNP.<sup>650</sup> On 25 May 2012, the victims commenced a further judicial review, challenging the independence of the reformed IHAT in *R(Ali Zaki Mousa and others) v SSD (No.2) (Ali Zaki Mousa*

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<sup>645</sup>The OTP should note that despite the *Al-Skeini* Grand Chamber judgment of 7 July 2011 extending ECHR jurisdiction to the battlefield (where it appears certain that many Iraqi civilians were unlawfully killed), the ASI's Terms of Reference have not been extended to include such matters.

<sup>646</sup>*Ali Zaki Mousa and others v SSD*[2010], *supra* note 227.

<sup>647</sup> See *Ibid.*; see e.g., *R (Al-Sweady and others) v SSD*[2009] EWHC 2387 (Admin) at paras. 52 to 56.

<sup>648</sup>*R (Ali Zaki Mousa and others) v SSD*[2011], *supra* note 76, para. 1.

<sup>649</sup> *Ibid.*

<sup>650</sup> See UK Ministry of Defense, Report on the Iraq Historic Allegations Team, available at [http://www.parliament.uk/documents/commons-vote-office/March\\_2012/26-03-12/4-Defence-Iraq-Historic-Allegations-Team.pdf](http://www.parliament.uk/documents/commons-vote-office/March_2012/26-03-12/4-Defence-Iraq-Historic-Allegations-Team.pdf).

No.2).<sup>651</sup> In its judgment on 25 May 2013, the High Court declined to order an overarching public inquiry into the deaths in custody cases but stated that it would consider ordering a form of inquisitorial inquiry based on the direct involvement of the DSP, once decisions on prosecution had been made. The High Court invited submissions from the parties on how this should be taken forward, these are discussed below.<sup>652</sup>

### *IHAT Terms of Reference*

According to IHAT's terms of reference (issued on 1 May 2012 following the restructure of IHAT, discussed below) IHAT's objective is to "*investigate as expeditiously as possible those allegations of mistreatment by HM Forces in Iraq allocated to it by the Provost Marshall (Navy)[...] in order to ensure that those allegations are or have been investigated appropriately.*"<sup>653</sup> The matters allocated include:

- i. judicial review claims relating to abuse of Iraqi civilians by UK Services Personnel in Iraq during the period from March 2003 to July 2009, issued or notified by way of a pre-action protocol letter as at 30 April 2010;
- ii. other cases of alleged mistreatment notified after this date may be subject to investigation by IHAT. This will be determined on a case by case basis;
- iii. specific cases which the UK now has an obligation to investigate following the judgment of the ECtHR in the case of *Al-Skeini*; and
- iv. the case of Baha Mousa. IHAT is to review the BMI report in order to assess whether more can be done to bring those responsible for the mistreatment of Baha Mousa to justice.<sup>654</sup>

The functions of IHAT were summarised by the High Court in their judgment in *R (Ali Zaki Mousa No.2) v SSD (Ali Zaki Mousa No.2)*.<sup>655</sup> IHAT's functions are to:

- i. investigate under the supervision of the Head of IHAT in accordance with the IHAT terms of reference;<sup>656</sup>
- ii. make or contribute to decisions on whether any of the Service Personnel should be charged. The officer in charge of the RNP makes decisions on the sufficiency of

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<sup>651</sup>*R(Ali Zaki Mousa and others) v SSD (No. 2)* [2013] EWHC 1412. Hearings took place on 11 December 2012, 29-30 January 2012 and 22 March 2013

<sup>652</sup>*Ibid.*, paras. 232-233.

<sup>653</sup>*R(Ali Zaki Mousa and others) v SSD (No.2)* [2013], *supra* note 651, para 26.

<sup>654</sup>*Ibid.*

<sup>655</sup>*Ibid.*, paras. 34- 37, 86-93.

evidence for a prosecution. Where that officer determines that there is insufficient evidence to bring a charge, or that there is sufficient evidence for a more serious charge, he must either consult or refer the case to the DSP, respectively; and

- iii. report so that wider systemic issues can be considered and remedied. Material gathered by IHAT is reported to the MoD to consider systemic issues and to make recommendations. IHAT submits quarterly and interim reports to the Directorate of Judicial Engagement (the Directorate). The Directorate is responsible for the MoD's response to, and cooperation with, inquiries and litigation arising from military operations and for ensuring wider lessons are learned. The Directorate identifies systemic issues and measures taken to address these issues, and implements additional measures where required.

With respect to individual death cases, the scope of investigation by IHAT is clearly limited to cases previously notified. Although there is a procedure for the consideration of additional cases, whether and to what extent additional cases will be investigated is questionable, given the delays and resourcing issues of IHAT to date. These are discussed in detail below.

#### *The restructured IHAT*

Although the High Court held, *inter alia*, that IHAT has been restructured in such a way that it can independently carry out its investigative and prosecutorial functions,<sup>657</sup> the High Court considered that the IHAT investigation does not meet the obligations of the UK under Article 2 of the ECHR.<sup>658</sup> Importantly, the Court noted the State duty to investigate deaths in custody without delay<sup>659</sup> and found that the delay in dealing with cases of deaths in custody “*is such that, in our view, it amounts to a failure to discharge the duty[under the ECHR], quite apart from being a source of great and increasing concern.*”<sup>660</sup> The High Court noted the “*inadequacy of the IHAT model*”<sup>661</sup> and stated that with respect to the “*very large numbers of deaths occurring at many different times and in different locations*” a new approach is required if the investigation and prosecution of these matters is to be achieved in a timely,

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<sup>657</sup>*Ibid.*, para.109.

<sup>658</sup>*Ibid.*, para.197.

<sup>659</sup>*Ibid.*, para.185.

<sup>660</sup>*Ibid.*, para. 186. The High Court also stressed (at para. 165) that the delay in making decisions in respect of prosecutions concerning those responsible for the Iraqis who died in custody is a source of increasing concern, because the Article 2 duty requires speedy action.

<sup>661</sup>*Ibid.*, para. 212.

cost effective and proportionate manner that discharges the very important investigative duties imposed upon the State.<sup>662</sup>

Significantly, the High Court stated that:

*“if, as there is some evidence to suggest, there was a lack of training and a failure to investigate early misconduct promptly, the question arises as to whether any responsibility for that arises in the higher ranks of the Service Personnel and in Government.”*<sup>663</sup>

With respect to systemic issues, the High Court found that on the evidence before the Court, *“the arrangements for the discharge of the function in relation to the wider issues and lessons learnt are not adequate and require further consideration,”*<sup>664</sup> The High Court stated that *“reconsideration is needed of the way in which the duty to assess the systemic issues and to take account of lessons learnt is discharged in a way that provides greater transparency and public accountability.”*<sup>665</sup> In particular, the High Court noted that the steps taken by the MoD to deal with wider and systemic issues are neither public, nor subject to independent scrutiny<sup>666</sup> and that *“the Directorate of Judicial Engagement policy, despite its work done in the conscientious manner we have set out, cannot be described as independent.”*<sup>667</sup> The Court found that the Directorate *“acts on behalf of the Secretary of State and is an integral part of the defence and military hierarchy.”*<sup>668</sup> Further, the Court noted that there was no evidence that the IHAT inquiry had considered or will consider with the appropriate level of detail *“the instructions, training and supervision given to soldiers undertaking tasks such as this in the aftermath of the invasion”* and that this would necessarily involve obtaining evidence from soldiers and from those responsible for devising and organising the training, and effectively testing this evidence to ensure its reliability.<sup>669</sup> The Court considered that IHAT is neither structured nor staffed to perform these functions and that:

*“the absence of this capability is particularly significant because in this case the case for a public investigation becomes greater where there is: ‘an accumulation of identical of analogous breaches which are sufficiently numerous and inter-connected*

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<sup>662</sup>*Ibid.*, para. 6.

<sup>663</sup>*Ibid.*, para. 177.

<sup>664</sup>*Ibid.*, para. 125.

<sup>665</sup>*Ibid.*, para. 7.

<sup>666</sup>*Ibid.*, para. 194.

<sup>667</sup>*Ibid.*, para. 93.

<sup>668</sup>*Ibid.*

<sup>669</sup>*Ibid.*, para. 192.



*to amount not merely to isolated incidents or exceptions but a pattern or system' (Ireland v UK (1979-1980) 2 EHRR 25 at paragraph 159).<sup>670</sup>*

### **IHAT Progress to Date**

After two years of investigations, IHAT has referred one single case, *Kammash* (described above in relation to the interrogation videos and discussed below) to the SPA for consideration of prosecution. The DSP for the SPA decided not to charge the JFIT interrogators in question. The decision was conveyed to the victims' representatives, PIL, in a letter dated 25 January 2012.<sup>671</sup> The conclusion of the SPA was that there “*was a case to answer*” in relation to some of the allegations. However, there was insufficient evidence for a realistic prospect of conviction of the interrogator featured in videos of the interrogation of the complainants because the use of “harshing” was “*complicated by the training then provided to the suspect soldiers*” and “*appears to be in keeping with trained techniques albeit the decision as to how best to apply these techniques was left to the interrogator.*”<sup>672</sup> This suggests strongly that such ill-treatment resulted from, and reflected, a sanctioned policy. Further, the fact that the SPA considered that the techniques did not “*sit comfortably with Article 3 of the ECHR,*”<sup>673</sup> confirms that the victims made credible allegations of illegal ill-treatment. The decision not to prosecute the interrogators reflects the obvious defence available to them, namely, that they had been trained to use these techniques, and that they were following orders specifically sanctioned by those in command including the OC JFIT (who would have known the techniques being used by his interrogators). It also suggests that no consideration has been given, or will be given, to the investigation and prosecution of superior officers responsible for ordering, supervising, training and authorising such misconduct.

### *Submissions in Response to the High Court Judgment of 24 May 2013*

On 28 June 2013, the claimants filed a submission in response to the High Court judgment of 24 May 2013.<sup>674</sup> The claimants seek a public statutory inquiry under the *Inquiries Act 2005* with the power to compel the attendance of witnesses, procedures to ensure the effective

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<sup>670</sup>*Ibid.*, para. 193.

<sup>671</sup> Letter from Bruce Houlder QC DL, Director of Service Prosecutions, to Mr Phil Shiner of Public Interest Lawyers dated 25 January 2012 [on file with author].

<sup>672</sup>*Ibid.*

<sup>673</sup>*Ibid.*

<sup>674</sup> Claimant's Submissions dated 28 June 2013 on the Inquest-Type Procedure in Response to Judgment of Divisional Court dated 24 May 2013 in *R (Ali Zaki Mousa) v SSD (No.2)* [2013], *supra* note 651.

participation of families of the deceased persons. On 4 July 2013, the Secretary of State filed a submission in response to the High Court judgment of 24 May 2013.<sup>675</sup> The submission notes that the Secretary of State has lodged an application for permission to appeal against the judgment on points of law of general public importance, but requests that no decision be taken on the application until the parties have made submissions on the proposals made by the Court, and until the Court has had the opportunity of responding to those proposals.<sup>676</sup> The Secretary of State proposes to involve an independent person in the work on systemic issues to “*enhance the work of the MoD.*”<sup>677</sup> The Secretary of State also proposes that inquisitorial investigations be established for death cases where there will be no IHAT investigation and no prospect of further prosecution and that once completed, consideration be given to whether it is necessary to conduct inquisitorial investigations with respect to other individual death cases.<sup>678</sup> However, the Secretary of State proposes a non-statutory based inquiry, without powers of compulsion to attend or to produce evidence, with very limited use of lawyers, and no requirement for questioning other than by the appointed individual conducting the inquiry.<sup>679</sup>

For the reasons already detailed, it is clear that these developments do not bring the UK any closer to holding those who bear the greatest responsibility for the mistreatment of detainees in Iraq criminally accountable. Years after the incidents, the UK Government is still playing for time, and insisting on investigative mechanisms that make prosecutions of relevant individuals highly unlikely, if not impossible.

### ***Reparations and Damages***

Although there has been no criminal liability for the systematic use of illegal techniques, there has been some accountability for a limited number of PIL Iraqi clients. In some cases, the PIL judicial review process had led to a Public Inquiry and other reparation has been granted (damages and an apology). Only Baha Mousa’s father (on behalf of Baha Mousa’s estate) and the surviving nine detainees in that incident fall within this category. It is public knowledge that Baha Mousa’s father and the survivors received £2.83 million in July

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<sup>675</sup> Secretary of State’s Submissions dated 4 July 2013 in Response to Judgment of Divisional Court dated 24 May 2013 in *R (Ali Zaki Mousa) v SSD (No.2)* [2013], *supra* note 651, para. 2.

<sup>676</sup> *Ibid.*, para. 4.

<sup>677</sup> *Ibid.* para. 24.

<sup>678</sup> *Ibid.*, paras 8-9.

<sup>679</sup> *Ibid.* paras.18, 19, 21, 22.

2008.<sup>680</sup> However, further details of the settlement process remain confidential. The ECtHR has noted that Baha Mousa's father accepts that he is no longer a victim of any breach of the procedural obligation under Article 2 of the ECHR, as the death of his son has been investigated by way of a public inquiry.<sup>681</sup> He also received an apology from the MoD and the Army.

In other cases, Iraqi victims have received only damages. Approximately 98 Iraqis have received damages from the MoD. On 8 October 2012, the MoD's solicitors wrote to PIL with details of 68 of the latest cases, where individuals have received an average of £66,102.07. These payments clearly do not discharge the UK's duties with respect to victims of war crimes committed by UK Services Personnel in Iraq. The United Nations Committee Against Torture in *Keppa Urra Guridi v Spain* No. 212/2002, confirmed that compensation in cases of torture should cover a wide range of factors:

*“the Committee considered that compensation should cover all the damages suffered by the victim, which includes, among other measures, restitution, compensation, and rehabilitation of the victim, as well as measures to guarantee the non-repetition of the violations always bearing in mind the circumstances of each case.”*<sup>682</sup>

Whilst we acknowledge payments to some victims, these payments clearly do not impact upon the UK's obligations to conduct investigations and prosecutions (where appropriate) in relation to the commission of war crimes by UK Services Personnel in Iraq.

### **c) Conclusion**

With regard to the first limb of the complementarity test set out above, the UK has failed to conduct any criminal investigations into the military officials who bear the greatest responsibility for the systemic abuses committed in Iraq, as presented in Chapter VI.<sup>683</sup> Secondly, as this Chapter describes, criminal investigations have been limited to low level

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<sup>680</sup> *BBC News*, “Iraqis to get 3m pounds in MoD damages,” 10 July 2008, available at <http://news.bbc.co.uk/1/hi/uk/7500204.stm>.

<sup>681</sup> *Al-Skeini and Others v. the UK* (no. 55721/07), note 9, para. 176.

<sup>682</sup> Committee Against Torture, *Keppa Urra Guridi v. Spain*, Communication No. 212/2002, U.N. Doc. CAT/C/34/D/212/2002 (2005), para. 6.8, available at <http://www1.umn.edu/humanrts/cat/decisions/212-2002.html> “article 14 of the Convention not only recognizes the right to fair and adequate compensation but also imposes on States the duty to guarantee compensation for the victim of an act of torture. The Committee considers that compensation should cover all the damages suffered by the victim, which includes, among other measures, restitution, compensation, and rehabilitation of the victim, as well as measures to guarantee the non-repetition of the violations, always bearing in mind the circumstances of each case. The Committee concludes that there has been a violation of article 14, paragraph 1, of the Convention.”

<sup>683</sup> OTP, *Policy Paper on Preliminary Examinations*, *supra* note 14, para. 47.

officials, and only some of the direct perpetrators of the abuses committed.<sup>684</sup> The few investigations which did occur were undertaken in a limited and deeply reluctant manner. In the next section, we assess the quality of these proceedings and conclude that there is compelling information which indicates that the UK is in fact unwilling to genuinely investigate and prosecute war crimes committed in Iraq between 2003 and 2008.

### 3) Unwillingness and Inability

Determining the unwillingness of a State to genuinely carry out investigations and prosecutions is a mixed subjective / objective test – what is the intention of the State in either failing to act or in acting in a manner which is inconsistent with the interests of justice, and what is the outcome of any action taken. Article 17(2) of the ICC Statute establishes several criteria to be taken into account when considering the unwillingness of a State to investigate and prosecute.<sup>685</sup>

Article 17(2)(a) of the ICC Statute sets out a subjective test focusing on whether there is evidence to suggest either total or partial shielding of those responsible from prosecution.<sup>686</sup> The situation as a whole must be considered in light of the intention of the State and the wider policies under which the investigation or prosecution has taken place. However, action (or a willingness to act) by one limb of the State (e.g. the Attorney General) should not render the case inadmissible where the inaction of another limb frustrates the whole investigation.<sup>687</sup> In contrast, Article 17(2)(b) of the ICC Statute requires a more objective test, whereby the ICC must look at any delay in proceedings, the impact of delay on the pursuit of justice, and whether the investigations were carried out in an impartial and independent manner.<sup>688</sup>

The test for inability is more objective than that of unwillingness.<sup>689</sup> Pursuant to Article 17(3), a state will be deemed unable to investigate or prosecute where there is evidence of a total or partial collapse, or an unavailability of the national justice system, or where there is evidence that the state is “*unable to obtain the accused, or the evidence and testimony, or otherwise*

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<sup>684</sup> *Ibid.*, para. 49.

<sup>685</sup> Schabas, *A Commentary on the Rome Statute*, *supra* note 256, p. 345.

<sup>686</sup> Ambos, *The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court*, (Berlin/Heidelberg, Springer, 2010), p. 67. See *ibid.*, p 69, where he argues that genuineness and bad faith are at the core of the Article 17(2)(a)-(c) unwillingness considerations,.

<sup>687</sup> *Ibid.*, p. 66-67.

<sup>688</sup> *Ibid.*, p. 68. See also OTP, *Policy Paper on Preliminary Examinations*, *supra* note 14, paras. 50-54.

<sup>689</sup> Ambos, *The Colombian Peace Process*, *supra* note 687, p. 80.

unable to carry out proceedings.”<sup>690</sup> The more relevant consideration here is whether there is effective access to justice or whether it is “unavailable”. Inability may be inferred from: the absence of conditions of security for witnesses, investigators, prosecutors and judges or lack of adequate protection systems; the existence of laws that serve as a bar to domestic proceedings, such as amnesties, or a lack of adequate means for effective investigation or prosecution.<sup>691</sup> The Court must consider objective facts and information, which are easily obtained and verified from outside sources, rather than conduct an in-depth review of the quality of a justice system.<sup>692</sup>

When assessing unwillingness and inability, the OTP is to consider whether any or a combination of the factors above impact on the proceedings to such an extent as to vitiate their genuineness.<sup>693</sup>

In the present case, it is clear that the major obstacle in the UK rests with issues of unwillingness, rather than inability to investigate and prosecute the alleged war crimes, although both issues warrant further investigation by the OTP. Below we provide a qualitative assessment of UK investigations and prosecutions to date, with a particular emphasis on (i) the poor quality of investigations and prosecutions; (ii) issues of a lack of independence and impartiality; (iii) how the proceedings to date have effectively shielded from responsibility, those individuals bearing the greatest responsibility for the crimes; and (iv) unjustified delay.

#### **i) Poor quality of Investigations and Prosecutions**

Investigations carried out by the RMP were ineffective and lacked independence. A conclusion reached by the High Court in the *Al-Sweady* judicial review case and the decision of the Grand Chamber of the ECtHR in the case of *Al-Skeini and Others v UK*.<sup>694</sup> The ECtHR found that the RMP investigations considered by the Court in that case were inadequate.<sup>695</sup>

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<sup>690</sup>OTP, *Informal Expert Paper: The Principle of Complementarity in Practice*, ICC-OTP 2003, p. 15, available at <http://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf>.

<sup>691</sup>OTP, *Policy Paper on Preliminary Examinations*, *supra* note 14, para. 57.

<sup>692</sup>*Ambos*, *The Colombian Peace Process*, *supra* note 686, p. 83.

<sup>693</sup>OTP, *Policy Paper on Preliminary Examinations*, *supra* note 14, para.58.

<sup>694</sup>Application no. 55721/07, Council of Europe: European Court of Human Rights, 7 July 2011.

<sup>695</sup>*Al-Skeini and Others v UK*, *supra* note 9, paras 171 and 173. See also comments by the High Court in *(Ali Zaki Mousa v SSD (No. 2) [2013]*, *supra* note 651, with respect to the inadequacy of the investigations to date.

Table 6 annexed to this communication contains a column titled “*Complaints/Investigations (not including complaints in medical examinations)*”.<sup>696</sup> This shows that during the relevant period, a number of detainees regularly complained to the UK authorities about their mistreatment and, on some occasions, were interviewed by the RMP. Not only did these investigations fail to secure accountability on behalf of the victims with the courage to complain, but they also failed to halt or change the patterns of abuse. This is clear from continued allegations of abuse, over a period of time. The UK Government has failed to address these inadequacies.

The quality of the prosecutions for crimes committed in Iraq is equally questionable. Individuals tried before the court-martial and in other disciplinary forums have been held accountable for the commission of far less serious crimes than the evidence suggested. For example, in the *Payne Case* only a selection of those persons who were individually and directly responsible for the death of Baha Mousa and the abuse of other victims were charged. Further, it is difficult to reconcile the offences for which the men were charged and convicted, and the nature and severity of the acts of abuse evidenced by the photographs. Finally, despite evidence of the existence of policy allowing (and indeed encouraging) hooding, sleep deprivation and harshing for the purpose of conditioning during interrogation, the case did not extend to superior officers in the chain of command. According to one critic, the major failure of the case was the narrow focus of the charges: “*if the charges had focused more squarely on those responsible for sanctioning the use of the conditioning techniques, a clearer picture of accountability may have emerged.*”<sup>697</sup> The failure to bring prosecutions in a number of cases against officers who were clearly implicated in the abuse, highlights the systemic failures of the investigation and prosecution processes.<sup>698</sup> This failure to bring war crimes before the courts undermines the quality of justice and demonstrates the UK’s unwillingness to genuinely carry out investigations and prosecutions, preferring to address serious crimes through disciplinary sanctions and less serious charges.

Two additional factors which have impacted upon the quality of prosecutions in the four court-martials are the poor quality of evidence and the “closing of ranks” during the

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<sup>696</sup> See Annex A6.

<sup>697</sup> Rasiah, *The Court-martial of Corporal Payne*, *supra* note 463, p. 197.

<sup>698</sup> Annex D2, Phil Shiner, Third Witness Statement, para. 48, discussing a number of occasions where officers were not prosecuted.

prosecution process.<sup>699</sup> For example, in the *XXX case*, the court-martial found that the investigation by the RMP was “*inadequate*” and contained “*serious omissions*.”<sup>700</sup> These flaws in the military justice process suggest that the investigating authority and the court-martial system in the UK lack the safeguards to ensure that the closing of ranks and soldier solidarity do not undermine, and ultimately destroy, a prosecution for international crimes.<sup>701</sup> In a review of the *Payne case*, and with respect to court-martials and accountability for international crimes, one author notes that:

*“states are inherently reticent to try their own nationals for international crimes, and if circumstances are such that prosecution is unavoidable, the military court martial is an inherently self-serving institution with a tendency to operate as a damage limitation mechanism, focusing responsibility on the lower ranks, characterising criminality as the aberrant conduct of a few ‘bad apples’, and failing to call the political and military elite to account for their role in the implementation of the systems that lead to or facilitated the crimes in question.”*<sup>702</sup>

## ii) **Insufficient Level of Independence and Impartiality**

Many of the relevant UK mechanisms have been widely criticised for a lack of independence and impartiality at each stage of proceedings.

With respect to investigations, the RMP’s investigations have been ineffective and unduly influenced by those who should have been implicated in the crimes under investigation. This was in part due to the RMP’s lack of autonomy and independence from the military chain of command. The RMP were dependent on the OC of the soldiers they were investigating for matters such as force protection (to secure RMP access to crime scenes), making soldiers available for interview, and for decisions on when to cease investigations. The ECtHR’s Grand Chamber in *Al-Skeini v UK*, quoting the Court of Appeal of England & Wales, found that:

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<sup>699</sup>In the court-martial of *R v Payne* the Judge Advocate identified a “*more or less obvious closing of ranks*” by all those potentially responsible for Baha Mousa’s death.

<sup>700</sup>See REDRESS, “UK Army in Iraq: Time to Come Clean on Civilian Torture,” *supra* note 235, p 12.

<sup>701</sup>Rasiah, *The Court-martial of Corporal Payne*, *supra* note 463, p. 187.

<sup>702</sup>*Ibid.*, p. 195.

*“the fact that the Special Investigations Branch [of the RMP] was not ‘free to decide for itself when to start and cease an investigation’ and did not report ‘in the first instance to the [Army Prosecuting Authority]’ rather than to the military chain of command, meant that it could not be seen as sufficiently independent from the soldiers implicated in the events to satisfy the requirements of Article 2 [of the ECHR].”*<sup>703</sup>

Following hand down of judgment by the Grand Chamber in *Al Skeini* the case was passed to the Committee of Ministers who oversee the execution of judgments. At the request of the Committee of Ministers the UK produced an Action Plan in which it detailed the individual and general measures to be taken following the judgment. The Action Plan was considered by the Committee of Ministers in June 2012 who noted the creation and terms of reference of the Iraqi Historic Allegations Team (IHAT) but invited the UK to provide further clarification on the structure of the new team in the IHAT, as well as on how the new system will take into account the findings of the European Court in these cases, including the specific criticisms concerning the investigation of the death of the fifth applicant’s son; and it further invited the authorities to keep the Committee of Ministers’ informed of the progress of the new team within the IHAT investigating the individual cases in this judgment and other similar cases. The Committee of Ministers decided to examine the case again on the basis of the additional information and clarifications sought. There has been no response from the UK to the request made for further information and a response is awaited.

As discussed above, following serious concerns about the independence of IHAT, raised by the claimants in *Ali Zaki Mousa No.1*, the Court of Appeal found that IHAT was not sufficiently independent and ordered that it be restructured.<sup>704</sup> Further, the Court found that, regarding “*whether the Secretary of State was entitled to adopt a “wait and see „policy pending the outcome of IHAT’s investigation and the completion of the Baha Mousa and Al-Sweady Inquiries”* such an approach was no longer tenable.<sup>705</sup> The Court stated: “*that ‘wait and see’ cannot survive as a policy once the independence of IHAT has been rejected.*”<sup>706</sup>

In March 2012, IHAT replaced the RMP members with RNP members. Despite this restructure, the original claimants remained concerned that IHAT was not sufficiently

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<sup>703</sup> *Al-Skeini and Others v UK*, *supra* note 9, para 172.

<sup>704</sup> *R(Ali Zaki Mousa) v SSD*[2011], *supra* note 76.

<sup>705</sup> *Ibid.*, para 4.

<sup>706</sup> *Ibid.*, para 41.



independent and commenced further proceedings.<sup>707</sup> Although the High Court has subsequently held, *inter alia*, that IHAT has been restructured so that it can independently carry out its investigative and prosecutorial functions, the High Court expressed concern in relation to two aspects of the current structure of IHAT. First, with respect to the disciplinary powers of the Royal Naval Command over the RNP, the High Court stated that:

*“we are troubled by the power of discipline that the Royal Naval command has over the Royal Navy Police, including the Royal Marine Police Troop...we can see no reason for such powers to be held by the Naval Command whilst the Royal Navy Police are assigned to IHAT. There is a risk of perception as to the independence of a police officer who is subject to the disciplinary sanctions of the Service Personnel command.”*<sup>708</sup>

Second, as noted above, the High Court considered that the Directorate, which plays an essential role in the identification and consideration of systemic issues, cannot be described as independent from the Secretary of State and the military hierarchy.<sup>709</sup>

Finally, we note with concern comments by the High Court in their judgment that, due to various evidentiary difficulties, it is highly unlikely that there will be criminal prosecutions in some of the death in custody cases.<sup>710</sup> The decision on whether to proceed with prosecutions in these cases is, as the High Court notes, a decision for the DSP. Our concern is that there is a risk, or a perceived risk, that these comments might impact upon the ultimate decision taken by the DSP. Alternatively, where a decision is made to prosecute, there is a risk, or a perceived risk, that these comments might impact on the subsequent conduct of the trial. For example, in the event that any of these cases is the subject of a criminal prosecution, it is unhelpful to have on the public record comments by the High Court that the evidentiary difficulties in these cases are such that in their view, criminal prosecutions are unlikely.

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<sup>707</sup>*R(Ali Zaki Mousa) v SSD( No. 2)[2013]*, *supra* note 651.

<sup>708</sup>*Ibid.*, para. 122. See also para. 79. Although the High Court concluded that this troubling “concern” should not lead to the conclusion that IHAT is not independent and not perceived to be independent in relation to its investigative and prosecutorial functions, the High Court considered it significant enough to express their hope that this would be addressed in the future: “we would hope that this concern would, for the future, be addressed by the Defence Council and the Secretary of State so that the risk of the perception of lack of independence by reason of the disciplinary powers of the Royal Navy and Royal Marine Command is removed.” See at para.123.

<sup>709</sup>*Ibid.*, paras. 87, 93.

<sup>710</sup>*Ibid.*, paras. 163,167.

### iii) Proceedings Shielding Those Bearing Highest responsibility

The limited scope of the inquiries undertaken by the UK to date, and the targeted investigations focusing only on low level perpetrators do not prevent the OTP from simultaneously opening an investigation into the individuals and crimes that are the subject of this Communication. Even potential new cases against direct perpetrators undertaken in the UK could be conducted in unison, and in cooperation, with investigations by the ICC into individuals higher up in the civilian and military chains of command. The nature of the investigative mechanisms undertaken by the UK, and the resulting inquiries and prosecutions demonstrate a clear failure to investigate individuals higher up in the chains of command who are responsible for policies, procedures and practices, which enabled or authorised the mistreatment of detainees by UK Services Personnel in Iraq, and who failed in their command responsibility to stop and prevent the commission of serious crimes by UK Services Personnel in Iraq. This failure, some ten years after the first crimes are alleged to have been committed, is evidence that the UK is unwilling to investigate and address systematic problems of abuse within its military, and to hold those in positions of national authority to account.

In the *Payne* court-martial, one of the primary reasons for the acquittals centred on evidence (accepted by the prosecution) that the BGIRO, Major Royce, had obtained a sanction at Brigade level approving the use of hoods and stress positions as a means of maintaining the “shock of capture”. Indeed, the case revealed that “conditioning” was a sanctioned tool of interrogation which was used regularly by 1 QLR Battalion.<sup>711</sup> Despite shocking evidence of the involvement of superior military members in enabling and authorising illegal techniques in Iraq, the court-martial dealt only with the individual responsibility of the direct perpetrators. No steps have been taken to investigate and hold to account more senior members of the UK military. This is particularly striking given that the findings of the BMI Report were published in September 2011.

As shown in the *Kammash* case (the one case referred by IHAT for consideration of criminal prosecution), discussed above, a decision was made not to prosecute a number of cases involving allegations of detainee abuse on the basis that the abuse appeared to be in keeping with trained techniques.<sup>712</sup> A public statement by the DSP noted that “*the question of*

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<sup>711</sup> Rasiah, *The Court-martial of Corporal Payne*, *supra* note 463, p.189.

<sup>712</sup> See above at Chapter VIII (B)( 2)(b) - IHAT Progress to Date

*interrogation techniques and training of interrogators more widely was a material factor in the SPA's deliberations.*" In relation to some of that abuse, it was explained that, "*it would not be possible to prove that the soldier was acting beyond his training*" and with respect to allegations of verbal abuse "*there was again the strong possibility that this was in accordance with the training that they had been given and therefore it would not be appropriate to launch a prosecution in relation to this allegation.*"<sup>713</sup>

The *Kammash* decision confirms that the victims made credible allegations of ill-treatment and that such ill-treatment resulted from, and reflected, policy. The allegations made in *Kammash* exemplify the same or similar allegations made by many of the other Iraqi detainees (IHAT is examining recordings from 2,616 sessions and many will be similar to those in *Kammash*). It is now also clear that there will be widespread difficulties in pursuing prosecutions of low-ranking soldiers and interrogators in other cases. The allegations made by the victims in the *Kammash* case are, in material terms, identical to allegations made by the large number of other victims of interrogation. It is inevitable that the same prosecutorial decision (i.e. no prosecution) will be made in a significant number of cases where techniques are found to be the result of training and state sanctioned policies.

Domestic criminal investigations demonstrate the UK's unwillingness to investigate those persons who bear the greatest responsibility for the widespread abuses which have occurred. There has been a failure to look up the chain of command to investigate the high ranking military officials who control military policy. Instead of focusing on the officials who had the authority to direct the initiation, dissemination and implementation of military policy, the UK criminal justice system has narrowly focused on only the most direct perpetrators of abuse. As a result, virtually all higher ranking officials have been shielded from prosecution, and thus, have yet to be held to account.

While inquiries such as the BMI have shown that the UK is willing to investigate some of the incidents in Iraq, it is clear that such efforts have been confined to specific incidents and time frames. There is no evidence that the UK has made any effort to investigate those individuals who bear the greatest responsibility for the failure to prevent, repress and refer incidents of serious mistreatment, and those individuals all the way up the military and civilian chains of command, who authorised or even ordered the use of prohibited techniques. The BMI was

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<sup>713</sup>Press Statement by Bruce Holder QC, Director of Service Prosecutions, "No prosecution of three soldiers known as soldiers E, G and H" (undated). (Attached to the letter from Mark Waring, For the Treasury Solicitor's Department, to Public Interest Lawyers dated 7 February 2012).

concerned only with the death of Baha Mousa, and only in the context of TQ and not interrogation. The Inquiry did not hear evidence from victims subjected to interrogation in Iraq. Chairman of the BMI William Gage stated:

*“I have not been asked to examine any other incidents where the practice of conditioning detainees may have been used; nor any other incidents involving allegations of ill-treatment of detainees. I have adhered to these terms of reference and have only investigated other satellite incidents where they appear to throw light on the issues with which I am directly concerned”.*<sup>714</sup>

A particularly striking example of the narrow terms of reference of the BMI is that the terms of reference did not enable the Inquiry to investigate evidence of “*a number of deaths in custody*” in 2003 (see above, in relation to ‘Fragmented Order’ 152).<sup>715</sup> In addition, in examining the circumstances surrounding the death of Baha Mousa, the BMI focused on a limited period of time in 2003. The BMI Report examines JFIT’s practices in the first few weeks after the UK’s invasion of Iraq on 22 March 2003.<sup>716</sup> In contrast, allegations raised in this communication cover the period from 2003 until 2008. There has been no investigation of JFIT’s operations up until the end of the UN Security Council Mandate on 31 December 2008. Therefore, although the BMI has provided valuable evidence of the conduct of UK Services Personnel in Iraq, and is the course of some of the evidence referred to in this communication, the Inquiry has investigated only a very small part of the overall picture of detainee abuse by UK Services Personnel in Iraq. It has examined some of the background to one incident at one facility only in a limited timeframe. Further investigations are clearly required.<sup>717</sup>

Similarly, the IHAT investigation has been hampered by a narrow mandate and restrictive terms of reference. IHAT was charged with the investigation of “*allegations of mistreatment of individuals by HM Forces in Iraq during the period 2003 to July 2009.*”<sup>718</sup> The original

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<sup>714</sup>The Report of the Baha Mousa Inquiry, *supra* note 40, para. 1.5.

<sup>715</sup> This phrase is taken from ‘FRAGO’ (fragmented order) 152 of 20 May 2003 distributed by a Senior Legal Officer, Lt. Col. Nicholas Mercer (see Baha Mousa Inquiry Report at page 860). Lt. Col. Mercer sent the FRAGO having been informed by the RMP that they thought there had been “5 or 6” deaths in custody: see his statement at paragraph 5 available at [http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_160310/bmi06895.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_160310/bmi06895.pdf).

<sup>716</sup> Report of the Baha Mousa Inquiry, *supra* note 40, Part VIII, pp. 699-852.

<sup>717</sup> This, indeed, was the conclusion of the Court of Appeal of England & Wales in *R (Ali Zaki Mousa) v SSD* [2011], *supra* note 68, paras. 43 to 46.

<sup>718</sup> Iraq Historic Allegations Team (IHAT), *Terms of Reference*, Release 1.0, 24 June 2010, para 2.

focus of IHAT was individual allegations notified to the Secretary of State prior to 30 April 2010. Although the terms of reference were widened on 1 May 2012 (detailed above), and although one function of IHAT includes reporting so that wider systemic issues can be considered and remedied, it is clear that this consideration does not extend to investigating, identifying and referring for prosecution, where appropriate, individuals who incur superior or command responsibility for the widespread mistreatment of detainees by UK Services Personnel in Iraq. This is especially concerning given that the High Court noted in *Ali Zaki Mousa No.2* that if, as the evidence suggests, there was a lack of training and a failure to investigate early misconduct promptly “*the question arises as to whether any responsibility for that arises in the higher ranks of the Service Personnel and in Government.*”<sup>719</sup>

**vi) Unjustified delay, which in the circumstances is inconsistent with an intent to bring the person concerned to justice**

Unwillingness can also be found in light of unjustified delays in proceedings.<sup>720</sup> Unjustified delay in proceedings may be assessed in light of, *inter alia*, whether the delay in proceedings can be objectively justified in the circumstances, and whether there is evidence in the circumstances of the lack of intent to bring the persons concerned to justice.<sup>721</sup> In the *2012 Report on Preliminary Examinations*, the OTP stated that “*assessing unjustified delay requires measuring investigative steps taken against a certain timeline, and taking into account whether any possible delay may be justifiable in light of specific circumstances.*”<sup>722</sup> We note that in the same Report, the OTP indicated that questions pursuant to Article 17 (2) and (3) of the ICC statute are raised with respect to investigations undertaken by both Russia and Georgia, which have - four years after the events - not yielded any results. These questions include whether: the proceedings were or are being undertaken for the purpose of shielding the person(s) concerned from criminal responsibility; there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the persons concerned to justice; the proceedings are not being conducted

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<sup>719</sup>*R (Ali Zaki Mousa) v SSD( No. 2)* [2013], *supra* note 651, para. 177.

<sup>720</sup>OTP, Policy Paper on Preliminary Examinations, *supra* note 14, p. 13, para. 50.

<sup>721</sup>*Ibid.*, para. 52.

<sup>722</sup>OTP, Report on Preliminary Examinations Activities, November 2012, p. 35, available at <http://www.icc-cpi.int/NR/rdonlyres/C433C462-7C4E-4358-8A72-8D99FD00E8CD/285209/OTP2012ReportonPreliminaryExaminations22Nov2012.pdf>.

independently or impartially, and in a manner which in the circumstances is inconsistent with an intent to bring the person(s) concerned to justice.<sup>723</sup>

The allegations in this communication occurred at best more than five years ago, and at worst, more than 9 years ago. Of those allegations, there has been no investigation into superior or command criminal responsibility for policies and training, which allowed or enabled the mistreatment of detainees by UK Services Personnel. Nor for failures to address the issue of detainee abuse, despite highly publicised and credible reports of detainee abuse between 2003 and 2008..

There have been limited investigations into individual criminal responsibility of lower level officers for some detainee deaths. In the Baha Mousa case, initial investigations have been found by the subsequent BMI, several years later, to have been inadequate. Despite the two inquiries that have been established by the UK to date, it is clear that the delay in taking such action cannot be objectively justified in the circumstances. It is consistent with a lack of intent to bring the persons concerned to justice. Efforts by the UK to date can be categorised as entirely reactive rather than proactive, undertaken in response to litigation seeking to enforce the UK's responsibilities under the ECHR. Further, the delay in establishing such investigations as there have been has had serious implications for their fact finding capacity and on the likelihood of referrals for prosecution. We note that in *Ali Zaki Mousa No.2*, the High Court considered that the delay in the investigation and prosecution of deaths in custody cases “*is such that, in our view, it amounts to a failure to discharge the duty [under Article 2 of the ECHR], quite apart from being a source of great and increasing concern.*”<sup>724</sup> The Court also noted that the facts relating to the deaths in custody cases are “*by no means clear*” and that “*it does not appear that a proper form of detailed inquiry was carried out shortly after the deaths concerned, or subsequently.*”<sup>725</sup> The Court referred to findings on delay in the Aitken Report published in January 2008 (some four years earlier) including:

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<sup>723</sup>*Ibid.*, p. 31.

<sup>724</sup>*R (Ali Zaki Mousa) v SSD( No. 2) [2013]*, *supra* note 651, para. 186. The Court also considered that the delay in making decisions in respect of prosecutions concerning those responsible for the deaths of Iraqis while in custody is a source of increasing concern. See at para. 165.

<sup>725</sup>*Ibid.*, para. 173.

- i. that the amount of time taken to resolve cases as at 2008 had been “unacceptable”, including with particular reference to the case of XXX, where the passage of time between the death and the court martial was some 28 months;<sup>726</sup> and
- ii. that aside from the impact of delay on the availability of witnesses and on administrative and disciplinary procedures by the Army, “*the longer the disciplinary process takes, the less likely it is that the chain of command will take proactive measures to rectify the matters that contributed to the commission of the crimes in the first place.*”<sup>727</sup>

The Court also noted that there appears to be “*recurring slippage*” and concluded that there are “*likely to be further long delays before IHAT finishes its work.*”<sup>728</sup> With respect to resources, the Court considered that there is little which shows that IHAT has been given sufficient resources to accord priority to, and to ascertain whether there will be criminal prosecutions with respect to the death in custody cases.<sup>729</sup> Finally, the Court considered that “*the decision to continue investigations without the necessary expertise, focus and direction of the Director of Service Prosecutions as to whether prosecution was a realistic prospect was a serious failure.*”<sup>730</sup> These observations clearly also apply to the investigation of allegations of torture and cruel, inhuman and degrading treatment.

In summary, the substantial delays in investigation and prosecution, detailed in this communication, cannot be objectively justified in the circumstances of this situation. The delay in investigating and prosecuting lower level individuals in a limited number of cases, and the entire failure to investigate and prosecute individuals at higher levels in the chain of command, for offences committed between five and nine years ago, is inconsistent with an intention to bring the persons concerned to justice. In combination with the other factors outlined above this demonstrates that the UK is genuinely unwilling to investigate and prosecute these matters.

#### **4) Conclusion on Complementarity**

The UK has failed to reach the standards of investigation and prosecution required to render this situation inadmissible before the ICC. There have been an extremely limited number of

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<sup>726</sup>*Ibid.*, para. 186.

<sup>727</sup>*Ibid.*

<sup>728</sup>*Ibid.*, para. 187.

<sup>729</sup>*Ibid.*

<sup>730</sup>*Ibid.*, para.184.

investigations and criminal prosecutions and these have focused solely on individuals at lower levels of the chain of command. Further, the nature, scope, quality and timeliness of investigations and prosecutions to date, detailed in this communication, demonstrate that the UK is genuinely unwilling to investigate and prosecute those individuals bearing the greatest responsibility for the commission of serious and abhorrent crimes, committed on a vast scale over a period of some six years.

### **C) Conclusion on Admissibility**

In summary, the assessment of the requirements of gravity and complementarity, detailed in this communication, show that this situation clearly meets the admissibility requirements under Article 17 of the ICC Statute. The interpretation of the gravity threshold by the OTP in its 2006 *Letter to Senders re Iraq*, in which it found the numbers of victims to be a “*key consideration*,” can no longer be upheld given the much greater number of cases detailed above. Even if the scale of the crimes were to be a determining factor in the assessment of gravity, this communication includes allegations of the commission of thousands of serious crimes by UK Services Personnel against hundreds, and potentially thousands, of victims. In addition, other relevant factors such as the nature of the crimes, the brutality and cruelty with which the crimes were carried out against protected persons, and the impact of the crimes on the local and international community justify a finding that the gravity threshold in Article 17 (1)(d) of the ICC Statute has been met.

With respect to the principle of complementarity, a review of past and ongoing investigations and mechanisms in the UK shows that such processes are insufficient to bar the ICC from opening a preliminary investigation, in light of Article 17 (2) and (3) of the ICC Statute. Investigations that are not “*genuine*” cannot be considered as a bar to the admissibility of a situation. It is highly relevant that each of the state investigations referred to in this communication – the BMI, the ASI, IHAT– had to be forced from a recalcitrant state, through litigation at the domestic and European level. An assessment of each individual inquiry, and the public inquiry system in its entirety, demonstrates a highly inadequate mechanism to ensure accountability for war crimes.

The nature, quality and emphasis of the investigations and prosecutions undertaken by the UK to date cannot support a finding of willingness and genuine ability to investigate and



prosecute those most responsible for serious crimes committed by UK Services Personnel in Iraq, beyond a small number of low ranking individuals. The efforts undertaken by the UK have suffered from problems of independence and substantial delays, which are inconsistent with an intention to bring those responsible to justice. Finally, the nature of the investigations and the procedures undertaken to date have effectively shielded those who bear the greatest responsibility for war crimes from criminal accountability.

The evidence presented in this communication therefore provides the OTP with a reasonable basis to proceed in accordance with Article 53(1) of the ICC Statute and justifies the initiation of an investigation by the OTP. In particular, the evidence presented in this communication demonstrates that: there is a reasonable basis to believe that crimes within the jurisdiction of the Court have been committed; the case is admissible under Article 17 of the ICC Statute; and that the countervailing interests of justice consideration in Article 53(1)(c) is not enlivened in the circumstances of this situation.

## **IX) CONCLUSION**

This Communication provides compelling evidence of widespread and systematic abuse of detainees by UK Services Personnel in Iraq between 2003 and 2008.

There is significant evidence that the conduct of UK Services Personnel in Iraq constitutes war crimes under the ICC Statute. In particular, the analysis of the abuse of 109 Iraqis represented by PIL, and the analysis of the 41 individual detainee accounts, demonstrates widespread abuse amounting to war crimes including inhuman and cruel treatment, outrages upon personal dignity, wilfully killing, wilfully causing great suffering, and torture.

This Communication provides a different picture, in terms of the scale and nature of abuse, and the quality and quantity of supporting information, than was considered by the OTP in 2006.

The pattern and scale of abuse, at all stages of arrest, transit and detention, provides concerning evidence that detainee abuse by UK Services Personnel was widespread and systematic. Further, there is concerning evidence that such treatment was ordered, sanctioned or enabled by higher level officers within the military chain of command, and with the knowledge of higher level civilian officers.

Ten years after the first war crimes were committed by UK Services Personnel in Iraq, the UK has failed to investigate or prosecute those individuals bearing greatest responsibility for these war crimes. Further, the limited efforts undertaken with respect to lower level offenders demonstrate that the UK is unwilling and unable to genuinely prosecute these crimes.

This Communication provides substantial and detailed information fulfilling the requirements of each of the four phases of the OTP's filtering process. We are firmly of the opinion that this Communication enables the OTP to act expeditiously at the stage of the preliminary examination and to request from the Pre-Trial Chamber the authorisation of an investigation in due course. We are available to assist the OTP and to provide further information with respect to any of the four phases of the filtering process.

## **ANNEXES**

- A. Tables of Mistreatment
- B. Witness Testimonies
- C. Letters before Claim
- D. Witness Statements of Phil Shiner in Ali Zaki Mousa proceedings
- E. Skeleton Argument of Claimants in Ali Zaki Mousa proceedings
- F. Map of Facilities
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