The abject failure of British military justice

Phil Shiner examines the background to the failure of British military justice to hold anyone to account for the killing of Baha Mousa.

Baha Mousa was killed by British soldiers in a detention facility in Basra, Iraq in September 2003. He had 93 separate injuries. Photographs taken after his death show the shocking extent of the bruising to his face and body. For most of the 36 hours in custody he was hooded. He was forced into the painful 'ski' stress position and deprived of food, water, and sleep. As Mr Justice MacKinnon observed in a judgment during the Court Martial: he was killed by a multiple of soldiers, some of whom were intruders, none of whom had been charged 'as a result of a more or less obvious closing of ranks'. The soldiers responsible nearly killed another man, who suffered acute renal failure, and badly abused at least five others. The evidence to the Court Martial also revealed that hooding and stressing detainees had become written UK policy, that interrogators were trained to do so, that the five techniques banned by the Heath government in 1972 returned, and that all battle groups were hooding and stressing.

Leaving aside the 1972 ban, it is manifest that hooding and stressing in the heat of Iraq—temperatures of up to 60°C—constitutes a clear violation of Article 3 of the European Convention on Human Rights (ECHR) (the absolute prohibition on torture). Given that the men in the Mousa incident had dirty toilet water flushed over their bodies, and were subjected to sexual humiliation, and in the light of the evidence as to the abuse meted out, it cannot seriously be argued that this treatment did not violate Article 1 of the UN Convention against Torture (UNCAT) (the definition of torture) or Article 16 (the definition of cruel, inhuman or degrading treatment). Torture is proscribed by the Statute of the International Criminal Court (ICC Statute) as both 'a crime against humanity' (Article 7) and a 'war crime'. As for the killing of Mousa, murder is a 'crime against humanity', and 'wilful killing' a 'war crime'. The wilful suffering, serious bodily injury and inhumane acts evidenced in the incident is caught by both Articles 7 and 8 of the ICC Statute. As for domestic criminal law, the UK government criminalised torture by section 134 Criminal Justice Act 1998, and brought the ICC Statute into domestic law by the International Criminal Court Act 2001. Given the evidence and the relevant domestic criminal provisions, how is it that no soldier was charged with torture, wilful killing, or murder? Why is it that the Court Martial ended with no one any the wiser as to who was responsible for Mousa's death? And who should be charged in relation to the systemic issues arising from this evidence?

The pressing nature of these questions is intensified by further evidence of systematic abuse raising systemic issues that go to the very top of the chain of command: military, civil service and political. The lawyer in charge of Army Legal in Iraq during the invasion and first few weeks of the Occupation was Lieutenant Colonel Nicholas Mercer. Mercer witnessed in late March 2003 at the UK's Theatre Internment Facility. He complained bitterly to the chain of command including to Permanent Joint Headquarters in Middlesex. He took the view that the ECHR applied and that if there was a moot point about the applicability of relevant legal standards the default position should be that the highest applied. On 20 May 2003 he wrote an Order to the chain of command that began: 'There have recently been a number of deaths in custody where Iraqi civilians have died while been held with various units in Theatre'. The International Committee for the Red Cross (ICRC) also witnessed hooding in the extreme conditions prevailing but despite their best efforts and those of Mercer, hooding and stressing continued. My own firm has a case where five men were detained in April 2007 and allegations of abuse include hooding, stressing, sleep deprivation, and beating with rifle butts.

In the Camp Breadbasket case, Iraqis including a 14-year-old boy were forced into simulated positions of anal and oral sex, and photographs taken. A man was strung up in the forks of a forklift as punishment for refusing to sever the finger of another. Sexual taunts were used. In the video released to the *News of the World* in 2005, Iraqi youths are beaten in full view of others, and astonishingly, soldiers walk by without even looking, so commonplace this type of behaviour must have been. In at least two cases, youths drowned after being abused and thrown into canals. In the Majar incident from May 2004, allegations, soon to be tested in the High Court, include that up to 20 Iraqis appear to have been executed in a detention facility, and another nine survivors were tortured and witnessed aurally the executions of the others. Nobody knows how many Iraqis lost their lives while in UK custody.

It must be noted that, despite several courts martial concerning abuse by UK soldiers in detention facilities in Iraq, all but two produced findings of not guilty for all soldiers charged. The exceptions were that Corporal Payne pleaded guilty to the 'war crime' of inhumane treatment in the Mousa case, and in the Camp Breadbasket case four soldiers were found guilty of

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variously: assault, aiding and abetting abuse, disgraceful conduct and failure to report the same. But consider these facts: (1) all seven defendants in the Mousa court martial who pleaded not guilty to any charges were found so; (2) not a single officer has been found guilty of any offence; (3) there has been no attempt whatsoever to explore any of the systemic issues raised by this evidence. Further, the Mousa Court Martial itself was forced out of a recalcitrant state by the pressure of the judicial review that eventually led to the finding by the House of Lords in June 2007 that the Human Rights Act 1998 and ECHR did apply to UK detention facilities in Iraq. In the Majar incident despite the Royal Military Police (RMP) interviewing over 200 witnesses the criminal investigation concluded with a finding of no wrongdoing and the matter closed. Now, as with the Camp Breadbasket case, the RMP have been forced into a further criminal investigation which given the delay of over four years seems absolutely doomed to ineffectiveness.

Articles 2 (the right to life) and 3 (the prohibition on torture) are protected by a requirement, developed within the jurisprudence of the European Court of Human Rights, that if the state might be implicated in violations of either Article there must be an enquiry. The jurisprudential requirements are that this enquiry must be independent, effective, prompt, open and involve the relatives. In *Al Skeini* the government argued that the military system of justice met all these requirements in respect of Mousa's death. The Divisional Court held it did not saying 'There has been no public accountability. All of this in a case where the burden of explanation lies heavily on the United Kingdom authorities'. Ultimately, on 14 May 2008, the government was forced to announce a public enquiry will be held under the Inquiries Act 2005. Although it will focus on the Mousa incident it will also examine how it came about that the five banned techniques were reintroduced.

To date there has been more or less complete impunity for these gross violations of Iraqis' human rights and the systemic failings that underpin them. However, the failings of the UK's military justice system extend far beyond the actions of UK soldiers in Iraq. First, there are issues, completely unexplored, of UK complicity with the actions of the US. A senior military witness at the Mousa court martial attested to the fact that hooding 'reflected verbal and written NATO policy'. When Mousa died there was a debate about softening UK interrogation techniques, and particularly whether to stop hooding. Military witnesses make it clear that there was already pressure from the US to toughen up our techniques and complying with ECHR standards 'would cut no ice with the US'. Our Theatre Internment Facility was shared with the US. It seems inconceivable that agents of the UK state would have followed a completely different set of Rules of Engagement to those of the US at the same facility in circumstances where the US and UK were Joint Occupying Powers and had established together the Coalition Provisional Authority authorised by UN Security Council resolution 1483 to administer Iraq. Second, questions must be asked as to how UK actions in Iraq differ from previous conflicts. If, as seems crystal clear, UK soldiers have tortured, killed, and systematically abused hundreds of Iraqis in UK custody, why is it that this evidence emerges from Iraq, but not previous engagements? The answer lies in the introduction of the Human Rights Act 1998 (HRA), and the procedural requirement of an enquiry to protect Articles 2 and 3, that makes all the difference. Without it, none of this evidence would be in the public arena, with much more to follow. That realisation, of course, leads to the nagging fear that UK soldiers may have behaved ever thus, but escaped accountability because until the HRA there was no effective enforcement mechanism to underpin relevant requirements of international humanitarian law that would override the inadequacies of the military justice system.

Thus, we need a complete overhaul of the military justice system. It is unacceptable to allow the cover-ups to continue as soldiers investigate other soldiers. Soldiers must be trained to understand where the lines are drawn, and why, and that if they cross those lines they will be investigated and prosecuted in a rigorous system and if found guilty thrown out of the forces, imprisoned and disgraced. A system of ex-officio investigation, a proper training programme and an independent review of UK detention policies is no more than is required by UNCAT Articles 10–13. Perhaps, if the courts forced our government now to accept that UNCAT does have extraterritorial effect we would move a little closer to accountability for these gross violations and to making effective the absolute prohibition on torture. ■

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