

Whitty, Noel (2010) Soldier photography of detainee abuse in Iraq: digital technology, human rights and the death of Baha Mousa. Human Rights Law Review, 10 (4). pp. 689-714. ISSN 1461-7781

Access from the University of Nottingham repository:

http://eprints.nottingham.ac.uk/1865/2/Soldier_Photography_of_Detainee_Abuse_in_Iraq.pdf

Copyright and reuse:

The Nottingham ePrints service makes this work by researchers of the University of Nottingham available open access under the following conditions.

This article is made available under the University of Nottingham End User licence and may be reused according to the conditions of the licence. For more details see:
http://eprints.nottingham.ac.uk/end_user_agreement.pdf

A note on versions:

The version presented here may differ from the published version or from the version of record. If you wish to cite this item you are advised to consult the publisher's version. Please see the repository url above for details on accessing the published version and note that access may require a subscription.

For more information, please contact eprints@nottingham.ac.uk

Article published as Noel Whitty, ‘Soldier Photography of Detainee Abuse in Iraq: Digital Technology, Human Rights and the Death of Baha Mousa’ (2010) 10(4) *Human Rights Law Review* 689-714. © Oxford University Press 2010.

Soldier Photography of Detainee Abuse in Iraq: Digital Technology, Human Rights and the Death of Baha Mousa

Noel Whitty*

Abstract

Digital media technologies provide new opportunities for the recording and publicising of human rights violations. In recent years, soldier photography during military conflicts has become one of the most controversial sources of images of abuse, especially in relation to the visual representation of detainees. The backdrop to this article is the death of Baha Mousa, an Iraqi civilian who died while in detention on a British Army military base in Basra in southern Iraq in 2003. A soldier’s video footage of Mr Mousa’s treatment in the detention facility has helped to generate a range of cultural, political and legal effects, not least an ongoing official Inquiry into the causes of his death. But while new media technologies, such as mobile camera-phones, can provide an expanded visual record of human suffering and death in war zones, this article argues that this brings dangers as well as possibilities. More generally, it raises questions about how human rights practitioners should respond to the increasing visualisation of witnessing.

1. Introduction

The development of new media technologies has had important consequences for human rights law and practice. The use of mobile camera-phones and compact digital video recorders, allied with almost instantaneous Internet posting, has provided new ‘technologies of witnessing’.¹ More generally, the concept of ‘human rights visual culture (“what do human rights look like?”)’² is undergoing profound change as digital imagery takes on a central, and even crucial, role. Whether in the context of human rights lobbying and educational campaigns, publicising marches and demonstrations, or the recording of abuse and victim testimonies, the use of new media technologies is now common practice. Perhaps more significantly, the construction of human rights claims, and the extent of public and media

*School of Law, University of Nottingham. My thanks to Thérèse Murphy, David Fraser, Daria Davitti and two anonymous referees for their very helpful comments.

¹ McLagan, ‘Making Human Rights Claims Public’ (2006) 108 *American Anthropologist* 191 at 191.

² Ibid.

engagement with the issues raised by these claims, can depend on the availability of visual evidence.³ The ability, in the digital era, to transcend national boundaries and effect a rapid globalisation of images is key: as *Time* magazine claimed in relation to the shooting of an Iranian woman, Neda Agha-Soltan, at a Tehran pro-democracy protest in 2009, the mobile phone footage resulted in ‘probably the most widely witnessed death in human history’.⁴

Important questions are raised by this growth of new media technologies in the human rights field, not least their impact on the historic problems of (mis)representation of the victim/violator by the mass media and political elites, and the inevitable contestation over controversial images of violence, suffering or death.⁵ In some contexts, of course, visual evidence – whether or not in new digital formats – will not be an influential factor in determining either official reactions or public disgust.⁶ As Stanley Cohen emphasises in his book, *States of Denial*, it would be wrong to assume that increased *visibility* and public knowledge of atrocities and suffering will provoke outrage or effective interventions; on the contrary, images of human rights abuses may work to further strategies of denial amongst both state and non-state actors.⁷ Furthermore, in relation to contemporary military conflicts, governments strenuously shape the visual experience of the public by deploying a range of propaganda. It may also be the case that some images – notably photos of atrocities in World War II – fix the memory of past events in ways that limit our understanding of, and responses to, visual coverage of contemporary atrocities.⁸ That said, the power of the visual can also be extraordinary: in some contexts, a representation of a human rights violation has both mainstream cultural impact and remarkable political and legal effects. So, why is it that some

³ On how visual media shape human rights claims see, e.g., Girling, ‘“Looking Death in the Face”: The Benetton Death Penalty Campaign’ (2004) 6 *Punishment & Society* 271; Gregory, ‘Transnational Storytelling: Human Rights, WITNESS, and Video Advocacy’ (2006) 108 *American Anthropologist* 195; Torchin, ‘Ravished Armenia: Visual Media, Humanitarian Advocacy, and the Formation of Witnessing Publics’ (2006) 108 *American Anthropologist* 214.

⁴ *Time*, 8 December 2009. Images of Saddam Hussein in his underwear while in prison, and a video of his execution, were also uploaded to the Internet. See generally Reading, ‘Mobile Witnessing: Ethics and the Camera Phone in the “War on Terror”’ (2009) 6 *Globalizations* 61.

⁵ See, e.g., Campbell, ‘Atrocity, Memory, Photography: Imaging the Concentration Camps of Bosnia – The Case of ITN versus *Living Marxism*, Part 2’ (2002) 1 *Journal of Human Rights* 143; Morrison, ‘“Reflections with Memories”: Everyday Photography Capturing Genocide’ (2004) 8 *Theoretical Criminology* 341.

⁶ See Garland, ‘Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America’ (2005) 39 *Law & Society Review* 793 (re the photographing of ‘the torture and killing of a man by a mob’ and the widespread distribution of such images on picture postcards).

⁷ Cohen, *States of Denial: Knowing About Atrocities and Suffering* (Cambridge: Polity Press, 2001). Cf. Sontag, *Regarding the Pain of Others* (London: Penguin, 2004).

⁸ See, e.g., Zelizer, *Remembering To Forget: Holocaust Memory Through the Camera’s Eye* (Chicago: Chicago University Press, 1998); Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton NJ: Princeton University Press, 2008) 107.

images of suffering operate in this way? More particularly, how should human rights practitioners respond to the increased visualising of witnessing?

These questions are explored in a general way in this article. Part 2 outlines one particular controversy over human rights visual imagery: the case of Baha Mousa, a 26 year-old Iraqi civilian who died in September 2003 while being detained for questioning on a British Army military base in Basra in southern Iraq. The circumstances of his death are the subject of an ongoing official Inquiry,⁹ at which a soldier's video footage of Mr Mousa's treatment in the detention facility is a key part of the evidence.

Part 3 looks briefly at the history of soldier photography in war zones. It will be seen that, in one respect, the Mousa case is far from unique: soldiers recording the abuse and death of prisoners, or of civilian populations, has been a common phenomenon in wartime. Moreover, from the Nuremberg Trials onwards, soldier photography has been used to establish accountability. New media technology, however, changes the concept of the 'soldier photographer': today's military equipment has the capacity to provide real-time visual records, and mobile phones and digital cameras are also ubiquitous in war zones. The increased production of war imagery by soldiers is not just an effect of advances in camera technology however. The desire to record, and to visualise, personal experience is a key characteristic of increasingly-mediated cultures and lifestyles. Soldiers, even in war zones, are choosing to experience life 'through a lens'. Exposed to images ranging from the banal to the horrific, they increasingly capture and share photos with military colleagues, family members, friends, and wider global audiences on the Internet.

The final part of the article looks at some of the visual evidence in the Baha Mousa Inquiry; specifically, the video of Mr Mousa in detention. While the proceedings of the Inquiry raise a wide range of issues, including aspects of evidence, humanitarian and human rights law, my focus will be a general one. The visual evidence of Mr Mousa's treatment helped to translate a victim claim into a wide-ranging human rights investigation, but it should not be assumed that the Inquiry's interpretation of the video images and the autopsy photographs – a hooded body in distress, and a battered and bloodied face in rigor mortis – will validate the arguments made on behalf of the victim. Images, whether moving or still,

⁹ See the Inquiry website available at <http://www.bahamousainquiry.org/> [last accessed 26 July 2010]. The Inquiry is established under the Inquiries Act 2005 and is chaired by a retired Court of Appeal judge, Sir William Gage. Written submissions are identified by the author name, the prefix 'Sub', and individual page numbers. Transcripts of testimony at the Inquiry are identified by the witness name, the prefix 'BMI', and individual page numbers.

require interpretation and, in legal contexts, the use of visual representations can have distorting effects. Thus, although new media technologies have the potential to publicise events in war zones, and to provide a visual record of human suffering and death, an emphasis on the *visual* as the most authentic record of past human rights violations brings with it dangers as well as possibilities.

2. The Death of Baha Mousa

The notoriety surrounding the death of Mr Mousa stems from a number of factors which, in combination, have produced unique effects – most notably, the ongoing Inquiry. Four factors have been especially significant. First, Mr Mousa died as a result of 93 injuries inflicted by a group of British soldiers over a 36-hour period in a detention facility on a UK military base in Iraq. The UK Ministry of Defence (MoD) has now acknowledged that ‘brutality and inhumanity’¹⁰ occurred, but lawyers acting for the father of Mr Mousa allege that ‘a torture victim’¹¹ died in custody:

In layman’s terms, ... Baha Mousa was beaten to death. ... He died because his capacity to withstand continuing conditioning and beating diminished during the course of the second day [of his detention]. The physical and psychological conditions that he was placed in (including those resulting from hooding, stress positions, sleep deprivation and deprivation of food and water) combined to put his body in an acutely vulnerable situation. At the point of his demise he was being attacked again.¹²

The second factor is the flaws in the military police investigation, and in the court-martial of seven soldiers, in relation to Mr Mousa’s death. It proved impossible for a range of reasons – for example, evidential failings, delay and, most notably, what Judge Advocate McKinnon described as a ‘closing of ranks’ by soldier witnesses – to establish fully how, and why, Mr Mousa died. Only one soldier, Corporal Donald Payne, was convicted of a war crime; after pleading guilty to inhumane treatment of civilians, he was sentenced to one year’s imprisonment in April 2007 and dismissed from the Army.¹³ However, during the court-martial it became clear that so-called ‘conditioning techniques’ had been used on Mr Mousa (and the nine other civilians detained with him), and that such interrogation practices –

¹⁰ MoD Closing Sub001017 at para 2.

¹¹ Public Interest Lawyers (‘PIL’) Closing Sub002341 at para 328. For details on PIL, a solicitors’ firm led by Phil Shiner, see <http://www.publicinterestlawyers.co.uk/> [last accessed 31 July 2010].

¹² PIL Closing Sub002322 at para 291.

¹³ The charge was brought under the International Criminal Court Act 2001.

though unlawful – were generally authorised by more senior levels of military command in the British Army.¹⁴

Thirdly, the father of Mr Mousa, Colonel Daoud Mousa, sought a judicial review of the UK Secretary of State of Defence's refusal (in March 2004) to order an independent inquiry into the circumstances of his son's death. In this test case, which was joined by the relatives of five other Iraqi civilians who were killed in shooting incidents involving British soldiers on patrol, it was established that the Human Rights Act 1998 (which incorporates the ECHR¹⁵ into UK law) has extra-territorial effect. However, the House of Lords ruled that the extra-territorial reach of the ECHR was exceptional and limited to geographical spaces (such as an embassy) where the UK had sufficient authority and control to secure ECHR rights to everyone within that space.¹⁶ A distinction, therefore, was drawn between the Iraqi civilian deaths occurring as a result of the actions of British soldiers in combat operations or out on patrol in southern Iraq, and a death occurring on a UK military base. Because Mr Mousa died when in a British military prison, this was within the 'jurisdiction' of the UK – as defined by Article 1 ECHR – and Colonel Mousa was entitled to a legal remedy as a 'victim' under the Human Rights Act. The remedy he sought was a proper and adequate investigation into a violent death (in custody) caused by agents of the state, as required by the procedural obligations of Articles 2 and 3 ECHR.¹⁷ In May 2008, the UK government finally conceded that a public judicial inquiry into events at the Basra detention facility, involving the

¹⁴ Physical and psychological coercion were used to extract information from detainees, including five practices – hooding, stress positions, subjection to noise, sleep deprivation, and denial of food and drink – which were formally banned by the UK Government in 1972 after their use by the British Army in Northern Ireland. In *Ireland v UK* (1978) 2 EHRR 25, a majority of the European Court of Human Rights found that the combined use of such practices amounted to inhuman and degrading treatment, while three judges dissented on the point and argued that the techniques constituted torture. On the attempts by US lawyers to evade the prohibition on torture, see Waldron, 'Torture and Positive Law: Jurisprudence for the White House' (2005) 105 *Columbia Law Review* 1681. For an account of UK complicity in torture, see *Cruel Britannia: British Complicity in the Torture and Treatment of Terror Suspects in Pakistan* (New York: Human Rights Watch, 2009).

¹⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, ETS 5 (ECHR).

¹⁶ See *R(Al-Skeini) v Secretary of State for Defence* [2004] EWHC 2911 (Admin); [2007] QB 140; [2006] EWCA Civ 1609; [2007] QB 140; and [2007] UKHL 26; [2008] 1 AC 153. For general discussion, see Wilde, 'The "Legal Space" or "Espace Juridique" of the European Convention on Human Rights: Is it Relevant to Extraterritorial State Action?' (2005) 2 *European Human Rights Law Review* 115; King, 'The Extraterritorial Human Rights Obligations of States' (2009) 9 *Human Rights Law Review* 521; Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction' (2010) 20 *European Journal of International Law* 1223.

¹⁷ On the procedural investigatory obligation guaranteed by Article 2 ECHR, see *R(Smith) v Secretary of State for Defence* [2010] UKSC 29; [2010] 3 WLR 223; *R(L (A Patient) v Secretary of State for Justice* [2008] UKHL 68; [2009] 1 AC 588; *R(Middleton) v West Somerset Coroner* [2004] UKHL 10; [2004] 2 AC 182; *R(Amin) v Secretary of State for the Home Department* [2003] UKHL 51; [2004] 1 AC 653. See also *Ramsahai v The Netherlands* [GC] 46 EHRR 983 at paras 324-25 (re the meaning of an 'effective' public investigation); and generally, Harris et al., *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights*, 2nd edn (Oxford: Oxford University Press, 2009).

treatment of Mr Mousa and the other nine detainees, and any other related matters was required.

The fourth factor is the prominence of two pieces of visual evidence. Prior to the House of Lords hearing in the *Al-Skeini* litigation in April 2007, a press conference was held by the lawyers for Colonel Mousa where 46 photographs detailing the 93 separate injuries on his son's body were presented. Subsequent media coverage centred on one autopsy photograph in particular; the close-up image of Mr Mousa's badly-bruised face. The other piece of visual evidence is a one-minute video taken from a British soldier's mobile phone recording. The video shows a hooded and handcuffed Mr Mousa, alongside five other Iraqi detainees in a room, being verbally abused and forced into painful 'stress positions' by Corporal Payne on the day before he died. It was originally banned from public release by the Judge Advocate at the Payne court-martial – on the ground that it would provoke further hostility towards British troops then operating in Iraq – but, following its introduction into evidence at the Inquiry in July 2009, it has now been 'replayed countless times on television news bulletins, newspaper websites and on You Tube'.¹⁸

The Mousa case is especially striking when viewed against an imperial tradition of military interventions by British armed forces in the Middle East region and elsewhere: the identity and fate of one civilian death in war or insurrection has not usually made an impact back in London.¹⁹ One difference from earlier eras is the growth, and global reach of, human rights law and practice; thus, in the Mousa case (and other 2003 Iraq war-related litigation) a skilled legal team could avail themselves of, and develop, the resources provided by the Human Rights Act 1998, the ECHR and other international human rights instruments in order to assert and defend the rights of *Iraqi* victims.²⁰ It is of especial significance that human rights law, as distinct from international humanitarian law, has played such a prominent role in the task of holding the British Army to account for its actions as an occupying force in Iraq. While various duties are placed on an occupier under international humanitarian law, it

¹⁸ Davies, 'Baha Mousa Inquiry: Geoff Hoon Claims Ignorance of the Interrogation Video', *Guardian*, 10 June 2010. Mr Hoon was the Secretary of State for Defence between 1999 and 2005.

¹⁹ See generally Porter, *The Lion's Share: A Short History of British Imperialism 1850-2004* (London: Longman, 2004). See further, Newsinger, *British Counterinsurgency: From Palestine to Northern Ireland* (London: Palgrave, 2001); Anderson, *History of the Hanged: Britain's Dirty War in Kenya and the End of Empire* (London: Weidenfeld & Nicolson, 2005).

²⁰ See *R (Hassan) v Secretary of State for Defence* [2009] EWHC 309 (Admin) (re inquiry into death of an Iraqi national in US custody after his transfer from British custody); *R (Al-Sweady) v Secretary of State for Defence* [2009] EWHC 1687 (Admin) (re alleged killing and torture of Iraqi nationals by British forces); *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58; [2008] 1 AC 332 (re unlawful detention of an Iraqi national); *Al-Saadoon and Mufdhi v UK* Application No 61498/08, Merits and Just Satisfaction, 2 March 2010 (re transfer of Iraqi nationals from British into Iraqi custody).

is obvious that the positive obligations under the ECHR (for example, in relation to the effective investigation of controversial killings by state actors) can be much more extensive.²¹ Another difference from earlier eras is the nature and scale of legal activism, nationally and internationally, around many aspects of the Iraq conflict.²² Crucially, the UK judiciary has been prepared to emphasise (new) principles of legality, distancing themselves from the Bush Administration's position on torture, detention and international human rights law more generally.²³ Indeed, it would not be an overstatement to say that the Iraq conflict has recast the legal relationship between the UK state and war – and that one of the consequences is that the memory and minutiae of a foreign military operation can now be opened up to forensic scrutiny in *legal* environments of courts and public inquiry rooms.²⁴ In the process, lawyers in military cultures, and the question of what constitutes legal expertise and legal risk in a war zone, have been forced to the forefront of contemporary warfare.²⁵

What is most striking about the Mousa case, however, is the existence of particular visual representations of the time, place and context of Mr Mousa's violent death – and relatedly, the ability to access and re-access this material on the Internet. There are images of Mr Mousa in the hours before and after his death at the hands of British soldiers; there are also images of the detention/interrogation facilities constructed in a war zone, interior environments historically off-limits to public scrutiny. New media technology has, in other words, made visible – to a potentially vast global audience of spectators – what is usually

²¹ See generally, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ Reports 226; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 ICJ Reports 136; Provost, *International Human Rights and Humanitarian Law* (Cambridge: Cambridge University Press, 2002); Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya' (2005) 16 *European Journal of International Law* 74; Gross, 'Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?' (2007) 18 *European Journal of International Law* 1.

²² See, e.g., White, *Democracy Goes to War* (Oxford: Oxford University Press, 2009); *R(Gentle) v The Prime Minister* [2008] UKHL 20; [2008] 1 AC 1356 (re an inquiry into the UK government decision to invade Iraq); *R(Smith) v Secretary of State for Defence*, supra n. 17 (re whether the Human Rights Act 1998 applies to soldiers operating outside a UK military base); American Civil Liberties Union, *The Torture Report*, available at: <http://www.thetorturereport.org/> [last accessed 31 July 2010].

²³ See, e.g., Steyn, 'Guantanamo Bay: The Legal Black Hole' (2004) 53 *International and Comparative Legal Quarterly* 1; Steyn, 'The Legality of the Invasion of Iraq' [2010] *European Human Rights Law Review* 1; Greenberg and Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge: Cambridge University Press, 2005); Kramer and Michalowski, 'War, Aggression and State Crime: A Criminological Analysis of the Invasion and Occupation of Iraq' (2005) 45 *British Journal of Criminology* 446; Sands, *Lawless World: Making and Breaking Global Rules* (London: Penguin, 2006).

²⁴ A second judicial inquiry, the Al-Sweady Inquiry, into allegations of unlawful killings and torture by British military personnel at other locations in southern Iraq commenced in March 2010, available at: <http://www.alsweadyinquiry.org/> [last accessed 28 July 2010]. See also *R(Al Zaki Mousa) v Secretary of State for Defence* [2010] EWHC 1823 (Admin) (re application for an additional inquiry into alleged torture of over 100 Iraqi detainees contrary to Article 3 ECHR).

²⁵ For discussion, see Kennedy, *Of Law and War* (Princeton NJ: Princeton University Press, 2006); Sands, *Torture Team: Uncovering War Crimes in the Land of the Free* (London: Penguin, 2009).

kept hidden and unknown in wartime. Crucially, however, this visual evidence did not appear, nor could it have had such powerful effects, in a vacuum. Rather, a sequence of key events had to unfold involving a range of media, military, political and legal actors. However, once in the wider public domain the representations of Mr Mousa's abuse came to be interpreted as evidence pointing to wider, *systematic* ill-treatment of Iraqi detainees by the British Army. Official strategies of denial²⁶ were doomed to fail in the end because two key obstacles could not be overcome: first, the vividness of the visual evidence surrounding Mr Mousa's death on a UK military base; and secondly, the judicial determination to extend the extra-territorial reach of Article 2 ECHR so that a full official re-investigation became obligatory.²⁷ The 'gap' in public knowledge between the two images of the same man – hooded in detention, and as a corpse with a battered face – could not plausibly be filled in any other way. The re-investigation, in the form of an official judicial inquiry, has now been running for over two years.

The Inquiry has a systematic reach, including access to both the official documentary trail and key witnesses.²⁸ Senior actors – soldiers, politicians, civil servants and legal advisers – have been called upon to justify their actions under cross-examination, and to do so against a backdrop of significant conflicts in witness testimony and documentary evidence.²⁹ As a result, there are now competing narratives about the exact role, and complicity, of various UK ministerial, bureaucratic, legal and military actors in the use of 'conditioning techniques' on Iraqi detainees. The definition, purpose and legality of these techniques (especially the routine use of hooding with sandbags), the motivations for the prolonged group violence against these particular detainees, and the failure of commanding officers to intervene at the time, have all become key issues of contention.³⁰ One especially significant aspect of the

²⁶ A record of some of the denial strategies can be found in UK Parliament Joint Committee on Human Rights, *UN Convention Against Torture: Discrepancies in Evidence Given to the Committee About the Use of Prohibited Interrogation Techniques in Iraq* (HL157/HC527, 15 July 2008); *R(Al-Sweady) v Secretary of State for Defence* [2009] EWHC 2387 (Admin) (re judicial criticism of MoD delay, non-disclosure and false public interest immunity claims).

²⁷ For example, Lord Carswell in the House of Lords stated that Mr Mousa suffered 'appalling maltreatment', but 'due to a regrettable paucity of evidence it has not proved possible to bring to justice those responsible for his death' (*Al-Skeini*, supra n. 16 at para 93). Lord Justice Rix in the High Court stated: '[T]he burden lies on the British military prison authorities to explain how he came to lose his life while in British custody' (*Al-Skeini*, supra n. 16 at para 287).

²⁸ As of June 2010, the Inquiry had heard 247 witness and the MoD, for example, had disclosed around 8000 documents including declassified military orders and email communications.

²⁹ For example, Donal Payne, the soldier seen abusing detainees in the Mousa video, admitted to lying in his evidence to his court-martial and alleged that many soldiers were involved in violence against the detainees: see Payne BMI32/72/8.

³⁰ The Inquiry has heard conflicting accounts of the legal regime applicable to the British Army in Iraq and, in particular, the legal standards which apply to prisoners of war and civilian detainees in occupied territory during

Mousa Inquiry is the evidence indicating the influence of US interrogation and detention policies (which were explicitly developed contrary to Geneva Convention standards³¹) on UK military practices and priorities in Iraq. That evidence, from military and legal personnel, includes the following:

[Banning hooding would affect] UK involvement in US ops where blindfolding is the milder end of the spectrum....³²

We would also need to be clear what we would do in practical and policy terms if the [UK Attorney General] gave clear advice that [hooding] was illegal but the US ... disagreed and wanted to continue using it in some circumstances.³³

[The] US made clear that they felt the UK were not getting the information from interrogation that the US expected, which inevitably had an effect on relation with the UK's principal coalition partner.³⁴

The Divisional Headquarters found itself in the extra-ordinary position of seeking the highest standards for prisoners but, being knocked back by those in senior legal and political posts.³⁵

However, it is the *images* from the war zone – images that were taken by soldier photographers – that give context to the Inquiry narratives. The image of a hooded Mr Mousa being ‘conditioned’, and of other Iraqi detainees hooded in armoured vehicles and elsewhere,³⁶ require in-depth explanation. Moreover, the autopsy photograph of Mr Mousa's bruised face is being constantly re-circulated by the media as the headline to news items about the Inquiry and, more generally, about the issue of torture in Iraq. In Part 5, I will look more closely at this visual evidence; first, however, the issue of soldier photography needs to be put in perspective.

3. Soldiers, War Photography and New Media Technologies

To photograph a war zone assumes a presence in the war zone. Only soldiers and military photographers have access to the uncensored sights of the battlefield. Photo-journalism, from its earliest days, has been subject to strict military and political controls; these in turn meant

times of international armed conflict. For accounts of the relevant law, including the Fourth Geneva Convention general requirement of ‘humane’ treatment of civilian detainees (as set out in Articles 3, 5, 27, 31, 32, 85 and 89), see MoD Closing Sub000953-1016; and PIL Victims’ Response to MoD Sub002843-71.

³¹ See Sands, *supra* n. 25.

³² Duncan MOD022183 (email 16 September 2003). Brigadier Duncan was a senior member of the Intelligence Corps in Iraq in 2003.

³³ Rose MOD050809 (email 17 May 2004). Vivien Rose was a legal adviser in the MoD in 2003-04.

³⁴ Duncan BMI06051 at para 61.

³⁵ Mercer BMI04082 at para 99. Lt Colonel Mercer was a senior military lawyer in the British Army in Iraq in 2003.

³⁶ For examples of photos, see MOD049409 and MOD054301.

that the public's exposure to war images could be regulated and managed. New media technology challenges these norms. In this part, three points are examined: first, the different types of war photography; secondly, the way that new media technology is changing the *visualisation* of war; and thirdly, the habits of soldiers – using digital cameras, and access to the Internet, to document every aspect of their experiences in contemporary war zones.

A. War Photos: Official and Unofficial

War photography is nothing new. The tradition of photographing the soldiers, battles, casualties and aftermaths of military campaigns can be traced right back to the time of the first cameras in the nineteenth century. The tradition of censorship can be traced back too: from the photos of the Crimean War in the 1850s to the first extensive televised reportage of war in Vietnam in the 1960s, and in every military conflict since, the ideological and emotional potential of the images of war has been contested.³⁷ One constant in official war photography, therefore, is the relationship between governments, military authorities and media organisations in relation to the images of war (especially during the conflict).³⁸ For example, only 200 official photographs were made available to depict the 1982 Falklands War, while representations of the 1991 Iraq War focused predominantly on the technological superiority of US military action to the exclusion of images of deaths and suffering.³⁹ More recently, the interest of the Bush Administration in regulating the visual field of US military action, and the deference thereto of both US political and media establishments, was encapsulated in the refusal to show images of the returning coffins of US military personnel.⁴⁰

Unofficial or personal war photography is also not a new phenomenon. Soldiers have always taken 'memento' photos of different aspects of their military lives when on deployment. Images of comradeship, daily barracks life, 'foreign' landscapes or associations with military equipment (such as posing with guns or on tanks) can be found from many military conflicts. What distinguished these types of representations historically, however,

³⁷ See Lewinski, *The Camera at War: A History of War Photography from 1848 to the Present Day* (London: WH Allen, 1978); Knightley, *The First Casualty: The War Correspondent as Hero and Myth-Maker from the Crimea to Iraq*, 3rd edn (Baltimore MA: John Hopkins University Press, 2004); Carruthers, *The Media at War: Communication and Conflict in the Twentieth Century* (Basingstoke: Macmillan, 2000).

³⁸ See further International Council on Human Rights Policy, *Journalism, Media and the Challenge of Human Rights Reporting* (Geneva: ICHRP, 2002).

³⁹ See Taylor, *War Photography: Realism and the British Press* (London: Routledge, 1991); and *Body Horror: Photojournalism, Catastrophe and War* (Manchester: Manchester University Press, 1998).

⁴⁰ Cf. King, 'The Afghan War and "Postmodern Memory": Commemoration and the Dead of Helmand' (2010) *British Journal of Sociology* 1.

was their personal nature, a limited intended viewing audience of comrades and family, and their disconnect from the actual details of any military operations.⁴¹ The physical characteristics of the camera were also an obvious limitation on these types of photos: the taking, developing and circulating of images of personal life in a war zone is always dependent on the available technology. Up until the current digital era, for example, personal rolls of film might only be able to be developed in commercial outlets when foreign military tours were over.⁴²

Atrocity photographs, the most notorious war images, admit of no easy classification. These photos recording the abuse or deaths of individuals were taken for a multitude of official and/or personal purposes. Atrocities committed by the Nazis and their collaborators in World War II were not hidden, but were recorded in obsessive quantity and detail. Photos of rape, torture, executions, the mutilation of bodies, and the immediate aftermath such as soldiers standing over graves of the dead, often provided a precise visual record of the victims, the location, and the identity of the perpetrators. The interior environments of some of the concentration camps, where extermination practices led to the deaths of millions of Jewish and other victims, were also captured by official Nazi photographers in order to create a visual record. Alongside still photography, propaganda films showing deportations, mass executions and the sexual abuse of women, were also produced and distributed.⁴³

Different reasons have been offered to explain the creation by soldiers of these official archives: for example, to demonstrate racial/cultural supremacy; to validate military superiority; to prove that orders were carried out; to intimidate target populations; or to satisfy sadistic impulses. This soldier photography was always part of a dehumanisation process: the photo was ‘an integral part of the humiliation process; in a sense it completed the violation’.⁴⁴ But the practice of collecting atrocity photos went beyond this. Many other photos of humiliation and atrocities were taken by soldiers unofficially, and stored in family

⁴¹ On the role of the camera in colonial settings, where the proximity of war and everyday life is reflected in photos, see e.g., Ryan, *Picturing Empire: Photography and the Visualization of the British Empire* (Chicago: Chicago University Press, 1997); Hight and Sampson (eds), *Colonialist Photography: Imag(in)ing Race and Place* (London: Routledge, 2002).

⁴² The court-martial of four British soldiers for abuse of Iraqi civilians at Camp ‘Bread Basket’ near Basra in May 2003 was triggered when the film was handed in for processing at a shop back in England. The film consisted of 22 images of soldiers assaulting Iraqis who had been undressed and bound, and also of images of forced simulated sex: see Gillan, ‘Soldiers in Iraq Abuse Case Sent to Prison’, *Guardian*, 26 February 2005.

⁴³ For detailed sources, see Struk, *Photographing the Holocaust: Interpretations of the Evidence* (London: IB Tauris, 2004). See also Morrison, *supra* n. 5 for a discussion of the atrocity photographs taken by Japanese soldiers between 1934-45.

⁴⁴ Struk, *ibid.* at 64.

photo albums, ostensibly as personal mementos of willing participation. Some photos ‘were even sent to relatives and friends in Germany, with dedications written on the back’.⁴⁵

Since the Nuremberg war crimes trials, the implications of soldiers using cameras to record their abuse or killing of detainees or civilians during wartime is legally unambiguous.⁴⁶ Representations of military personnel engaged in atrocities have also had evidential, emotional and ideological impacts on war crimes trials.⁴⁷ Video evidence, for example, played a key part in the evolution of the International Criminal Tribunal for the Former Yugoslavia (ICTY), with its early creation of a computerised archive of over 300 videos of witness testimony of atrocities in the Balkans. Additionally, in a number of ICTY cases, prosecution reliance on the discovery of ‘execution videos’ recording paramilitary forces killing civilians, or military commanders present at the scene of war crimes, has proved legally significant.⁴⁸

The use of cameras in *wartime detention facilities* is dealt with by the 1949 Geneva Conventions which mandate ‘humane treatment’ at all times for persons held in captivity. Article 13 of the Third Convention in relation to prisoners of war, and Article 27 of the Fourth Convention in relation to civilians, specifically provide protection against ‘public curiosity’⁴⁹ – a term universally interpreted as requiring a ban on photographs or films identifying a detainee’s face.⁵⁰ The implication, therefore, is that cameras should always be controlled in detention environments. Furthermore, the opportunity for soldier photography would be reduced if detention facilities were to strictly comply with Geneva Convention aims

⁴⁵ Levin and Uziel, ‘Ordinary Men, Extraordinary Photos’ at 6, available at: http://www1.yadvashem.org/odot_pdf/Microsoft%20Word%20-%20202290.pdf [last accessed 31 July 2010].

⁴⁶ Prosecutors at the International Military Tribunal in Nuremberg introduced photographic and film evidence of atrocities in relation to the charges of war crimes and crimes against humanity. Note also that the International Military Tribunal for the Far East held that the Japanese government’s *censorship* of photographs depicting mistreatment of prisoners of war was evidence of the government’s complicity in war crimes: see *United States v Sadao Araki* (Int’l Mil. Trib. for the Far East, 4-12 November 1948) *reprinted in* (1979) 60 *International Law Studies* 437.

⁴⁷ See Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford: Oxford University Press, 2001); Douglas, ‘Film as Witness: Screening “Nazi Concentration Camps” before the Nuremberg Trial’ (1995) 105 *Yale Law Journal* 449; Fraser, *Law After Auschwitz: Towards a Jurisprudence of the Holocaust* (Durham NC: Carolina Academic Press, 2005).

⁴⁸ See Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal* (Chicago IL: Chicago University Press, 2003) at 45-6. In June 2005, in the Slobodan Milošević case, the ICTY viewed video footage showing a Serbian paramilitary unit, calling itself the Scorpions, execute six Bosnian Muslim men and teenagers captured after the fall of Srebrenica in 1995.

⁴⁹ The relevant part of Article 27 states: detainees ‘shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity’.

⁵⁰ ICRC, *Commentary: Convention (III) Relative to the Treatment of Prisoners of War* 141, available at: <http://www.icrc.org/ihl.nsf/COM/375-590017> [last accessed 31 July 2010]. See also Rowe, *The Impact of Human Rights Law on Armed Forces* (Cambridge: Cambridge University Press, 2006) 114.

– as distinct from what occurred in the Iraq war, where there was deliberate blurring of detention and interrogation, and the roles of ‘prison staff’.⁵¹ Significantly, the legal attempt by the US government to prevent publication of photos depicting abusive treatment of detainees in Iraq and Afghanistan (even where personal features had been concealed) has been rejected as contrary to the history and preventative purposes of the Geneva Conventions:

Article 13 of the Third Geneva Convention and Article 27 of the Fourth Geneva Convention do not prohibit dissemination of images of detainees being abused when the images are redacted so as to protect the identities of the detainees, at least in situations where, as here, the purpose of the dissemination is not itself to humiliate the detainees. ... Release of the photographs is likely to further the purposes of the Geneva Conventions by deterring future abuse of prisoners.⁵²

B. New Visualisations of War

New technology has provided military authorities and established media organisations – the two main historical sources of images of war – with opportunities to expand, and further shape, the visual record of military conflicts. Journalists now have an instantaneous ability to upload digital photos and video from the battlefield by satellite to a potential worldwide audience. Military personnel now also commonly supply television broadcasters with dramatic, live video footage of battlefield scenes and events. Yet, in the wars in Afghanistan and Iraq, government controls have limited the visual experience of the public:

What is most striking about traditional war coverage in the Anglo-American news media is that the images are so relatively bloodless, and seldom hint at the capacity of modern warfare machinery to injure the human body. In recent years, increasingly professional government media management strategies seem to have strengthened the wartime dominance of official perspectives in the US and UK mainstream news media.⁵³

The common practice of ‘embedded’ reporting is one such media management strategy, whereby limited journalistic access to a war zone is permitted but only on condition that certain images and narratives are (un)reported. Intimidation of journalists by military personnel, and the confiscation of their cameras in order to delete unwanted film footage, is

⁵¹ See, e.g., Welch, ‘Detained in Occupied Iraq: Deciphering the Narratives for Neocolonial Internment’ (2010) 12 *Punishment & Society* 123 (re the US military detention in 2007 of over 26,000 Iraqis in a network of large camps).

⁵² *American Civil Liberties Union v US Department of Defense*, 543 F.3d 59 (2d Cir. 2008) (on appeal to US Supreme Court).

⁵³ Anden-Papadopoulos, ‘Body Horror on the Internet: US Soldiers Recording the War in Iraq and Afghanistan’ (2009) 31 *Media, Culture & Society* 921 at 923. In contrast, the editorial position of Al-Jazeera was to broadcast uncensored images from the Iraqi war zone.

another tactic. The result is that ‘despite the claims of “real time” and spontaneous coverage ... photographs from the conflicts in Afghanistan and Iraq have been characterized by a narrow range of recurrent motifs and routinized scenarios’.⁵⁴ One notorious example from the 2003 Iraq war, the ‘Jessica Lynch Story’,⁵⁵ powerfully demonstrates the combination of (apparently) privileged access to the imagery of elite military operations and media complicity:

[T]he Coalition Media Center (CMC) [is based] at the U.S. Central Command Headquarters in Qatar. This \$1.5 million briefing operation, with a futuristic, Hollywood-inspired set replete with plasma TV screens, is housed in a remote warehouse hundreds of miles from the battlefield [Journalists] were presented with an edited five-minute military video – shot through a night lens, producing green, grainy images of silhouetted figures – detailing the Special Forces rescue of Private Lynch. ... A single still image was taken from this operation and circulated widely, showing Lynch lying on a stretcher aboard a U.S. Special Forces helicopter, smiling grimly under a U.S. flag draped across her chest.⁵⁶

One consequence of such media management is that hyper-controversy erupts when radically alternative images of war (such as the Baha Mousa and Abu Ghraib⁵⁷ photos) appear – representing a very different legal, political and cultural reality.

Technological developments in actual weapons systems are another factor in the heightened visualisation of contemporary war. A standard feature of military aircraft, drones, missile and satellite surveillance systems is the facility to video record (often in real time) the details of military operations.⁵⁸ While this video footage may be used for intelligence, training and propaganda purposes, it also has potential legal significance – if acknowledged and made available – for the investigation and prosecution of any alleged war crimes. If unauthorised disclosure of military video occurs, it is likely to have an enhanced – and perhaps uncontrollable – impact. One such example is the leaking of the audio and visual record of the deliberate killing of Iraqi civilians in Baghdad in 2007 by US forces:

Private Bradley Manning, who had a top-secret security clearance, has been held in military custody in Kuwait since his arrest in Iraq in May over the video, which caused great embarrassment to the US military establishment. It showed an air strike

⁵⁴ Kennedy, ‘Securing Vision: Photography and US Foreign Policy’ (2008) 30 *Media, Culture & Society* 279 at 283.

⁵⁵ Jessica Lynch was allegedly wounded in a gun battle, captured, and mistreated during her detention in an Iraqi hospital. Subsequently, it was revealed that she had received the best available medical treatment from Iraqi medical staff from injuries diagnosed as resulting from a serious road traffic accident.

⁵⁶ Campbell, ‘Representing Contemporary War’ (2003) 17 *Ethics & International Affairs* 99 at 104.

⁵⁷ See *infra* n. 76.

⁵⁸ See Beard, ‘Law and War in the Virtual Era’ (2009) 103 *American Journal of International Law* 409.

that killed a dozen people, including two Iraqis working for Reuters news agency. The air crew is heard falsely claiming to have encountered a firefight in Baghdad and then laughing at the dead. WikiLeaks gave the video the title *Collateral Murder*.⁵⁹

Use of war imagery is not confined to state actors; in the conflicts in Afghanistan and Iraq groups linked to al-Qaeda have produced and distributed (via DVD and Internet formats) videos of military vehicle bombings, ‘martyrdom’ attacks and, most controversially, the detention and beheadings of civilian and military hostages.⁶⁰ The concern with war propaganda, and the use of new media technologies, is now shared by all sides in war.

Of particular interest to my analysis is the incorporation of new media technology into operations by soldiers to identify, arrest and detain individuals for questioning within a war zone. The ability to be a ‘soldier photographer’ is now greatly expanded from previous eras because of the technological abilities of military equipment such as helmet-cameras and night-vision goggles, as well as the presence of mobile camera-phones and compact digital video recorders. It has also been argued that new forms of technological visualisation of ‘targets’ exacerbate a process of dehumanisation on the battlefield (reinforced by the immediate hooding of detainees) – which may continue to operate even in the ostensibly safer space of the military detention facility.⁶¹

A revealing insider-perspective on counter-insurgency practices, and the new dominance of video technology, is provided by journalist Mark Urban’s book, *Task Force Black*; a detailed account of UK SAS special forces in Iraq between 2003 and 2009. In one operation, ‘[v]ideo shot by troops shows the moments after they burst in on the hostages’ and, in another operation, soldiers watched ‘the events unfold on Kill TV back at [the Joint Operations Centre] ... [via] the night-vision image captured by the aircraft orbiting above’.⁶² Urban also confirms that in order to *avoid* the presence of CCTV surveillance (and potential visits by ICRC delegates⁶³) in known detention facilities, one US strategy was to construct secret ‘black prisons’ or, what were known as Temporary Screening Facilities, for the explicit

⁵⁹ McGreal, ‘US Private Bradley Manning Charged with Leaking Iraq Killings Video’, *Guardian*, 6 July 2010.

⁶⁰ See Brahimi, ‘Terrorist Beheadings: Politics and Reciprocity’ in Scheipers (ed), *Prisoners in War* (Oxford: Oxford University Press, 2010) 297.

⁶¹ See *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, 28 May 2010, A/HRC/14/24/Add.6 at para 84 (re the risk of a ‘Playstation’ mentality to killings because of the distancing effect of technology – computer screens and remote audio-feed – used by the operators of drones).

⁶² Urban, *Task Force Black: The Explosive True Story of the SAS and the Secret War in Iraq* (London: Little, Brown, 2010) at 130 and 143.

⁶³ Under the 1949 Geneva Conventions and the Additional Protocols of 1977, the ICRC has a mandate to visit and register detainees, and to monitor their treatment.

purpose of torture.⁶⁴ Another strategy, used by both US and UK special forces personnel, was to take advantage of the ‘time lag’ between arrest and formal detention: as Urban puts it, ‘the violent circumstances of many takedowns produced opportunities for their operators to question the prisoner before putting him on a helicopter...’.⁶⁵ Thus, one effect of the potential legal scrutiny of the detention facility on *a UK military base* in a war zone – that is, extra-territorial jurisdiction – is that detainee abuse is being transferred to other sites off-base.⁶⁶ Moreover, the new predominance of combined US and UK special forces operations, as in Iraq and Afghanistan, and the extreme covert nature of these elite military cultures, means that the risk of abuse of so-called ‘high value’ detainees has grown – and that any *visual* record of human rights violations, if one is kept, is unlikely ever to reach the public domain.⁶⁷

C. 2003 Iraq War: Soldiers Online

At the same time, however, the personal photos of individual soldiers have become the most expansive, vivid – and controversial – source of war imagery. Mobile phones, digital cameras, laptops, email, social networking websites, video-sharing sites, and blogs are now common features of soldier life in foreign military operations. The consequences can be dramatic, as the following accounts of UK and US military behaviour in Iraq attest:

Soldiers ... take pictures like crazy ... They take pictures because they’re bored or want souvenirs. They take pictures of people they arrest (an abrogation of the Geneva Conventions), of fighters they kill (ditto), of bodies they desecrate (a war crime). They email them home or send them with photos of their wives to a porno website or string them together and add sound to make commemorative videos.⁶⁸

When we were out there, we had like a market person that came on and he sold loads of DVDs – he sold a lot of DVDs of people being killed and people were taking pictures all the time. People were even getting their pictures developed in Iraq so they

⁶⁴ Ibid. at 67, 131 and 149. See also *Getting Away with Torture? Command Responsibility for the U.S. Abuse of Detainees* (New York: Human Rights Watch, 2005).

⁶⁵ Ibid. at 131. See also HM Government, *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* (July 2010), available at: <http://download.cabinetoffice.gov.uk/intelligence/consolidated-guidance-iosp.pdf> [last accessed 31 July 2010]. This document regulates UK military personnel involvement with detainees held overseas by third parties and states that hooding may constitute cruel, inhuman or degrading treatment or punishment – except where it does not ‘pose a risk to the detainee’s physical or mental health and is necessary for security reasons during arrest or transit’ (at 13).

⁶⁶ See supra n. 16; and *R(Evans) v Secretary of State for the Defence* [2010] EWHC 1445 (Admin) (re the risk of torture following the transfer of detainees from British custody to specific Afghan detention facilities).

⁶⁷ See Davies, ‘Afghanistan War Logs: Task Force 373 – Special Forces Hunting Top Taliban’, *Guardian*, 25 July 2010. See also *The Torture Report*, supra n. 22 at chap 3, for an account of the ACLU Freedom of Information Act litigation in relation to records on detainees held in US custody abroad – and the destruction, despite court orders, of ‘film of hundreds of hours of Washington-directed torture’.

⁶⁸ Wypijewski, ‘Judgment Days: Lessons from the Abu Ghraib Courts-Martial’ February 2006 *Harper’s Magazine* 39 at 43.

didn't have to take them over to England and get them developed. It was – everybody was taking pictures of everything⁶⁹

Recording images has become a central part of soldiers' immediate experience – and, later, their memory – of war. However, what is really new here is not the increased versatility of the digital camera and the desire to create a visual record; it is the ability instantaneously to view and share any such records with colleagues and, more particularly, with a potential global virtual audience.⁷⁰ The personal soldier perspective, historically confined to the war zone, can now be instantly transmitted out of the war zone. A study of US soldier photography emphasises that soldiers have diverse reasons for documenting their experiences visually and disseminating those images. The photos they take blend 'the genres of institutional, touristic, and war photography into a new type of soldier photography.'⁷¹ Communicating with family and friends back home; keeping up morale; showing the mundane life and frat-style humour of barracks; behaving like a tourist; and providing alternative imagery of the 'real war' are all common motivations for taking and sharing images.

In a study of the explicit 'blood and guts' imagery of Iraqi war dead posted online on one controversial website, Kari Anden-Papadopoulos concludes that the communicative function of these atrocity photographs appeared to be three-fold.⁷² First, it was an attempt to share the gruesome reality of war with other soldiers, both in terms of dehumanisation of the dead 'enemy', and reliving the personal trauma of either killing or witnessing killing. In light of the lethal risks of war, keeping a record (even if horrific) is for soldiers a proof of personal survival. Secondly, new online technology provided an insider military community with access to an outside public forum where explicit pictures of violent conflict, and accompanying soldier commentary, could throw 'the discrepancy between military and civilian perception of war into sharp relief.'⁷³ And, thirdly, the photographs were intended to intimidate the enemy as violent spectacle and a form of propaganda.⁷⁴ Though graphic and

⁶⁹ Lee BMI18/126/8-16. Private Lee was a British soldier serving in the Iraq war.

⁷⁰ See, e.g., 'IDF soldier posts images of blindfolded Palestinians on Facebook, from "best time of my life"', *Haaretz*, 16 August 2010.

⁷¹ Kennedy, 'Soldier Photography: Visualising the War in Iraq' (2009) 35 *Review of International Studies* 817 at 819.

⁷² *Supra* n. 53. The website (now closed down) contained sexually explicit images, which US troops were allowed free access to if they posted an authentic photograph proving they were serving overseas. Only a minority of the photos submitted were graphic battlefield images; the majority were landscape and military equipment images.

⁷³ *Ibid.* at 933.

⁷⁴ The US Defense Department launched its own YouTube channel in 2007 called MNFIRAQ (Multi-National Force – Iraq) to provide an alternative, sanitised propaganda footage. Kennedy, *supra* n. 71 at 830, states that the

offensive to many, it would be simplistic to conclude that the ‘new digital generation’ of soldiers photographs and circulates imagery of the dead only for pathological or sadistic reasons. In any event, consideration of this issue cannot be confined to individual soldiers. On two occasions the US military command in Iraq authorised the publication of explicit images of the war dead: playing a video of the badly-wounded sons of Saddam Hussein, and displaying an enlarged photograph of the head of Abu Musab al-Zarqawi, at a press conference. Then Secretary of Defense Donald Rumsfeld defended the action, saying that the deceased were ‘two particularly bad characters, and that it’s important for the Iraqi people to see them, to know they’re gone, to know they’re dead’.⁷⁵

Photographs of detainees inside detention facilities in a war zone raise different considerations. The most notorious collection of such photos from the Iraq war is from Abu Ghraib – digital videos and photos of torture and abuse, created by US reservist soldiers who guarded the detainees inside the interrogation block of the prison. There is a substantial literature on different aspects of the scandal – covering legal, racial, sexual, political and cultural dimensions⁷⁶ – but my interest is in two particular issues. The first concerns the nature of photographs, specifically the role of *interpretation* in deciphering their meaning. No photograph can be said to have one intrinsic, guaranteed meaning: other interpretations are always possible depending on our knowledge, and assumptions, about what is in – or left out – of the frame. The contestation over the Abu Ghraib images stems precisely from this: did the photos represent the activities of, and enjoyment of, certain individuals engaged in (sexualised and racialised) practices associated with the abusiveness, and tedium, of US military and penal cultures? Or, did the images represent the central role of such ‘softening up’ practices in a US government-authorised torture programme designed to extract intelligence from detainees in Iraq and elsewhere? Was it possible to interpret some of the photos as proof of both these meanings? Also, how should one decipher the motivation of the individual soldier photographer in Abu Ghraib: as a person engaged in further voyeuristic excess (and with an intention to share the digital photos of naked bodies)? Or, as the creator

US military has no plans to ban the possession of camera phones and digital cameras, but it has imposed restrictions on soldier use of the Internet.

⁷⁵ Transcript available at: <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2894> (24 July 2003) [last accessed 31 July 2010].

⁷⁶ See, e.g., Human Rights Watch, *supra* n. 64; Puar, ‘Abu Ghraib: Arguing Against Exceptionalism’ (2004) 30 *Feminist Studies* 522; Danner, *Torture and Truth: America, Abu Ghraib and the War on Terror* (New York: New York Review of Books, 2004); Mestrovic, *The Trials of Abu Ghraib: An Expert Witness Account of Shame and Honour* (Boulder: Paradigm Publishers, 2007); Brown, *The Culture of Punishment: Prison, Society and Spectacle* (New York: New York University Press, 2009).

of an official visual record of the agony and humiliation of the torture victim (with the intention of using the most ‘shaming’ images as blackmail for detainee co-operation)?⁷⁷ These photographs, in other words, cannot tell the whole story: ‘[t]hey only provide evidence of stories, and evidence is mute; it demands investigation and interpretation’.⁷⁸ And, as Judith Butler points out, investigation and interpretation are not inevitable either: ‘[o]ne might expect that the photo would at once alert us to the abominable human suffering in the scene, and yet it has no magic moral agency of this kind’.⁷⁹

The second point concerns official responses and legal contexts. Consider two infamous images from the Iraq war: both are photos of corpses, one is Baha Mousa and the other is Manadel al-Jamadi, one of the detainees in Abu Ghraib. Both are visual evidence of war crimes. However, only the image of Mr Mousa continues to generate an *official* search for accountability both in relation to the immediate circumstances of his violent death (and the attempted cover-up) – *and* the wider legal and political factors which contributed to the abuse, torture and deaths of some Iraqi detainees.⁸⁰ The Abu Ghraib photo of Mr al-Jamadi – lying in an unzipped body bag with a battered face while a female soldier, Sabrina Harman, poses over him with a smile and a thumbs-up sign – did not generate this sort of response. The court-martial of Sabrina Harman for maltreatment of detainees (including posing in photographs) deliberately excluded this photo from the evidence.⁸¹ In spite of global access to the digital image of a dead detainee, the presence of numerous witnesses at the location of his death, the existence of other photos (taken by Harman) of injuries to his body, and an autopsy report confirming a death in US military custody – this particular image of a war crime was deemed irrelevant for official purposes. Why? Because Mr al-Jamadi died during a CIA interrogation in a shower room in Abu Ghraib – the result of an officially-sanctioned torture programme on Iraqi detainees.⁸²

4. Visual Evidence and the Mousa Inquiry

⁷⁷ For further analysis of the soldier photographers involved, including a potential whistle-blowing motive, see Gourevitch and Morris, *Standard Operating Procedure: A War Story* (London: Picador, 2008); and Morris, *Standard Operating Procedure* (Sony Pictures Classics DVD, 2008).

⁷⁸ *Ibid.* at 148.

⁷⁹ Butler, *Frames of War: When is Life Grievable* (London: Verso, 2009) at 91.

⁸⁰ *Supra* n. 9 and n. 24.

⁸¹ Mestrovic, *supra* n. 76 at 31-32.

⁸² For an account of his death, and the removal of his body from the prison, see Gourevitch and Morris, *supra* n. 77 at 172-84.

Interpretation of photographs is unpredictable. So are the consequences which may follow the publication of a photograph, especially where the image depicts violence or suffering. Take the example of the Abu Ghraib photos: while visually opening up US practices of detainee torture to a worldwide audience, these images also worked to close down public and official scrutiny.⁸³ This occurred because the most sensational images – for example, smiling soldiers posing over pyramids of naked bodies – deflected attention onto the individual perpetrators in the photos, and away from the *context* in which such practices originated, became institutionalised and were openly photographed. Media coverage was important in this regard as a selective use of photos – for example, Lynndie England holding a naked detainee on a leash – reflected the Bush Administration’s emphasis on isolated acts of mockery, sadism and sexual perversion.⁸⁴ The legal process did the same: faced with such photographic evidence at the courts-martial of the low-ranking soldiers, the judge ruled that the *abuse* of the naked detainees was the relevant issue, but the ‘nudity thing’ – that is, *why* all the detainees were naked in a US military interrogation block – was ‘irrelevant’.⁸⁵ By interpreting the visual evidence in this way – focusing only on ‘bad apple’ soldiers and their pathological and criminal acts – the images did not contribute towards exposing the systematic severity and illegality of US interrogation policy: in fact, they worked to sideline it.

The Mousa Inquiry mandates a different process of investigation. It is forged from European human rights law and one of its primary purposes is to establish *accountability* on behalf of the individual victim of serious human rights violations. Where there has been a controversial death caused directly or indirectly by UK state actors, and other mechanisms (such as a court-martial) have failed, Article 2 ECHR requires the state to conduct ‘an effective public investigation by an independent official body’ into the circumstances of the death.⁸⁶ The perspectives and interests of the victim are formally represented in the process: the ‘relatives of the deceased must be able to play an appropriate part in it’.⁸⁷

⁸³ See generally, Danner, *supra* n. 76.

⁸⁴ US military investigative reports into Abu Ghraib concentrated on the actions of ‘bad apple’ soldiers: see, e.g., Greenberg and Dratel, *supra* n. 23, at 448, 909 and 1007. Cf *Senate Armed Services Committee Inquiry into the Treatment of Detainees in U.S. Custody*, 12 November 2008, available at: <http://levin.senate.gov/newsroom/release.cfm?id=311783> (re the involvement of senior military and civilian officials in developing US interrogation policy) [last accessed 31 July 2010].

⁸⁵ Colonel James Pohl, cited by Mestrovic, *supra* n. 76 at 32.

⁸⁶ *R(Middleton) v West Somerset Coroner* [2004] UKHL 10; [2004] 2 AC 182.

⁸⁷ *R(Smith) v Secretary of State for Defence*, *supra* n. 17 at para 64; citing *Middleton*, *ibid.*, and *R(L (A Patient) v Secretary of State for Justice*, *supra* n. 17.

What this means in relation to visual evidence before the Mousa Inquiry is that the images cannot be interpreted *just* as a story of ‘bad apple’ soldiers. Soldier photography provides crucial evidence of the individual soldier(s) involved in the abuse and death of Mr Mousa, but the Inquiry is required to focus both on the actual perpetrators of the violence – and the extent to which *systematic* policies and failings in military, political and legal circles were connected to the death. A central question is what significance the visual evidence will have in the Inquiry findings. In particular, how will the visualisation of the suffering of Mr Mousa – in the one-minute video which shows him undergoing ‘conditioning’ – be interpreted? Can one expect that a claim of ‘torture’ will be recognised as such when it is made against state actors in a legal forum? Moreover, what are the risks if the video (and other visual evidence) is used to support an official Inquiry finding that Mr Mousa was *not* tortured?⁸⁸

The first point to note is that the Mousa video provides the Inquiry with the location, date and time of the events; a timeline can be established because the camera analysis confirms that ‘the footage was shot on 14 September at 08:02:17’ and – because of the difference in time zones – the actual time in Basra would be either 11:02:17 or 12:02:17.⁸⁹ Moreover, the visual images of the physical environment challenge assertions that the duration and ferocity of the abuse was unknown to others not in the ‘Temporary Detention Facility’ (TDF): ‘the windows were open, meaning noise could be heard outside ... the entrance to the accommodation block.’⁹⁰ Secondly, lawyers for the victims have firmly placed the video footage in a wider context of abusive soldier photography, and insisted upon one particular interpretation of the visual frames:

One means of controlling and de-humanising the *enemy-other* in one’s own mind, was to photograph him. The video ... was such an act: a commemoration of torture – with Payne occasionally looking straight into the camera meaningfully. The film of the TDF itself apparently acquired the title amongst some soldiers as the *House of Pain*.⁹¹

⁸⁸ Space does not permit a discussion of the interpretation of autopsy photographs. Whether the photographed injuries were visible to military medics at the time of Mr Mousa’s attempted resuscitation or not; and their significance in determining the nature and level of violence inflicted, and the ultimate cause of his death, are all heavily-contested issues before the Inquiry.

⁸⁹ PIL Closing Sub002225 at para 126.

⁹⁰ PIL Closing Sub002399 at para 453.

⁹¹ PIL Closing Sub 002622 at para 223. Only Inquiry personnel can judge this gaze because Corporal Payne’s face is redacted in the video released to the public. PIL also make reference to the other examples of photos found amongst soldiers in the regiment, including images of dead bodies, hooded prisoners and prisoners in forced positions. One soldier, Private Mackenzie, created *fake* photos, representing the abuse of Iraqi detainees, which he sold to the *Daily Mirror* in May 2004.

The key point of dispute is how the violence represented in the video should be characterised.⁹² This is of crucial significance for the wider contestation over British Army practices of ‘conditioning’ and alleged torture. Will the images be interpreted by the Inquiry giving greater weight to the perspective of the victims (Mr Mousa and the other TDF detainees)? One thing that is clear is that there is no one soldier perspective on the video evidence. For example, ex-Corporal Payne, admitted to the Inquiry that his behaviour in the video was ‘appalling’ and ‘inhuman’.⁹³ In contrast Major Peebles, a commanding officer in Payne’s regiment, believed that the practices shown were not ‘going over the top’ because there was ‘no physical harm or assaults’.⁹⁴ Other soldiers testified that the hooding and forced stress positions shown in the video were intended to maintain ‘the shock of capture’; far from being arbitrary, it was ‘standard operating procedure’ taught in training.⁹⁵

In some of the Inquiry evidence, it is apparent that the interpretive debate on the visual images is being shaped by particular legal knowledge. The Treasury Solicitors, who are representing senior military and governmental actors, have accused the victims’ lawyers of seeking ‘to blur the distinction between conditioning and conventional violence’⁹⁶ – and have insisted that “[t]orture” today constitutes the worst of mistreatment, the worst of cruelty at the hands of the state.⁹⁷ The MoD’s approach is to deny condoning an illegal interrogation policy. Thus, while acknowledging that ‘gratuitous violence’ was inflicted on the detainees over a lengthy period, the MoD strongly disputes that a military ‘culture of casual violence’ existed in Iraq.⁹⁸ It admits that hooding for interrogation purposes is illegal and that ‘brutality and inhumanity’ were inflicted on Mr Mousa;⁹⁹ it argues, however, that the motives for the violence were ‘misplaced revenge’, ‘sheer thuggery’, ‘sadism’ and ‘loss of control’ in a handful of soldiers¹⁰⁰ – in other words, none of the violence implemented, or was influenced by, British Army interrogation policy or practices. In contrast, the victims’ lawyers interpret

⁹² Sontag, *On Photography* (New York: Anchor Books, 1990) argues that a photograph is more powerful than the visual flow of a video because the arrest of time in the photograph provides the space for contemplation of the image. On the other hand, a video may provide context that a photograph lacks.

⁹³ Payne BMI32/132/1-9.

⁹⁴ Peebles BMI40/203/14-204/15.

⁹⁵ See, e.g., Crowcroft BMI22/109/14; Payne Closing Sub0000019 at para 3.39.

⁹⁶ Treasury Solicitors Reply Sub002812 at para 57.

⁹⁷ Treasury Solicitors Closing Sub001258 at para 43. In this respect, the relatively ‘moderate’ violence shown in the Mousa video could act to deflect public attention away from the much more brutal violence that occurred later and elsewhere.

⁹⁸ MoD Reply Sub002734 at para 25.

⁹⁹ MoD Closing Sub001017 at para 2.

¹⁰⁰ MoD Closing Sub001026 at para 2. The MoD admitted legal liability and paid compensation of £2.83 million to the families of Mr Mousa and the nine other detainees in July 2008.

the evidence in the video to substantiate two key points: first, that it is the perspective of the *victims*, not the perpetrators, which must be paramount in deciphering the violence:

From the point of view of the recipient of the conduct seen on that video, would it not feel like a beating? ... Moreover, from the point of view of the observer, one must take into account that this is a handcuffed and hooded prisoner, rendered particularly vulnerable by his loss of liberty, sight and freedom of movement, not knowing what will happen next. ... But in terms of the experience of pain, ... these [assaults] mould into one.¹⁰¹

Their second point is that the video provides us with a visual snapshot of the early stages of an incident of *torture* – which ended with the death of Mr Mousa and injuries to the other detainees:

[T]he treatment of the detainees over the [36 hour] period did amount to torture in the sense of constituting severe pain and suffering intentionally carried out by state agents for the purposes of obtaining information and inflicting punishment¹⁰²

They insist that the Inquiry ‘should call what happened to the victims what it is’.¹⁰³ It remains to be seen whether the Inquiry will accept this interpretation and, in particular, what significance will be placed on the video footage in light of the competing accounts of applicable legal standards and the conflicts between witness testimony.

5. Conclusion

In this article, my focus has been on soldier photography, specifically the use of digital cameras in detention facilities located in a war zone. Where images of serious human rights violations in such environments are created and distributed, the impact may be significant in cultural, political and legal terms. But, as with the images of Baha Mousa (and the Abu Ghraib photos), different interpretations of what is meant by ‘abuse’ or ‘torture’, and who should be held to account, always come into play. The camera does not provide an unchallengeable record of what happened. We have seen that a visual image, on its own, does not have the power or ‘magic moral agency’ to *dictate* a particular response. Photos of atrocities have always been circulated in certain environments – being enjoyed, shared, ignored – without any accompanying outrage or sanction. Moreover, in legal contexts, this visual evidence may have to enter into a competition with other types of evidence which

¹⁰¹ PIL Closing Sub002220 at para 117.

¹⁰² PIL Closing Sub002390 at para 427.

¹⁰³ Ibid.

advance a different version of truth. Images of suffering, in other words, have the potential to work in different directions.

It is for this reason that I have highlighted the importance of the *political and legal contexts* in which a particular visual representation is given a specific meaning¹⁰⁴ – and the distinctive nature of the Mousa Inquiry. Looking ahead, the official Inquiry report will provide one means of assessing the role, and significance, of soldier photography from a human rights perspective. But a wider assessment is also needed. One matter that needs to be explored is the extent to which the new ECHR-driven inquiry differs from previous official efforts to investigate controversial actions by armed services personnel (especially special forces).¹⁰⁵ Often, where images of military violence have been in issue, the power of the official interpretation of events has prevailed – for example, the 30 January 1972 (‘Bloody Sunday’) killings of 13 civilians by the British Army in Northern Ireland was photographed, filmed and audio-recorded by the international media as it happened, yet this visual record had no influence on the initial judicial inquiry.¹⁰⁶ The Mousa Inquiry, the future Al-Sweady Inquiry and a potential Al Zaki Mousa inquiry¹⁰⁷ provide important opportunities to determine the merits of new accountability mechanisms.

Another issue is the significance of the extension of ECHR extra-territoriality to the space of the military prison in a war zone. This extension was of paramount importance in relation to the Iraq war because US/UK military intervention quickly descended into a war of occupation and counter-insurgency.¹⁰⁸ Mass detention of Iraqi civilians led to a focus on the interior life of hitherto unknown spaces such as the Temporary Detention Facility and the Temporary Internment Facility, especially as the treatment of ‘detainees’ had been raised as a

¹⁰⁴ David Garland has also argued that the image of a *prison inmate* works against sympathetic public engagement with their welfare; the assumption being one of ‘supposed guilt’ because they are visualised in a prison. Arguably, this effect is enhanced in a war zone with hooded detainees. See Garland, ‘Postcards from the Edge: Photographs of Torture in Abu Ghraib and the American South’ in Behr et al. (eds), *Kriminalitäts-Geschichten* (Berlin: Lit Verlag, 2006) 25 at 30.

¹⁰⁵ See, e.g., Anthony and Mageean, ‘Habits of Mind and “Truth Telling”’: Article 2 ECHR in Post-Conflict Northern Ireland’ in Morison et al. (eds), *Judges, Transition and Human Rights* (Oxford: Oxford University Press, 2007) 181; Jamieson and McEvoy, ‘State Crime by Proxy and Juridical Othering’ (2005) 45 *British Journal of Criminology* 504.

¹⁰⁶ Contrast the 1972 Widgery Report with the 2010 *Report of the Bloody Sunday Inquiry*, chaired by Lord Saville, available at: <http://www.bloody-sunday-inquiry.org/> [last accessed 31 July 2010].

¹⁰⁷ Supra n. 24.

¹⁰⁸ See Urban, supra n. 62; and, more generally, Cockburn, *The Occupation: War and Resistance in Iraq* (London: Verso, 2007); Chandrasekaran, *Imperial Life in the Emerald City: Inside Baghdad’s Green Zone* (London: Bloomsbury, 2006).

major human rights concern from the start of the conflict.¹⁰⁹ However, there are other spaces where detainee abuse or torture can occur – off-base locations or when inside military vehicles on patrol – which are not within UK jurisdiction.¹¹⁰ In any event, military authorities, now acutely aware of the power of new media technologies to expose and embarrass, may enhance their efforts to control and censor the visual field of war by closing down soldier photography. Furthermore, while the general desire to record and share personal experiences may continue to grow, can one expect (after the various ‘abuse photo’ scandals and a process like the Mousa Inquiry) that British Army personnel would risk posing with the same sense of impunity in any future video or photos? Soldier photography as a potential human rights resource may, therefore, be limited.

A final issue to be addressed is the use of photographs of suffering and victimhood. It must be recognised that a visual focus on the suffering of the victim may, paradoxically, limit our understanding of the *perpetrator* of the violence. Of course, this opens up definitional questions about the meaning of perpetrator as some may present themselves as ‘victims’ (for example, of war, of superior orders or of peer pressure). The answer to such questions may also result in different consequences in relation to how law views the credibility and motivation of the ‘witness’ photographer.¹¹¹ In the Mousa video, Corporal Payne’s face is blanked out so we are somewhat constrained in our interpretation of his actions and emotions. In these images, should we see a racist and violent bully, or a soldier playing his allotted part in ‘conditioning’ of detainees? Will he become more humanised in public opinion if the official Inquiry report commends his change of evidence, and his revelation of intentional mass beatings of Mr Mousa? The perpetrator perspective is important because we need to engage with, and try to understand, the pressures, conditions and events which lead soldiers to act in this way. Torture in a war zone occurs because of the action – or inaction – of many individuals (including military lawyers), all of whom may appear ‘normal’ people.¹¹² Atrocity photographs, as discussed earlier, are both shocking and unremarkable precisely because they unashamedly represent this ‘normality’ in visual form.

¹⁰⁹ The ICRC and Amnesty International complained about the condition of detainees from March 2003 onwards: see MOD Sub012243 at MOD012256; ICRC, *Report of the International Committee of the Red Cross (ICRC) 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). The involvement of UK special forces in US military operations, and their handing over of detainees to particular US-controlled sites, was also apparently the subject of major controversy: see Urban, *supra* n. 62 at 72-3.

¹¹⁰ But see the judgments of Brooke LJ and Sedley LJ in the Court of Appeal in *Al-Skeini*, *supra* n. 16, who were supportive of the view that jurisdiction could extend beyond the walls of the military prison.

¹¹¹ See Fraser, *supra* n. 47.

¹¹² See generally, Rejali, *Torture and Democracy* (Princeton: Princeton University Press, 2009).

As to the victims, on the one hand, the image of the abused or tortured detainee is humanising because it creates the potential for recognition and empathy. On the other hand, endless re-publication of the image would be a further dehumanisation: for example, the Abu Ghraib media coverage shows naked, terrified, humiliated individuals in pain and distress. Where faces are blanked out to protect privacy, or bodily features cropped by picture editors, only a disembodied representation remains – in other words, ‘photos of people who are for the most part faceless and nameless’.¹¹³ The face of Baha Mousa is not revealed in the video because he is hooded; we only ‘know’ him after his death, as a victim, because the autopsy photograph is the most widely-circulated media representation of him.¹¹⁴ The dilemma, therefore, is knowing how to expose the human rights violation, and generate the appropriate responses, without further violating the rights of the victims or their relatives. When that image of suffering becomes entangled in a post-Iraq war introspection, of which the Mousa Inquiry is a part – or the image is an archived graphic symbol on newspaper websites – determining what is and is not acceptable is made more difficult. Finally, new digital technology provides the capacity to record, copy, publicise and consume visual imagery in numerous ways, but how will this ability affect how we remember contemporary atrocities?¹¹⁵ Photographic representations of the Holocaust, for example, belong in no special category, when it comes to interpretations of their meaning, their contemporary purpose, or the limits of appropriate use of the images.¹¹⁶ There are also no controls on who can create, or access, a website displaying an atrocity photograph.¹¹⁷ After the Mousa Inquiry concludes, what will happen to the images of Mr Mousa?

¹¹³ Butler n. 79 at 94.

¹¹⁴ There is also a photo of Baha Mousa, his wife and two sons in the public domain, but this used less frequently in television and newspaper coverage.

¹¹⁵ See also Cohen, ‘Government Responses to Human Rights Reports: Claims, Denials and Counterclaims’ (1996) 18 *Human Rights Quarterly* 517.

¹¹⁶ Zelizer, *supra* n. 8. See also, Valverde, *Law and Order: Images, Meanings, Myths* (Abingdon: Routledge-Cavendish, 2006) 153.

¹¹⁷ Struk, *supra* n. 43 at 209.