The Baha Mousa Public Inquiry

Inquiry Chairman: The Right Honourable Sir William Gage

Rulings (First Directions Hearing)

1. At the directions hearing on 3 December 2008 I heard submissions on applications made by various parties. This document sets out my rulings on these applications and my reasons for them.

Background

2. I preface my rulings with a short summary of the background. This Inquiry arises out of an incident which occurred in Iraq on 14/16 September 2003 when ten Iraqi nationals were detained by the First Battalion of the Queen's Lancashire Regiment (1 QLR). In the course of their detention a number of the detainees sustained injuries and one, Baha Mousa, died. In 2006 seven members of 1 QLR were tried by Court Martial. One, Corporal Payne, pleaded guilty to an offence of inhuman treatment contrary to s.51(1) of the International Criminal Courts Act 2001 and was sentenced. He was acquitted of manslaughter. All six other accused men were acquitted of all offences with which they were charged.

3. On 14 May 2008, the then Secretary of State for the Ministry of Defence announced that a public inquiry would be held into the circumstances surrounding the death of Baha Mousa. I was invited to chair the Public Inquiry. The terms of reference are:

> *"To investigate and report on the circumstances surrounding the death of Baha Mousa and the treatment of those detained with him, taking account of the investigations which have already taken place, in particular where responsibility lay for approving the practice of conditioning detainees by any number of the 1st Battalion, the Queen's Lancashire Regiment in Iraq in 2003, and to make recommendations."*

Applications for undertakings

4. On 15 October 2008 I made an opening statement, in the course of which I gave a brief outline of the procedures the Inquiry would adopt. I also announced that in the interests of obtaining from witnesses the fullest co-operation and frankest account of the events which had occurred, I had sought and obtained from the Attorney-General an undertaking in respect of witness evidence in the following terms:

> *"An undertaking in respect of any person who provides evidence to the Inquiry that no evidence he or she may give before the Inquiry, whether orally or by written statement, nor any written statement made preparatory to giving evidence, nor*

any document or information produced by that person to the Inquiry, will be used in evidence against him or her in any criminal proceedings (including any proceedings for an offence against military law, whether by court martial or summary hearing before a commanding officer or appropriate superior authority), except:

(a) A prosecution (whether for a civil offence or a military offence) where he or she is charged with having given false evidence in the course of this Inquiry or having conspired with or procured others to do so, or

(b) In proceedings where he or she is charged with any offence under section 35 of the Inquiries Act 2005 or having conspired with or procured others to commit such an offence".

I went on to invite written submissions on the question of whether it was necessary or desirable for me to seek a similar undertaking from the Permanent Secretary at the MoD in relation to the taking of administrative action against Crown servants who may give evidence before me.

5. In response to this invitation a number of written representations were submitted on behalf of different groups of interested parties and individuals. As yet the question of representation has not been definitively resolved. For these reasons, where necessary, I shall refer hereafter to the different groups in broad terms. These broad terms and reference to individuals should not be taken as any indication of what will be the likely final representation.

6. The written representations seek the following:

(1) an extension of the Attorney-General's undertaking incorporating:

(a) an undertaking that evidence given by a witness will not be used "… to the prejudice of that person in any criminal proceedings (or for the purpose of investigating or deciding whether to bring such proceedings) except proceedings where he or she is charged with having given false evidence in the course of this Inquiry …"

(b) an undertaking that no application will be made on behalf of the crown, under the hearsay provisions of the Criminal Justice Act 2003, to adduce evidence given

before this Inquiry by a witness against any other witness in the Inquiry in criminal proceedings.

(2) the above undertakings be replicated by undertakings given by the DPP.

(3) an undertaking be given by the Permanent Under-Secretary of the MoD and/or by the Heads of the Armed Services in the following terms:

No material provided by a witness to the Inquiry will be used in any administrative proceedings (including AGAI 67 (Army) Action or QR 1027 (RAF) Action as appropriate) to his detriment in the future or against any other witness to the Inquiry.

(4) an undertaking by the Secretary of State for the Home Department and the Attorney-General, on behalf of the Government, that no record of evidence given, nor a copy of any report produced by the Inquiry will be formally or informally transmitted to a foreign state or a foreign court or tribunal.

(5) an undertaking by the Secretary of State for Defence that in the event of proceedings being taken against any witness in overseas proceedings the Secretary of State will provide and fund legal assistance to the witness in relation to such proceedings.

7. Before turning to the specific written representations made on behalf of the broad groups and individuals I set out, so far as is material to these applications, the statutory background and legal principles which are not in dispute.

The statutory provisions

8. The Inquiry is set up under section 1 of the Inquiries Act 2005 (the Act). It is being conducted by me as Chairman without other member(s). It was set up on 1 August 2008 with terms of reference as above. Proceedings in the Inquiry are conducted in accordance with sections 17 to 23 of the Act. Section 17 provides:

"17 Evidence and procedure

(1) Subject to any provision of this Act or of the rules under section 41, the procedure and conduct of an inquiry are to be such as the chairman of the inquiry may direct.

(2) …

(3) In making any decision as to the procedure or conduct of an inquiry, the chairman must act with fairness and also with the need to avoid any unnecessary cost (whether to public funds or to witnesses or others)."

Section 21 provides powers to the Chairman to require production of evidence. It reads in the material parts:

"**21 Powers of chairman to require production of evidence etc.**

(1) The chairman of an inquiry may by notice require a person to attend at a time and place stated in the notice –

(a) to give evidence

(b) to produce any documents in his custody or under his control that relate to a matter in question at the inquiry;

(c) to produce any other thing in his custody or under his control for inspection, examination or testing by or on behalf of the inquiry panel.

(2) …

(3) …

(4) A claim by a person that –

(a) he is unable to comply with a notice under this section, or

(b) it is not reasonable in all the circumstances to require him to comply with such a notice, is to be determined by the chairman of the inquiry, who may revoke or vary the notice on that ground.

(5) In deciding whether to revoke or vary a notice on the ground mentioned in subsection(4)(b), the chairman must consider the public interest in the information in question being obtained by the inquiry, having regard to the likely importance of the information."

9. Section 22 preserves the right of a witness to refuse to give evidence or produce documents which may incriminate him. It reads:

"22 Privileged information etc.

(1) A person may not under section 21 be required to give, produce or provide any evidence or document if –

(a) he could not be required to do so if the proceedings of the inquiry were civil proceedings in a court in the relevant part of the United Kingdom, or

(b) the requirement would be incompatible with a community obligation.

(2) …"

The legal principles

10. It is, of course, not in dispute that any witness in this Inquiry has a right to refuse to answer questions or produce documents which may tend to incriminate himself or herself. The boundaries of the privilege against self-incrimination are however less clear (see below).

11. It is also not in dispute that subject to a possible common law discretion (see *Brannigan v Davison* [1997] AC 238) and a statutory discretion (see s.21(5) above) a witness has no such right or privilege against self-incrimination in respect of foreign criminal proceedings.

The written representations

12. Written representations have been submitted by the following:

1. Counsel instructed by Kingsley Napley & Co on behalf of those soldiers the subject of the Court Martial (the CM 7);

2. Counsel instructed by the Treasury Solicitor on behalf of Crown Service servants (including soldiers other than the CM7);

3. Counsel instructed on behalf of the Ministry of Defence (the MoD);

4. Counsel instructed on behalf of the Ten Detainees (the Ten Detainees);

5. Counsel separately instructed on behalf of the CM7 as follows:

   Counsel for Colonel Mendonca, counsel for Major Peebles, counsel for WO Davies, counsel for Sergeant Stacey and

Kingsman Fallon, counsel for Corporal Payne and counsel for Corporal Crowcroft.

13. All save those representing the MoD and the Ten Detainees support the representations for which counsel, Mr James Dingemans QC, for the CM7 contends, namely in respect of **6**(1) to (5) above. I shall indicate where those representing the MoD and the Ten Detainees agree or disagree with the above representations.

14. At this juncture, it is necessary for me to stress that the procedure of the Inquiry is inquisitorial and not adversarial. It follows that where there is agreement between counsel for all parties it is not appropriate for me simply to accept the agreed position. I have to be satisfied that, within the statutory framework, what is being proposed is appropriate.

I shall deal with the representations in the order in which they appear above.

1. The proposed extension of the Attorney-General's existing undertaking.

15. As appears above this proposal is in two parts. In the first limb the proposal by Mr Dingemans is that I should seek an undertaking from the Attorney-General in the form set out in **6**(1)(a) above.

16. Mr Dingemans' representations and submissions are supported and adopted on behalf of all parties save for the Ten Detainees, represented by Mr Rabinder Singh QC and Counsel, Mr David Barr, representing the MoD. The latter two counsel, whilst not supporting this proposal, do not oppose it. The proposal is very similar to an undertaking given by the relevant authorities in the Bloody Sunday Inquiry (BSI). Its purpose as outlined by Mr Dingemans, is to make clear that the privilege against self-incrimination is not confined simply to incriminating answers given by a witness but extends to any answer which might risk a prosecuting authority taking a step to investigate criminal proceedings and the decision whether or not to bring criminal proceedings.

17. Having carefully considered the written representations and the oral submissions, I decided that it would be appropriate for me to seek an extension to the existing undertaking given by the Attorney-General. My reasons for doing so are as follows.

18. The privilege against self-incrimination has been said to be "a basic liberty of the subject" (see *Rank Film Distributors v Deo Info Centre*

[1982] AC 380). It is preserved for the purpose of a public inquiry under s.22 of the Act. In order to avoid witnesses exercising this privilege and thereby thwarting this Inquiry in its efforts to elicit the truth, I requested the Attorney-General to give the existing undertaking.

19. The boundaries of the privilege against self-incrimination have been the subject of a number of judicial decisions. It now seems clear that it extends to evidence which may form steps towards the case which the prosecution may wish to establish and material upon which the prosecution may wish to rely in deciding whether to prosecute. It is less certain that it extends to questions which a witness might answer but which are not even steps towards the case which the prosecution might wish to establish but which open up a line of inquiry which would lead to incriminating evidence from other sources.

20. In *Saunders v The United Kingdom* [1997] BCC 872, the European Court of Human Rights said:

> *"70 … However, the Government have emphasised, before the Court, that nothing said by the applicant in the course of the interviews was self-incriminating and that he had merely given exculpatory answers or answers which, if true, would serve to confirm his defence. In their submission only statements which are self-incriminating could fall within the privilege against self-incrimination.*
>
> *71. The Court does not accept the Government's premise on this point since some of the applicant's answers were in fact of an incriminating nature in the sense that they contained admissions to knowledge of information which tended to incriminate him (see paragraph 31 above). In any event, bearing in mind the concept of fairness in Article 6 (art 6), the right not to incriminate oneself cannot reasonably be confined to statements of admission of wrongdoing or to remarks which are directly incriminating. Testimony obtained under compulsion which appears on its face to be of a non-incriminating nature – such as exculpatory remarks or mere information on questions of fact – may later be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility. Where the credibility of an accused must be assessed by a jury the use of such testimony may be especially harmful. If follows that what is of the essence in this context is the use to which*

> *evidence obtained under compulsion is put in the course of the criminal trial."*

21. Waller LJ in *Den Norske Bank v Antonatos* [1999] QB 271, in a judgment with which the two other members of the Court of Appeal agreed, said (at p.289A):

> *"Thus, it is not simply the risk of prosecution. A witness is entitled to claim the privilege in relation to any piece of information or evidence on which the prosecution might wish to rely in establishing guilt. And, as it seems to me, it also applies to any piece of information or evidence on which the prosecution would wish to rely in making its decision whether to prosecute or not."*

He also cited with approval the judgment of Kirby P in *Accident Insurance Mutual Ltd v McFadden* 31 NSWLR 402, in which Kirby P said:

> *"… I can only say, the strong inclination of my mind is to protect the party against answering any question, not only that has a direct tendency to incriminate him, but that forms one step towards it …"*

22. In the light of these decisions, in my judgment, an extension to the present undertaking, in a suitable form, would provide further protection to a witness against self-incrimination. Having reached that conclusion, for the reason which caused me to seek the existing undertaking, it seemed to me sensible and appropriate to invite the Attorney-General to extend her undertaking. I am quite satisfied that this added protection for a witness ought further to encourage witnesses to be frank in their evidence to the Inquiry.

23. As a result of informal discussions with the Attorney-General she has agreed to give an undertaking in the form set out in the letter at annex A to this document. The form of her undertaking does not follow precisely the form canvassed in oral submissions, but I am quite satisfied that it meets appropriately the submissions made by counsel on this issue.

24. The second limb of Mr Dingemans' proposed extension seeks an undertaking from the Attorney-General that evidence given by any witness to the Inquiry will not be used by way of hearsay evidence pursuant to the hearsay provisions of the Criminal Justice Act 2003 against any other witness in the Inquiry. This further extension of the

Attorney-General's undertaking is supported by those appearing for other soldiers who may be witnesses in the Inquiry.

25. Mr Dingemans accepts that such an undertaking is unprecedented. He also accepts that it does not engage directly the privilege against self-incrimination. However, he submits that as a matter of principle, undertakings provided in the context of public inquiries need not be limited to the privilege against self-incrimination. He further submits that such an undertaking might encourage witnesses, not themselves involved in any misconduct but who had observed others so engaged, to give evidence about what they had seen. He submits that such an undertaking might assist in breaching what the Judge Advocate in the Court Martial proceedings described as "the wall of silence".

26. Mr Rabinder Singh in his written representations described Mr Dingemans' representations on this issue as "staggering and deeply disappointing". I would not myself go so far as to describe Mr Dingemans' submissions on this issue in those terms, but I am quite satisfied that I should reject the request for this extension of the Attorney-General's undertaking. All counsel agree that a balance has to be struck between measures taken by the Inquiry to promote an environment which will enable it to discover the truth and the public interest enshrined in Articles 2 and 3 of the European Convention on Human Rights. In regard to the latter the Inquiry must so far as possible not only establish the facts, but do so in such a way that those responsible for what occurred may be held accountable.

27. In my judgment it is neither necessary nor appropriate to invite the Attorney-General to give this proposed undertaking in respect of hearsay evidence. The Inquiry has power to compel witnesses to give evidence. The process of examination and cross-examination of witnesses is, in my view, sufficiently robust to determine where the truth lies. Where it is appropriate to do so, I will not shrink from drawing inferences from witnesses who choose to remain silent. In addition, as Mr Singh points out, the Criminal Justice Act 2003 provides some safeguards in respect of the admissibility of hearsay evidence. Whilst I recognise that if given the protection of this undertaking some witnesses, who would not otherwise give a truthful account of what they knew of the events of 14/16 September 2003, may decide to do so. Nevertheless in my view this is not sufficient to outweigh the public interest in preserving the right of prosecuting authorities to use statements made in the Inquiry for the purposes of any subsequent appropriate proceedings. Soldiers are public servants who should feel obliged to tell the truth. There is the potential for this Inquiry to uncover some very serious misconduct by some personnel. In the

circumstances, in my opinion, it is wholly inappropriate to limit the use of the evidence of some witnesses in subsequent proceedings against another witness or witnesses.

2. An undertaking by the DPP.

28. The CM7 supported by other groups of soldiers invite me to request the DPP to replicate undertakings given by the Attorney-General. The reason for this request is to prevent the DPP from taking proceedings in the event that the Attorney-General's powers to consent to prosecutions are restricted, if not removed, by provisions of the proposed Constitutional Renewal Bill. Neither the Ten Detainees nor the MoD sees the necessity for such an undertaking. They submit that it is inconceivable that any DPP would take proceedings in the face of such an undertaking given by the Attorney-General. They further submit that if such proceedings were taken there would be available to the Defence a substantial ground for a successful abuse argument.

29. In my judgment there is considerable force in the submissions of the Ten Detainees and the MoD. Nevertheless, in an excess of caution I see no reason not to seek such an undertaking from the DPP and I propose to do so. Accordingly, I approached the DPP with the object of obtaining such an undertaking. The result has been that the DPP has given an assurance on this issue which is set out in a letter from his office which is attached at annex B to this document.

3. The administrative undertaking

30. The CM7, supported by other groups of soldiers, invite me to request from the Permanent Under-Secretary in respect of civil servants, the Chief of the Naval Staff for the Royal Navy, the Chief of the General Staff for the Army, and the Chief of the Air Staff for the Royal Air Force, in respect of service personnel, an undertaking that no evidence given by a witness, orally or in writing, should be used against him or her in disciplinary proceedings. The form of the undertaking, it is submitted, should mirror the undertaking given by the Attorney-General in respect of criminal proceedings. Mr Dingemans submits that such an undertaking is necessary. He relies on the fact that there may be many soldiers who are fearful of giving evidence which may implicate superior officers and comrades. Many will fear that their evidence, implicating others, may adversely affect their subsequent careers in the armed forces. Mr Dingemans points to the fact that similar undertakings were given in the Hutton Inquiry and in the Rosemary Nelson Inquiry.

31. Mr Garnham QC, on behalf of soldiers other than the CM7, seeks an undertaking in the same terms as that sought by Mr Dingemans but including an undertaking restricting the use of the evidence of one witness against another witness in disciplinary proceedings.

32. Lord Thomas QC, representing Major Peebles, one of the CM7, supports the submissions made by Mr Dingemans and Mr Garnham. In addition to the submissions and representations made by Mr Dingemans and Mr Garnham he relies on the fact that Major Peebles has already faced a court martial which acquitted him of an offence not an offence under civil law. Lord Thomas submits that this distinguishes Major Peebles from witnesses in the Hutton and BS Inquiries. In the circumstances he submits that it would be unfair if Major Peebles were to be put at risk of facing disciplinary proceedings as a result of evidence given either by him or another witness to this Inquiry. Ms Isabel Hogg, solicitor for WO Davies, makes a similar written submission on his behalf.

33. The MoD and the Ten Detainees oppose such an undertaking. Their submissions are very similar to those made by them in respect of the proposed hearsay extension to the Attorney-General's undertaking.

34. Before the directions hearing counsel to the Inquiry drafted and circulated for discussion two forms of undertaking which sought to protect witnesses from disciplinary proceedings arising from admissions in evidence to the Inquiry of a previous failure or failures to disclose to the authorities knowledge of misconduct by other witnesses. One form was similar to the undertakings given in the Hutton and Rosemary Nelson Inquiries. The other was narrower in scope.

35. My conclusion on this issue is that it would be appropriate for me to seek such an undertaking, but only one of limited scope. I recognise that there may be soldiers and possibly civil servants who would be more likely to give truthful and complete evidence if their evidence was protected from use in disciplinary proceedings against them, or against others. Common sense indicates that a witness who had previously failed to disclose what he or she knew of what happened on 14/16 September 2003 might very well be unwilling to disclose it to the Inquiry if it might lead to disciplinary proceedings being brought against him or her and/or against a superior officer or comrade. But in my judgment, any undertaking should be limited to such failure to disclose. To go further would protect a witness from disciplinary or administrative proceedings if he or she admitted to other and possibly more serious misconduct. In such circumstances it seems to me wholly

inappropriate that the authorities should be prevented from using that evidence in disciplinary or administrative proceedings against the witness or any other witness. Such a restriction would, in my view, unreasonably restrict the ability of the authorities to hold accountable by disciplinary or administrative proceedings those who had been guilty of misconduct. Nor do I think it unfair that any witness who was a defendant in the Court Martial proceedings should be at risk of administrative proceedings despite the fact that he was acquitted of charges made against him in the Court Martial.

36. Mr Dingemans made one further submission on this issue. He submitted that the undertaking he sought was akin to the protection given to witnesses in Employment Tribunals who are protected from the consequences of giving evidence in employment tribunal proceedings. He cited "The Employment Equality (Religion or Belief) Regulations 2003" as an example of protection from discrimination by victimisation for giving evidence in connection with proceedings in an Employment Tribunal.

37. I do not accept this as a parallel. A witness giving evidence of his own misconduct cannot properly complain of victimisation if disciplinary action is taken against him in respect of that misconduct. So far as career prospects are concerned, it is pointed out by counsel for the MoD that a witness who believes his career prospects may have been hindered can invoke the service complaints procedure under the Armed Forces Act 2006.

38. For the reasons above I invited the Permanent Under-Secretary and the Chief of the Naval Staff, the Chief of the General Staff and the Chief of the Air Staff to give an undertaking in a limited form. The undertaking which I sought was as follows:

> "If written or oral evidence given to the Inquiry by a witness who is a former or current member of HM Forces or a former or current MoD civil servant may tend to indicate that:
>
> (1) the same witness previously failed to disclose misconduct by himself or some other person, or
>
> (2) the same witness gave false information on a previous occasion in relation to such misconduct,
>
> then the MoD undertakes that it will not use the evidence of that witness to the Inquiry in any administrative action (for military personnel) or disciplinary proceedings (for civil servants) against

that witness where the nature of the misconduct alleged is the failure to give a full, proper or truthful account on that previous occasion."

I have received responses which indicate that the above office-holders are prepared to give the relevant undertaking. Their responses are set out at annexes C, D, E and F.

4 and 5. The foreign proceedings undertaking

39. The CM7 and the other groups of soldiers seek undertakings providing protection in respect of possible proceedings in foreign courts (see (4) and (5) in paragraph **6**). It is submitted that evidence given at the Inquiry may be indicative of conduct which has a potential for a finding of torture. Mr Dingemans in his written representations helpfully set out the reasons why as a result of evidence given in the Inquiry some soldiers may be at risk of proceedings in the International Criminal Court (ICC) and in a foreign court on the basis that they were guilty of the offence of torture.

40. For the purposes of my ruling on these issues I am prepared to accept that it is possible that the evidence may be sufficient to establish that some soldiers committed the crime of torture as defined by Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (UNCAT). I am also prepared to accept, as Mr Dingemans submits, that the crime of torture is universal in nature and capable of being prosecuted by any state regardless of where it occurred (see *R v Bow Street ex parte Pinochet (No.3)* [2000] AC 147 and *A and others v SSHD (No.2)*[2006] 2 AC 221 at para 333).

41. Such an alleged crime may therefore give rise to proceedings in the ICC or proceedings in another State. Mr Dingemans submits that the fear of such proceedings may inhibit witnesses from giving truthful evidence. Accordingly the undertakings which he seeks are:

(1) an undertaking that no record of evidence given at the Inquiry, nor any other evidence, nor a copy of any Report given by the Inquiry will be formally or informally transmitted to a foreign state or a foreign court or tribunal; and

(2) an undertaking that legal assistance will be provided and funded in respect of overseas proceedings against any witness.

42. It is accepted by Mr Dingemans and counsel for the group of other soldiers that there is no privilege against self-incrimination in respect of criminal proceedings in a foreign court or tribunal, but that there is a discretion afforded by the common law and s.22(5) of the Act to excuse a witness from answering questions which might incriminate him or her in proceedings subsequently instituted in a foreign court. Therefore, Mr Dingemans submits that it is appropriate for the undertakings to be given. In any event, he reserves the right of any witness to apply to the Inquiry for the right to refuse to answer questions which might incriminate him in respect of possible criminal proceedings in a foreign court.

43. There are, in my opinion, practical difficulties in relation to the undertaking set out in **41**(1) above. In order to comply with the requirement of transparency, the Inquiry proceedings will be available to the general public on the Inquiry's website. The website will include witness statements and evidence. In due course the Inquiry Report will be published on the website. In these circumstances, it seems to me that any undertaking in the form sought would be of no value to a witness. The material will be freely available to any person or State.

44. Secondly, by Article 9 of UNCAT, the United Kingdom, as a signatory to the Convention, is bound to give another State "… the greatest measure of assistance in connection with criminal proceedings brought …" in respect of offences of torture "… including the supply of all evidence at their disposal necessary for the proceedings". A failure by the United Kingdom to provide assistance could be construed as a breach of the Convention. A similar obligation in relation to the ICC is provided by Article 93(1) of the Rome Statute of the International Criminal Court.

45. There are other reasons why such a blanket undertaking should not be sought. Firstly, so far as the ICC is concerned, Article 17 of the Rome Statute provides restrictions on the admissibility of cases to be brought before it. It reads:

"Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and Article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court."

Article 20(3) provides a rule against double jeopardy.

46. It is apparent from the above that any prosecution in the ICC would face formidable hurdles. Counsel for the MoD attached to their written representations a letter dated 9 February 2006 signed by the Chief Prosecutor of the ICC which demonstrates that any case arising out of the events with which the Inquiry is concerned is very unlikely to be considered sufficiently grave to justify further action by that Court.

47. Finally, so far as proceedings in the ICC are concerned, Article 55(1)(a) of the Rome Statute and Rule 74 of the Rules of Procedure and Evidence suggest that evidence amounting to self-incrimination is unlikely to be admitted where a witness has been compelled to give such evidence.

48. So far as possible proceedings in another state are concerned, the state most likely to institute such proceedings is Iraq. However, counsel for the MoD have annexed to their written representations the Coalition Provisional Authority Order Number 17 which provides, for all Coalition Personnel, immunity from Iraqi Legal Process for acts which are crimes under the Parent State's jurisdiction. Torture is such a crime in England and Wales (see s.51 and Schedule 8 Art.8(2) International Criminal Courts Act 2001).

49. In addition, Counsel for the MoD point out that the privilege against self-incrimination is an international norm (see Article 14(3)(g) of the International Covenant for Civil and Political Rights and Art.6 of the ECHR).

50. Thus, in my view, the prospect of proceedings against any witness in this Inquiry, either before the ICC or in another state, are remote.

51. As to the undertaking to provide for funding and legal assistance to a witness prosecuted in the ICC or another state, Queen's Regulations for the Army provide a right to legal assistance from the Armed Forces Criminal Legal Aid Authority.

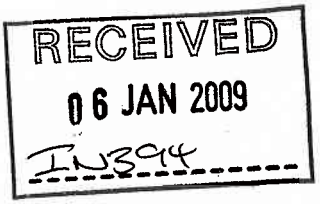
52. Balancing the impracticability of the proposed undertaking ((1) in para **41** above) together with, as I find it, the remote possibility of proceedings being taken in the ICC or in another state against the need for accountability in respect of those responsible for misconduct, I unhesitatingly conclude that the balance comes down against seeking such undertakings. I repeat what is set out earlier in this ruling, in my opinion, the procedures of the Inquiry are quite sufficiently robust to compel witnesses to give evidence and for the truth to be discerned.

53. I should add that if during the course of these proceedings a witness claims that his answers may incriminate him or her in respect of possible foreign proceedings, I shall, of course, consider any application to remain silent on its merits. Such an application will involve a consideration of all relevant factors and the exercise of my discretion. It will involve the Inquiry taking into account, among other things, the public interest (see s.21(5) of the 2005 Act).

54. I am grateful to all counsel for their written and oral submissions on the above issues.

THE RT HON SIR WILLIAM GAGE
CHAIRMAN, BAHA MOUSA PUBLIC INQUIRY
6 January 2009

04-010
ANNEX A



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Our ref: ADV/213/08

Date: 31 December 2008

Dear Duncan,

THE BAHA MOUSA INQUIRY: SELF-INCRIMINATION

Sir William Gage wrote to the Attorney General in relation to an extended undertaking. This matter has been discussed extensively at Official level and with Gerard Elias QC. The Law Officers have both now had the opportunity to consider the matter and the Attorney has agreed to the following undertaking:

This is an undertaking in respect of any person who provides evidence to the Inquiry relating to a matter within its terms of reference, including oral evidence, any written statement, any written statement made preparatory to giving evidence, and any document or information produced to the Inquiry.

1 No evidence a person may give before the Inquiry, will be used in evidence against that person in any criminal proceedings or for the purpose of deciding whether to bring such proceedings (including any proceedings for an offence against military law, whether by court martial or summary hearing before a commanding officer or appropriate superior authority), save in such proceedings as are referred to in paragraph 2 herein:

2 Paragraph 1 does not apply to:

(i) A prosecution (whether for a civil offence or a military offence) where the person is charged with having given false evidence in the course of this Inquiry or having conspired with or procured others to do so, or

(ii) (ii) Proceedings where the person is charged with any offence under section 35 of the Inquiries Act 2005 or having conspired with or procured others to commit such an offence"

3. Where any such evidence is provided to the Inquiry by a person, it is further undertaken that, as against that person, no criminal proceedings shall be brought (or

continued) in reliance upon evidence which is itself the product of an investigation commenced as a result of the provision by that person of such evidence.

If I can be of any further assistance, please do not hesitate to contact me.

Yours sincerely

Kristin Jones

KRISTIN JONES

ANNEX B

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DX No 300850 Ludgate EC4

The Rt Hon Sir William Gage
Chairman
Baha Mousa Public Inquiry
Finlaison House
15-17 Furnival Street
London, EC4A 1AB

5 January 2009

Dear Sir William,

I refer to my letter to you dated 10 December 2008 and to subsequent exchanges of email between Gerard Elias QC, Duncan Henderson and myself. In particular, I refer to Duncan Henderson's email to me of 31 December 2008, to which he attached a copy of a letter that he had received that day from the Attorney General's Office (AGO). The letter from the AGO contained the wording of a revised form of undertaking that the Attorney General had provided for the purposes of your inquiry.

Having read the revised form of undertaking; and having previously been consulted as to its content; I am happy to confirm, on behalf of the Director of Public Prosecutions (DPP), that he and successive DPPs would honour the undertaking without question or qualification.

Yours sincerely,

Chris Newell

CHRIS NEWELL

ANNEX C

09-008

SIR BILL JEFFREY KCB

MINISTRY OF DEFENCE
FLOOR 5, ZONE D, MAIN BUILDING, WHITEHALL
LONDON SW1A 2HB

Telephone: 020-7218 2193
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PERMANENT UNDER-SECRETARY OF STATE

D/PUS/2/45 (711)

19 December 2008

When we spoke last week you indicated your belief that an undertaking in respect of possible administrative or disciplinary action against witnesses will assist you to fulfil your terms of reference.

In recognition of this, I give the following undertaking:

If written or oral evidence given to the Inquiry by a witness who is a former or current MoD civil servant may tend to indicate that:

(1) the same witness previously failed to disclose misconduct by himself or some other person, or

(2) the same witness gave false information on a previous occasion in relation to such misconduct,

then I undertake that the MoD will not use the evidence of that witness to the Inquiry in any disciplinary proceedings against that witness where the nature of the misconduct alleged is the failure to give a full, proper or truthful account on that previous occasion.

I enclose similar undertakings from the Commander-in-Chief Fleet, on behalf of the Chief of the Naval Staff, for the Royal Navy, the Chief of the General Staff for the Army and the Chief of the Air Staff for the Royal Air Force.

Yours ever

Bill Jeffrey

BILL JEFFREY

The Rt Hon Sir William Gage
Chairman
The Baha Mousa Public Inquiry

Admiral Sir Mark Stanhope KCB OBE
Commander-in-Chief Fleet

Ministry of Defence
5th Floor, Section K
Main Building
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Telephone: 020 7218 6193
Fax: 020 7218 4702

CNS/6/5

The Right Honourable Sir William Gage
Chairman
The Baha Mousa Public Inquiry

18 December 2008

Dear Sir William,

In a discussion with the Permanent Secretary last week you indicated your belief that an undertaking in respect of possible administrative action against witnesses in the Baha Mousa inquiry will assist you to fulfil your terms of reference.

In recognition of this, I give the following undertaking on behalf of the Chief of Naval Staff:

> If written or oral evidence given to the Inquiry by a witness who is a former or current member of the Royal Navy may tend to indicate that:
>
> (1) the same witness previously failed to disclose misconduct by himself or some other person, or
>
> (2) the same witness gave false information on a previous occasion in relation to such misconduct,
>
> then I undertake that the Royal Navy will not use the evidence of that witness to the Inquiry in any administrative action against that witness where the nature of the misconduct alleged is the failure to give a full, proper or truthful account on that previous occasion.

Yours sincerely,

Mark Stanhope

ARMY

General Sir Richard Dannatt KCB CBE MC ADC Gen
Chief of the General Staff
Ministry of Defence
5th Floor, Zone M,
Main Building, Whitehall, London, SW1A 2HB

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Fax	020 7218 2340	Fax	(9621) 82340

GS/06/06 (CGS)

The Rt Hon Sir William Gage
Chairman
The Baha Mousa Public Inquiry

19th December 2008

BAHA MOUSA INQUIRY - PROVISION BY THE ARMY OF UNDERTAKINGS IN RESPECT OF FUTURE ADMINISTRATIVE AND DISCIPLINARY ACTION AGAINST WITNESSES

In a discussion with the Permanent Secretary last week you indicated your belief that an undertaking in respect of possible administrative action against witnesses will assist you to fulfil your terms of reference.

In recognition of this, I give the following undertaking:

If written or oral evidence given to the Inquiry by a witness who is a former or current member of the Army may tend to indicate that:

(1) the same witness previously failed to disclose misconduct by himself or some other person, or

(2) the same witness gave false information on a previous occasion in relation to such misconduct,

then I undertake that the Army will not use the evidence of that witness to the Inquiry in any administrative action against that witness where the nature of the misconduct alleged is the failure to give a full, proper or truthful account on that previous occasion.

From: Air Chief Marshal Sir Glenn Torpy GCB CBE DSO ADC BSc(Eng) FRAeS FCGI RAF

ROYAL AIR FORCE

Chief of the Air Staff

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CAS/10

The Rt Hon Sir William Gage
Chairman
The Baha Mousa Public Inquiry

18 December 2008

Dear Sir William,

In a discussion with the Permanent Secretary last week you indicated your belief that an undertaking in respect of possible administrative action against witnesses will assist you to fulfil your terms of reference.

In recognition of this, I give the following undertaking:

If written or oral evidence given to the Inquiry by a witness who is a former or current member of the Royal Air Force may tend to indicate that:

(1) the same witness previously failed to disclose misconduct by himself or some other person, or

(2) the same witness gave false information on a previous occasion in relation to such misconduct,

then I undertake that the Royal Air Force will not use the evidence of that witness to the Inquiry in any administrative action against that witness where the nature of the misconduct alleged is the failure to give a full, proper or truthful account on that previous occasion.

Yours sincerely,

Glenn Torpy