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# Session One: Using Forensic Medical Evidence in Court

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## Session One: Using Forensic Medical Evidence in Court

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## SESSION ONE: USING FORENSIC MEDICAL EVIDENCE IN COURT

### Opening Remarks from Professor Duarte Nuno Vieira, Session Chair\*

Good morning, my name is Duarte Vieira. I come from Portugal—a very cold Portugal, at this time it is not usual for us—but here is much better. I want to begin by saluting all of the participants in this session, to salute all the speakers in this first session, and to salute the organizers of this conference and, of course, congratulate them for choosing this very important topic, congratulate the Washington College of Law and the International Rehabilitation Council for Torture Victims for this excellent organization.

It is the end of a three-year project, as has been said, and I think we all have so much. Our thanks to the International Rehabilitation Council for Torture Victims (IRCT) for the excellent work they have been doing. No one has dealt today about the fundamental importance of forensic evidence in the investigation of torture and other cruel inhuman treatments or punishments. We all know that forensic evidence is fundamental in many areas—for battling impunity, for the redress of survivors, for compensation under the forms of restitution, for rehabilitation, introduction of reforms, for the official public acknowledgment of these situations, and of course, for preventing and ending ongoing abuse.

As stated in the program conference, documentation makes it difficult for perpetrators to deny their crimes, and especially puts tremendous pressure on the government and on states concerning their obligations under international law to both bring perpetrators of torture to justice and provide reparations to victims. We know that today we have many international bodies, many organizations that are



involved in the investigation of torture, but of course, there are always difficulties in the investigation of torture. Torture always takes place behind closed doors and without witnesses. States and authorities tend to deny the practice of torture. Methods of torture are, every day, increasingly aimed at leaving no visible marks. The worst scars are usually on the mind. Victims of torture are usually kept in isolation, far from families, far from lawyers, far from doctors, at least while the visible marks are still present. To compound the issue of identification of torture, many victims of torture tend to deny the practice of torture because they fear reprisals—reprisals on themselves, reprisals on their families. However, a well-trained forensic expert is able to identify possible lesions and signs of abuse, even in the absence of specific complaints. We will see that during this morning's sessions.

The documentation of signs of possible abuse, both physical and psychological, is one of the competencies of these forensic experts, and they will also be able to interpret this evidence and deduce possible causes, knowing that the absence of evidence is not always the same as the evidence of absence. We will listen to forensic experts this morning that will discuss the fundamental importance of the forensic examination and forensic reports. We will also see how their application in courts will be fundamental to hold perpetrators accountable and to provide reparations to the victims. We will first hear from Professor Hans Petter Hougen from the University of Copenhagen's Department of Forensic Medicine, who will discuss forensic medical expertise in torture cases.

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## Remarks of Professor Hans Petter Hougen\*

Thank you, Duarte, and it is a great pleasure for me to be here today with all of you I know, and all of you that I hope to know during these two days. It is good to be among friends. I will talk about medical expertise in torture cases. The content of my presentation will be about sequels to torture, the Istanbul Protocol,<sup>1</sup> and the Minnesota Protocol.<sup>2</sup> Then, I will share a few words about our project, the Forensic Evidence Against Torture (FEAT) Forensic Expert Network, and will then give my thoughts on the forensic expert in court.

### SEQUELS TO TORTURE

Most of us have scars on the body, from falling down stairs, falling while playing football, falling off a bicycle or whatever. Looking at scars from whipping—this is a case from Sudan some years ago—you see the dark stripes on the back, which present the typical appearance of scars from whipping. Cigarette burns: We have seen these kinds of lesions in many torture cases. They heal up with round scars, but we also have to be aware of the fact that burning can be done for ritual purposes. I show you a photo of scars that are not after cigarette burnings, but after cigar burnings. They originate from one of the Caribbean islands as ritual, and *not* torture. Clearly, the forensic pathologist has to know something about the rituals and customs in the country or the region in which he or she is working.

This is phalanga—beating of the soles of the feet—a torture method used for many centuries throughout the world. The picture to the left is from Nepal, and the picture down at the right is from Spain during the Franco period, from the early seventies. I have seen cases from Latin America to the Far East. Sequels to phalanga can be seen years after. You can see here that there are several small scars under one foot—you can see the wrinkles under the non-affected foot, but not under the other. Many of the victims of phalanga have walking difficulties, which can persist for the rest of the life. Here we can see a young man from Rwanda with scars after chopping. In knowing what was occurring during the genocide in Rwanda, specifically that a frequent method of killing or torturing was chopping with machetes, then it is obvious that these scars are the result of chop wounds.

These next wounds are *not* torture, however. They are self-inflicted wounds. We see these types of scars in many of the Western countries, where young people with psychological



problems cut themselves. We call them “cutters.” This is not torture, and we have to be mindful of the fact that not all lesions are the result of torture. To recognize this, we must know something about the society in which we are working.

This is a picture painted by a local person from Burma (Myanmar) who suffered various forms of torture and was a victim of forced labor. It will be interesting to see how Burma develops, because it still has a long way to go to real democracy, especially in the eastern part of the country. There, the infrastructure is very poor, and the military has the habit of invading the villages, taking all the males away and burning the villages. The military then forces the men to work for them, carrying heavy weights, for instance. And as you can see here from this picture, the treatment is not very nice. So when a person presents deep abrasions of the back and shoulders, it is very likely, maybe even obvious, that he has been a victim of forced labor by having served as a carrier of heavy goods. If he presents himself a long time afterwards, with shoulder and back scars, it is quite obvious, knowing the context, that this person has been forced to carry heavy burdens for the military.

This photo is from a trip to Togo a couple of years ago, when we found this person in a remote police station. He had been accused of stealing two chickens, and to speed up the process of obtaining a confession, the police whipped him. Here we see stripes on the skin, where the superficial parts of the skin have been lost during the whipping. Sure enough, in the same police station, we found a thin tree branch which was used for whipping the detained persons. Here are photos from another facility in Togo: this person had the striped skin hematomas and another

\* Hans Petter Hougen is professor of forensic medicine at the University of Copenhagen and chief forensic pathologist of East Denmark. Professor Hougen has completed forensic expert assignments for the United Nations, Organization of American States, the International Committee for the Red Cross and various national authorities as well as several NGOs with experience from more than 15 different countries during more than 25 years.

person at the same facility had skin lesions with small hemorrhages on the side and pale skin in the middle. Both men had been beaten, and sure enough, we found a stick in the facility, and the local police then admitted that it was occasionally used, when the detainees did not behave “as they should.”

### THE ISTANBUL AND MINNESOTA PROTOCOLS

Next, I would like to say a few words about the Istanbul Protocol, which is an essential instrument used when we document torture. The Istanbul Protocol is comprised of different chapters: legal standards, ethical codes, legal investigation of torture, general considerations for interviews, physical evidence of torture, psychological evidence of torture, and annexes like laboratory schemes, drawings, et cetera.

Here is a photo depicting the typical situation of a torture documentation interview. Note that the doctor and the interpreter are sitting on the carpet, while the torture victim is not. This is not good practice.

The Istanbul Protocol provides a checklist for the different parts of the body that have to be examined, and also suggestions for specialized diagnostic tests regarding the situation. The Istanbul Protocol also has a chapter on psychological evidence of torture. Psychological evaluation is essential and a torture victim examination that only includes a physical exam is incomplete. Torture does not necessarily leave scars on the body but almost always leaves scars on the mind. The Protocol includes special considerations about Post-Traumatic Stress Disorder (PTSD), which is a psychological condition seen in a lot of torture victims, but that is *not* only found in torture cases. PTSD is a reaction to extreme stress, and we know that torture is a severe psychological stressor. Torture may be physical or psychological, and is often a combination of the two.

Then there is what I have talked a little bit about already, the context: political or cultural differences. The psychological consequences of torture may be a range, from nil to invalidating psychoses. In most cases, there are psychological consequences to torture, even though in many cases you may not see any physical signs of torture. There will almost always be some psychological sign of the torture, and preferably, specialists should conduct a psychological or psychiatric evaluation. However, I know very well that we do not have psychiatrists all over the world; not every village in every country has its own psychiatrist or psychologist.

These are some drawings made by torture victims where they try to express how they feel after torture. This person has been submitted to phalanga. In his work, you can see the beating of the foot soles, and therefore you see his feet are big, swollen. Hooding, where victims are hooded or blindfolded, is a very common act during torture sessions. The victim in this photo is “locked in his own mental prison” where it is difficult to get out and to connect normally with others. Stripping a victim naked during torture sessions, with a lot of eyes looking at her, is a

humiliation tactic. You can see the same tactic here, where the victim is naked and highlighted by spotlights. It is a tremendous humiliation to be naked when you do not want to be naked.

The Minnesota Protocol covers the process for autopsies of those who do not survive the torture or are victims of extralegal executions. It is part of the UN Manual on Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions, which has a legal section, and also contains a Model Autopsy Protocol and a Model Protocol for Disinterment and the Analysis for Skeletal Remains for forensic anthropologists.

### THE WORK OF THE FORENSIC EVIDENCE AGAINST TORTURE (FEAT) NETWORK

Brita Sydhoff has already mentioned the Forensic Evidence Against Torture (FEAT) Forensic Expert Network, which was established by the International Rehabilitation Council for Torture Victims (IRCT) and my department at the University of Copenhagen. There are two main types of networks: ad hoc networks and “spider web” types of networks. In this context, IRCT is the spider. As we have already heard, members of the forensic expert group come from many different countries. The network has dealt with several cases during this project period, over the last two and a half or three years. This is the Khaled Mohamed Saeed site, a case that the next speaker will discuss, and in which our network also intervened.

This was a case that was brought before the Inter-American Court of Human Rights, where two of the members of our network made their forensic study available and made a report to the Court. Our network’s efforts was one of the main reasons why the state of Ecuador had to pay compensation to the family of this person who had died in a hospital and had not received the care that he was entitled to. The Court ordered the State of Ecuador to compensate the family, to change the law in this area, and to publish the results of the verdict of the Court. The Court will supervise the implementation of the sentence.

Then there was the UK military hooding case in Iraq. In this case, brought through the court system in the UK, our network intervened, made a statement,<sup>3</sup> and published a report in the *Journal of Torture*, which you can see up here afterwards if you are interested. As a result, also of our efforts, hooding is now banned in the UK.

The network has also made an operational manual for medical team missions, which has now been translated from English to Spanish and French, and a Portuguese version is coming out soon, so it will be in some of the main languages. Our network also promotes human rights work at conferences, including international forensic conferences, the most recent of which was in Madeira last year.

So what have we learned in this network? Well, the network operates fast: with email, you can achieve great results in a day or two. Network members all have experience in their field. Many of



the network members have influence, especially locally, and some also have international influence. The network is taken seriously. But, the network members are all busy because we have other work, as well. Someone has to take the lead in every specific case, and this to say that someone also has to do the hard work. The network as all networks, has to be activated, and the network needs a secretariat, so the IRCT is not only the spider in the middle of the network, but is also the network's secretariat.

FEAT has sent forensic missions to a lot of different countries, including Afghanistan, Bahrain, Cambodia, Colombia, Georgia, Iraq, Israel, Peru, Philippines, Russia, Thailand, and Venezuela. For example, here is a photo of Cambodian tribunal trying the Khmer Rouge for abuses it committed in the 1970s. This is a picture made by one of the survivors, depicting his leg in shackles, similar to many of the prisoners. This picture is from a museum, where you can see the shackle. This is a scar on a victim's ankle. Scars can be detected even some forty years after the torture or maltreatment. It is necessary to know what happened in the country, because without other information, this is just an isolated scar that says nothing. However, combined with all we know, this could very well be a scar that is the result of an ulcer resulting from shackling. Thousands and thousands of the victims were tied by their arms during the torture or before being killed. Here you can see the strings—these are

hammock strings. Here again you can see a scar from forty years later, which fits very well with what we know of the country's human rights violation history.

The last thing I will talk a little bit about is the forensic expert in court. We have several lawyers present and we know, from our different countries, that forensic experts are called to court, in some countries more than others. On the international level, especially in human rights cases, some of us think that we should be used more. So why is forensic expertise necessary in court? Forensic pathologists are specialists in trauma documentation, and are also specialists in trauma interpretation. We can interpret scars, and we are impartial. We are not the patient's doctors, and we are not the police's doctors. Forensic pathologists know how to write a report, and are accustomed to going to court, while not all doctors are used to going to court. Forensic pathologists can explain what lawyers need to know about torture, at least the medical part of it. Forensic pathologists know that torture often leaves no physical marks, and can explain a case in plain words because we do not speak "doctor Latin," at least not all the way. We are used to explaining what we find to people who are not doctors. And finally, the words from an expert count. So, with that, and the Little Mermaid from Copenhagen, I would say thank you for your attention.

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## Remarks of Mostafa Hussein\*

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### THE CASE OF KHALED SAID

Thank you very much for having the time to listen to the Khaled Said case. Khaled Said is an Alexandrian, a 28-year old man, who died minutes after two secret policeman approached him. They smashed his head onto a marble shelf of an Internet café. They beat him in broad daylight in front of everyone. They smashed his head on a marble shelf in the café and then took him outside and smashed his head again. Outside in front of everyone, he was crying for help, he died minutes later. Days later on the Internet his lawyers uploaded two images of a bloody disfigured head, the one you see now. This created immense uproar online and people decided to protest because there were already known cases of torture that had been happening in Egypt for a long time.

There were many online protests on the Internet, and many groups formed to share information about how people would organize and take to the streets. These protests were met with arrests and further brutality. The Egyptian government decided



to tell us about the circumstances following Khaled Said's death and, in a published statement, said that the two secret policemen basically did not touch Said, they only tried to stop him so that they could search for drugs. They said that when the two

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\* Mostafa Hussein is finishing his postgraduate studies at Ain Shams University and has worked previously at the El Nadim Center for Psychological Treatment and Rehabilitation of Victims of Violence.

policemen approached him he swallowed a wrap of hash and he choked and died. This statement was followed by other threatening statements from the Ministry of Interior. Basically, they just wanted the case to die. The first forensic report that appeared backed the story of the state and was the same story that the two secret policemen had told. Immense public pressure and requests by the family and the lawyers forced the public prosecutor to take the case to further autopsy. A second report was published days later after an autopsy was done at the gravesite for an hour or so; this single page report confirmed the earlier circumstances and the earlier report.

Out of the past 30 years of similar cases, the Egyptian government, the state security officers, and the former Minister of Interior are now being tried along with other generals for only 18 days of those 30 years. The Egyptian government had 30 years of an emergency state. This emergency state enabled the police unlimited powers to arrest and persecute with impunity any individual. After years of work, international and local organizations find torture in Egypt to be systematic and basically a state policy. Article 126 of the Egyptian Criminal Code, which defines cases of torture, is incompatible with the international definition of torture and several requests for the previous parliaments to sign and ratify the optional protocol were refused. The Egyptian government continued to resist any form of prosecution or trial against any of their police officers. Some of the youngest officers were tried only after immense pressure, but they only served as scapegoats and received light sentences.

Let us go back to the first report produced by the forensic authority and I will quote a bit from it. Essentially, the section described under item one is trauma resulting from collision with solid objects or objects of whatever nature those described under item two are, friction of trauma resulting from collision, and friction of surface body or bodies of whatever nature. Similar to what occurs from falling to the ground, those described under the above injuries are minor and not the cause of death. We believe that the death was the result of aspiration asphyxia as a result of blockage of air passages by the packet that was found stuck in the area of the oropharynx in accordance with the prosecution's memo. The second forensic report that I told you was done at the gravesite and was basically just the single page essentially said that the second autopsy of the body showed the presence of injuries in accordance with what has been shown in the previous forensic report: injuries as a result of collision with a solid body or bodies of whatever nature. There is nothing to exclude the possibility that the injuries could be the result of beating during the attempt to control the victim. These injuries are generally minor and do not result in, nor have they caused, the death. Additionally, analysis of the bowels of the deceased found the substance of Tramadol (an opiate narcotic) listed in the narcotics schedule as well as traces of hashish metabolism, which is a cannabinoid. As the attached pictures clearly show, the photo of the bloodied face and neck was actually taken after the autopsy.

The El Nadim Center which was established in 1993 as a rehabilitation center for victims of torture and is part of the IRCT network decided to take both reports and photographs available to the international forensic experts. Actually, before that, we tried to work with local experts, but there was immense public pressure because of the case's high profile that some of the local experts decided not to look at the documentation or provide extra (or any) reports on it because of the political sensitivity of the situation. Thus, the Nadim center contacted the IRCT, which commissioned Dr. Duarte Nuno Vieira and Dr. Jørgen L. Thomsen, both forensic pathologists. They have written a report and I have a summary of the items mentioned in that report. Essentially, it criticized the first two reports for failing to comply with international standards for forensic autopsy. As to the first report, it concludes that diagnosis of death by asphyxia is not sufficiently supported by the data provided, and that most of the aspects described are nonspecific and inconclusive of their own. It goes on to say that the photographs supplied are not clear and do not fulfill the minimum requirements of forensic photography.

The second report has the same weaknesses and deficiencies as the first and is far below the minimum international standards accepted for forensic autopsies. Both reports describe that the subject was clearly subjected to physical aggression, but they did not take into account that the secret policemen said otherwise or that there were other witnesses who supported the claim. There is much worry over the standard practice in the country. The standard practice of forensic evidence or forensic pathology in the country was also criticized. The conclusion of the report was that the deficiencies, inadequacies, and incongruence of the previous reports and autopsies performed on the cadaver of Khaled Said clearly make it impossible to reach any firm conclusions about the circumstances surrounding his death, including the cause.

Suddenly, the medico-legal authority in Egypt was under intense scrutiny and accused by everyone of being a part of the regime—a state tool. It didn't even help when the chief forensic examiner appeared on TV. He appeared on TV late in the case, after the revolution, and he proudly stated that he was chosen by the state security department for his position. Luckily, he was fired soon after this statement. The case of Khaled Said is a very sensitive one for the medico-legal authority. They still deny that the state put any pressure on them to write such reports, but they concede that there is an incredible lack of experience and tools to write proper professional reports that meet international standards. The medical authority uses tools and has guiding legislation that has been there for fifty years and has never been changed or amended. One example is that the forensic authority does not have sterile swabs for victims of sexual torture or sexual abuse.

The court in October of last year, after a very lengthy judicial process, decided to hand down seven years in prison to the two secret policemen. This was not because of torture or killing, but rather because of the misuse of force, the abuse of

law enforcement powers, and something called bodily harm and bodily torture. This is not exactly the torture that happens as legally defined by officials, but torture that can happen between two normal citizens. This sentence wasn't well received publicly in Egypt because people were hoping for either the death sentence, which is still in place in Egypt, or at least 25 years in prison for both of them. The court discarded the forensic reports provided by the international expert and discarded forensic reports made after the chief forensic examiner was fired. These reports were completed by local university experts in Egypt. This result stems from the fact that the court system in Egypt considers itself the supreme expert on any case.

It is unfortunate to look at it this way, but if we look at the bigger picture, the Khaled Said case was the catalyst for younger Egyptians to overthrow Mubarak. He was thought of nationally as a martyr and now we have thousands of Egyptians willing to fight for dignity and human rights. This final image was taken on the 6th of June 2011. This is the anniversary of Khaled Said's death and this is actually the Ministry of the Interior and protesters spraying graffiti of Khaled Said's image on the walls of the ministry of the interior. The prosecution has filed for a retrial to the Court of Cassation. We still do not know what is going to happen, if there will be a retrial or not, but hopefully there will be. Thank you very much.

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## Remarks of Professor Juan Méndez\*

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### INTRODUCTION

Thank you, Duarte. Thank all of you for being here, and I especially want to thank the law school and the International Rehabilitation Council for Torture Victims (IRCT) for inviting me to speak at this very timely and important conference. As many of you know, the Special Rapporteurship on Torture is one of the special procedures of the United Nations (UN) and is a very well-established part of the machinery of human rights protection that the UN has set up. In fact, the Rapporteurship was one of the earlier thematic mechanisms. It has existed for about 26 years. But more important than that, it has previously been occupied by four very distinguished European jurists that have set a very high bar for what I have to do. At the same time, I see it more as a platform than as a challenge. It does make one's work a lot easier when you can say, "well, this is the way this has been done for 25 years." In that sense, the four jurists that have preceded me have really done excellent work.

But you should know also that the United Nations has been dedicated to combating torture for a long time. Beyond the Rapporteurship, there is the Committee Against Torture



that is now chaired by Dean Claudio Grossman. There's the Subcommittee on the Prevention of Torture that is part of the Optional Protocol to the Convention Against Torture,<sup>4</sup> and our staffs try to coordinate our work as much as possible. Coordination is not easy, but the exchanges have been very fruitful, at least for me. I've been able to learn from the Committee Against Torture and the Subcommittee on the Prevention of Torture, and we regularly meet and exchange views, and even plan to maximize the possibilities for each of the bodies.

Additionally, we have been working with regional mechanisms that have been set up to deal with the same topics, the Inter-American Commission on Human Rights, which is fortunately based here in Washington as well. They have a Special Rapporteurship on the Rights of Persons Deprived of their Freedom. They have also been doing excellent work, and have coordinated and exchanged views with us. It is difficult to

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anticipate, but we are also even planning on doing some joint projects as well. That is not limited to the Western Hemisphere. As you know, Europe has had for a long time a Committee on the Prevention of Torture (CPT) under the Council of Europe. We have also started to coordinate with them; I had a meeting in Geneva with them last December, but even before coordinating, I was very pleased to see that more or less coincidentally with when I issued a report to the General Assembly on Solitary Confinement, the CPT actually issued its own report to the Council of Europe and called for the abolition, or at least strict regulation, of solitary confinement in Europe. Serendipitous, certainly, because we had not discussed it, but it is good to know that we support each other and can draw on a body of prestige like the CPT for some advances we propose in international standards. More recently, in January, I also participated in an attempt to coordinate with similar mechanisms of prevention of torture that have been set up in the African Commission on Human and Peoples' Rights. So this is all to say that there is a coincidence of interest in preventing torture, and in documenting and providing evidence for torture, and the reason is self-evident. Despite all these efforts, torture continues to be so prevalent and so widely used for various reasons that we just cannot let up our guard. We may have thought some time ago that complete abolition of torture is around the corner, but unfortunately it is not the case. There is much more that needs to be done, and much more imagination has to be displayed as we make the prohibition of torture more effective.

## THE DEFINITION OF 'TORTURE' IN INTERNATIONAL LAW

For our purposes, I'd like to start with the definition of torture in international law. I think that some of the definitional challenges call on the medical profession and forensic sciences to assist us in the task of documenting and proving torture. As you know, the definition calls for "severe pain and suffering." One of your colleagues, Dr. Pounder, has written that "severe pain and suffering" is not a medical term, it is a legal term. I suppose he's right, but I also have to say that legally, it is also a very complicated standard. It is difficult to know when you cross the line of severity that converts what is otherwise cruel, inhuman, and degrading treatment into torture. Because it depends both on subjective and objective factors, the severity threshold is very difficult to establish, and much more difficult even to document. Nevertheless, it is there and we need to have it in mind when we decide that a certain practice, a certain technique, a certain assault on human dignity or on human integrity constitutes torture. For that, we need the assistance of the medical profession. The definition also says that the severe pain and suffering can be either physical or mental, and establishing when pain and suffering of exclusively mental nature has been reached, is perhaps even more complicated than being able to find traces of physical suffering that can still be borne by the body. But we also have to remember that perhaps there is a difference in degree of cruel, inhuman, and degrading treatment, and torture, but they're both prohibited, they're both absolutely forbidden. They have somewhat different legal effects once you decide that something is one or the other, but the fact that something may not reach

the level of severity that we call torture does not mean that the conduct is permissible. Sometimes that is forgotten in this work.

Then there are some forms of treatment that do not even reach the level of severity that is required for cruel, inhuman, or degrading treatment. Being able to determine that is very hard to do. In my mind, I am guided at least by jurisprudential decisions by the European Court of Human Rights in a case called *Selmouni v. France* in which, at least as guidance, the European Court says that any force applied on a detainee that is not justified by the detainee's own conduct and proportional to that conduct is impermissible, or a violation of Article 3 of the European Convention on Human Rights.<sup>5</sup> I think that is not easy to determine, but at least it gives us good guidance to tell authorities, "You're not free to use force, you can only use force under very limited and very specific circumstances; and once you use it, then you still are bound to exercise that force within certain boundaries."

I am not going to discuss in the definition questions of authorship. As you know international law prohibits torture when practiced by state agents, and there are circumstances in which that line is difficult to draw, but in general I think that anybody who is aiding and abetting the state and committing torture, qualifies as a state agent. Harder are questions of non-state agents, clearly, and even anti-state agents, rebel groups, etc., but I think that issues of torture and cruel, inhuman, and degrading treatment in those circumstances are covered well enough by international humanitarian law and the laws of war, and we can act on them. Although I am mostly there to address states in specific situations, I do not think the legal framework under which I operate would prevent me from addressing non-state actors in those kinds of cases. But of course there are also more gray areas that my predecessor especially has explored from time to time. That is the question of treatment in mental institutions that are not state institutions, but are completely private. I acknowledge that is kind of a gray area, but it is one that, like my predecessor, it is one I do not want to simply walk away from, and I would like to find ways of doing my work in creative, but also in effective, ways. Besides, quite frankly, even with state mental hospitals, there is so much to do that I do not have to worry too much about having nothing to say.

The definition also talks about the purpose. The purpose for torture has to be either to obtain a confession or for punishment (the definition of cruel, inhuman or degrading treatment does not require a specific purpose). I think those words are broad enough that they do not create too much of a problem in addressing specific situations. In fact, many times, torture is used for both purposes—both as a means for gathering evidence, but also as a punishment. By its very nature, torture is punitive and therefore, whether or not interrogation takes place simultaneously, the treatment itself qualifies as either torture or cruel, inhuman, or degrading treatment.

Finally, the definition excludes pain and suffering that is incidental to a lawful sanction. There, the challenges we have

to deal with include, for example, the death penalty and particularly conditions on death row. My predecessor and I have pretty consistently looked at conditions in death row and decided that by themselves they constitute cruel, inhuman, and degrading treatment, and, in some cases, torture. It is also important to note that there is very little room for states to impose the death penalty and still not commit cruel, inhuman, and degrading treatment by the very nature of the time that has to pass between conviction and execution, and by the very threat of execution. Similarly, it is difficult to conceive of a mode of execution of capital punishment that does not inflict a level of pain and suffering that is itself severe enough to constitute cruel, inhuman or degrading treatment or even torture. With the Special Rapporteur on Extrajudicial Execution, Christof Heyns from South Africa, we are considering joining forces to document and research questions of whether the death penalty under any circumstances can be imposed without violating the prohibition on arbitrary executions and on torture or cruel, inhuman, and degrading treatment.

This question of what is incidental to a lawful sanction came up in an important way when I issued the report about solitary confinement. In many countries, solitary confinement is used for different purposes, and without any regulation of it. But in most cases, it is used pursuant to either prison regulations that allow it for disciplinary purposes, or as part of the form of punishment, in the form of the execution of a lawful sanction. I think it behooves us to look at what point even a lawful sanction is impermissible on grounds of cruelty. Just the fact that it is regulated and sanctioned in procedural codes or in prison regulations should not be enough to decide that therefore it cannot be prohibited by international law, if in fact it produces some measure of severe pain and suffering. In this case the suffering would be almost always mental, but it could be severe enough that in fact crosses a threshold into what international law forbids. I think those are the challenges of what we have to do; and I have to say that I am very encouraged by the reception that my report on solitary confinement has had because there is a lot of interest in developing the ideas further. I have to say, of course, before you go and read it, that it was just an attempt to throw some ideas out into the open. It is based on scientific research to some extent, but obviously it is scientific research read by a non-scientist like me, so you have to understand that I may have made serious mistakes. It was more the sense of a need to foster more scientific research about how solitary confinement really operates on the brain, mind, and body; to see at what point, even though you do not see marks on the body, pain and suffering of a prohibited nature has happened.

### THE INTERNATIONAL LAW OBLIGATIONS OF STATES CONCERNING TORTURE

As you know, states are obliged to do a number of things under international law when it comes to torture. First and foremost, they have to criminalize it under domestic law, and you'd be surprised that in some states, criminalization is not as clear and not as effective as it should be. In our most recent trip

with Duarte, we went to Kyrgyzstan, and the law in Kyrgyzstan considers torture a relatively lesser offense. That means, among other things, that nobody spends any time in prison and also that, either by law or prosecutorial discretion, the cases are pursued only if the victim is interested. You can imagine how interested a victim can be if they have to pursue charges against somebody who is still in authority and carry the burden of activating the prosecution, bringing the evidence, and all of that. That is a very simple legal question; Kyrgyzstan just has to change the law, period. It has to provide for a definition of torture and penalty that is commensurate with the gravity of the crime, and that is basically an obligation that Kyrgyzstan acquired when it signed and ratified the Convention Against Torture. There is a bill pending in the Kyrgyz parliament to do just that. It still needs some work, but it is a relatively easy matter.

Much beyond that, even in cases where torture is criminalized appropriately, in practice, the same effects that I just mentioned regarding Kyrgyzstan are still present. In practice, prosecutors rely on whether the victim is interested in pursuing a case or not. Many countries come back and say, "Well, we didn't get any complaint here, that is why we didn't investigate," as if they didn't know that torture is a crime that has to be prosecuted *ex officio*, and that there's ample authority for it in decisions by international courts and international bodies. But the practice is, however, that that is the way prosecutors do their work just about everywhere. They will prosecute, but only if there is enough interest and activity by the victim. That puts the victim in such a difficult situation that unless we are able to assist the victim with good forensic evidence, for example, it is going to be very hard to get any traction on this very important obligation to investigate, prosecute, and punish torture. By the way, the obligation to investigate, prosecute, and punish, is generally applied to crimes against humanity, that is: serious acts of violence perpetrated in widespread or systematic patterns, and to war crimes. But torture is unique in international law because even a single episode of torture triggers the obligation from the state to investigate, prosecute, and punish. Therefore, we need to generate conditions under which this obligation can be effectively discharged. In my experience, limited as it is, one of the main conditions that is lacking is the ability to prove or to provide evidence to document the fact that torture has occurred. By and large, torture victims are left to their own devices, so that when they come to a judge or a magistrate or a prosecutor and they say they have been tortured, the burden of proof shifts to them, and I'm saying this *de facto*, not *de jure* obviously. But it shifts to them to show they have been tortured, otherwise it is very easy for courts and prosecutors to dismiss the complaint on the basis of lack of evidence. It is at that point where sometimes we get into more egregious violations because people are not even allowed to have independent forensic evidence, and they rely on the testimony of medical doctors that are employed by the police or by the penitentiary, and that have a stake in not finding that torture has happened. Quite frankly, as you know better than me, it is a lot easier than that. You just wait and make sure that traces in your body disappear, and then you bring the person before the judge when it is too late anyway to do a serious investigation.

When Duarte and I go to places of detention, we always recommend that the very least a state can do is organize a seriously independent forensic service. The service should operate from the beginning of the detention so that it can actually have a meaningful role in determining whether torture has occurred, is occurring, or not. Under those circumstances, your services have obviously a great effect in allowing victims to prove torture. In addition, as you well know, it has an enormous preventative effect because if the torturer knows that a lawyer, a prosecutor, a judge, but especially a doctor, is going to come around and determine what has happened, by experience we know that factor alone is going to stay the hand, or at least make them think twice, before practicing torture.

I also think that all of these standards in international law depend on the assistance of forensic services not only to prove torture when it happened and therefore to exclude evidence obtained under torture, or to generate the obligation of the state to investigate, prosecute, and punish, but also to obtain reparations. Providing remedies and reparations is another cardinal obligation of the state when the time comes to decide whether and to what degree torture has created damages that have to be compensated and repaired by the state. We also need the support of forensic science in the determination not only of whether torture has happened, but on the effects on the life, on the emotions, on the prospects of future employment, on the life project, as the Inter-American Court on Human Rights has said from time to time, of the victim. That obviously depends on many subjective factors, but enough objective factors exist that we need the support of doctors, psychiatrists, psychologists. We know that we have used them to some great effect in the Inter-American Court of Human Rights; some of you have participated in those determinations very effectively. Your reports to the Inter-American Court of Human Rights and your testimony before the court have made a difference, not only for the victims, but also for the standing, the weight, and the persuasiveness of the decisions of those bodies.

I also think that one of the obligations of the state is to prevent, and among other things, to prevent by developing and building capacity in the institutions of the state to prevent torture from happening in their first place. There again, as you know better than me, your services are greatly effective. Many states use a variety of excuses for why torture happens and one of them, the first one that I was confronted with the first time I spoke to the Human Rights Council, is that they do not have the capacity to do serious scientific crime investigations. I think it is important to persuade states, or at least eliminate the excuse, that forensic sciences can be very professional and scientifically sound, and they do not have to be so expensive that they are completely out of the reach of poor countries. There is an extensive ability to do not only north-south but also south-south exchanges of technology and experiences, and we have to foster that. As I said, in most cases it will be more a way of taking away an excuse. In some cases it is also true that we are dealing with states that have very limited resources, and if we can persuade them that the technology is not completely out of reach for

them, that they can develop their own capacities by being willing to accept international cooperation and NGO cooperation, I think we can prevent cases of torture from happening in the first place. Unfortunately all of what I have been saying is still not going to be enough: we have to fight the struggle in the court of public opinion as well.

### CONCLUDING THOUGHTS: DIFFICULTIES IN ERADICATING TORTURE

I would like to finish by just adding some impressions I have as to why torture has been so difficult to eradicate. Unfortunately, I think a certain tolerance for torture has gained ground in the last ten years or so since 9/11. The public at large in most countries has been more or less conditioned to believe that torture is inevitable, that torture is a fact of life, that torture happens because there aren't too many other ways to keep us safe. Therefore, we do not like it, but we look the other way because if it makes us safe, then we might as well just live with it. Of course we do not live with it, it is the victims that live with it. But I feel that that kind of tolerance that has been fostered in the last ten years especially though not exclusively by Hollywood, is perhaps the more significant barrier that we have to fight against torture. I think that your services in demonstrating the effects of torture can go a long way in eliminating this sense of the "abstract" nature of torture. In daily life, people talk about torture as if it is something ugly, yet we do not want to get into the details. But it is getting into the details that is going to make a difference—in our moral sense of whether we can stand by and let it happen, or whether we should actually do something to eliminate it.

Another excuse is lack of resources and impatience with results. Especially policemen always say that the public wants them to solve crimes and to get to the bottom of these investigations, and they just do not have time to do scientific investigations. I think forensic sciences can show themselves to be so much more effective in determining with much more rigor whether a crime has been committed and by whom that I think forensic sciences can become a serious alternative to the brutality of torture in the investigation of crimes. If we can demonstrate that this is the real, the proper, the morally correct, and the most effective way of investigating crime, I think we will take away another excuse for why torture continues to happen.

We also have to reckon with the excuse that torture happens because it works. We know it is not a question of saying that people who confess will always confess untruthfully. Of course sometimes they will say the truth. But the question is not so much first, whether it is always effective, whether especially in the ticking bomb scenario, there's really no reason why we should accept that somebody who is tortured will always actually say exactly where the bomb is going to explode. That person could be so determined to let the bomb explode, that he or she will withstand torture and the bomb will explode anyway. In the meantime, because we do not know who it is, we'd probably have to torture a hundred people, but still not be able to stop the



bomb from exploding. And besides, the ticking bomb scenario cannot justify the use of torture on a routine basis when there is simply no bomb about to explode – which is the way most torture happens in real life. So those arguments against the ticking bomb scenario are logical, though unfortunately they do not carry a lot of sway with the public at large, but I think it is something we need to say from our own professional experiences.

We will be even more effective if we can demonstrate the price that societies pay for engaging in widespread torture. You know it from your experiences in many parts of the world, and we lawyers know it because we have seen it in many different parts of the world as well. Torture has such an offensive effect not just on a number of people who may be innocent, but on their families, on the society at large, and on the institutions and the members of the institutions that take sometimes justified pride in their belonging to an institution, but then all of a sudden have to reckon with the fact that the institution itself is asking them to perform morally repugnant techniques on other human beings. With your experience, we can work on the larger picture of what price societies pay for engaging in widespread

or systematic patterns of torture, even if they may gain some ground very momentarily on obtaining evidence of crime. Of course, *esprit de corps* and silence among friends will always interfere with serious investigations. There again, when the evidence is strong, it will tend to break down those barriers of conspiracies of silence that will always happen.

There are obviously many other reasons why torture prevails, but my final message would be to try to look at the services of the forensic sciences and medical practitioners, both in the small and in the large picture. That is, on documenting specific techniques and evidence in helping individual victims to overcome the barriers to effective remedies of different sorts, but also in educating the public at large about what really happens when torture is allowed to go on. Obviously, last but certainly not least, I think you can have a great effect on the fellow members of your profession around the world because the more we get the medical and scientific and psychiatric and psychological profession engaged in the struggle against torture, the harder it will be for governments to engage in these practices. I thank you very much for your attention.

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## Remarks of Dean Claudio Grossman

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### INTRODUCTION

Let me begin by saying that I am honored to be on the panel with such a group of distinguished experts, and to share our views and opinions as to how we can contribute to the important goal of preventing torture, and ensure accountability and reparations in accordance with the legal standards when torture takes place.

I would like to start with a few questions. The first question is why do we have these norms at the international level? Why do not we have them only at the domestic level? The international community concluded that the domestic norms and procedures in certain circumstances would not protect the rights of individuals. A tragic reminder of that situation was the World War II, which provided an impetus for the development of international norms. As a result of the inability of the domestic governments to protect the rights of individuals, the development of norms started with the Universal Declaration of Human Rights as a moral standard of achievement followed by the adoption of treaties stating that every human being was entitled to internationally-protected rights. This development reflected a very important humanitarian value, namely that human beings existed as subjects of international law, and that those rights apply irrespective of nationality, ethnicity, religious preferences, gender, etc. If you read the texts of the International Covenant on Civil and Political Rights, or the Convention against Torture, they state that everyone is entitled to due process, to be presumed

innocent, to his/her religion, and so forth. This developed a common narrative of human dignity.

Also crucial to human rights is the understanding that these norms apply in all circumstances. If you look at the International Covenant on Civil and Political Rights or the Convention against Torture, they established that some rights cannot be derogated ever—even under an emergency situation. One of those is the right to your physical, emotional, and psychological integrity—the prohibition against torture and other forms of cruel, inhuman, or degrading treatment or punishment. Particularly during states of emergency and war, rights suffer and domestic systems do not offer protection. In the context of populations that are scared and governments that talk about real or perceived enemies, the domestic judiciaries are unable or unwilling to protect the population or groups of the population in some of these cases. In addition to rights, the international community created institutions and mechanisms at the international level that would assist countries in complying with their obligations. These developments were necessary to ensure that independent experts resorting to different forms of supervision would ensure the application of international norms.

### THE ROLE OF THE UN COMMITTEE AGAINST TORTURE

I am going to refer to one supervisory organ, the United Nations Committee against Torture, and the UN Convention against Torture. This supervisory organ measures behavior against the standards laid down in the Convention. The

Convention against Torture includes a definition of torture, and under Article 2, the right to be free from torture is non-derogable.<sup>6</sup> The Convention's obligations include, *inter alia*, the prohibition of using confessions extracted under torture in judicial proceedings; the principle of non-refoulement—sending people to countries where they might be subject to torture; the obligation to investigate and punish those who perpetrate torture; the need to repair the consequences of torture; etc.<sup>7</sup> The Committee with its experts is expected to assist states in complying with their obligations.

The Committee has a dual role from a political and legal point of view. In addition to exposing mass and gross violations, the first role of the Committee is to avoid a slippery slope created by isolated events that violate the Convention's obligations. Resorting to different techniques of supervision we detect early on whether violations are occurring. It is often easier to solve a problem when it is detected at an early stage. The second role of the Committee is to expand compliance with the Convention's obligations by utilizing its expertise to help provide expert advice to states.

The Committee resorts to different techniques in performing its duties. One technique takes place through country reporting whereby states submit a report to the Committee when they ratify the Convention and then every four years thereafter. A dialogue with the state where we review the status of compliance, and formulate concluding observations to the states involving, for instance, the incorporation of the prohibition against torture, or compiling useful data, or the role of judges and doctors, etc. The Committee's observations are useful for the states in the adoption and implementation of public policies designed to comply with the Convention. In addition, in accordance with Article 22 of the Convention,<sup>8</sup> the Committee decides individual petitions alleging violations of the treaty in cases where a country has declared its acceptance of that procedure. What weight should be given to decisions by the domestic judiciary or administrative organs? In the Committee's General Comment No. 1, which interprets obligations of the Convention against Torture, at Paragraph 9, which applies to the communications for violations of Article 3, it states that the Committee should give "considerable weight" to "findings of fact ... made by organs of the State party concerned."<sup>9</sup> The Committee, however, as stated in the same General Comment No. 1, "is not bound by" the findings of fact of a domestic proceeding and "instead has the power ... of free assessment of the facts based upon the full set of circumstances in every case."<sup>10</sup> How does the Committee exercise that power when an alleged violation has taken place and considerable time has elapsed, and the Committee has before it only a written record? How does it identify relevant facts?

### THE ROLE OF FORENSIC MEDICAL EVIDENCE IN FULFILLING COMMITTEE OBJECTIVES

In order to assist the Committee, three situations could be identified. The first situation is one where the facts are undisputed, but the issue is whether the facts constitute a violation of

the Convention. For example, where through the domestic judiciary it has been established that someone was water boarded, or was held in isolation for a long time, and the domestic judiciary concluded that there was no torture, or that such treatment amounted to something other than torture such as cruel treatment. (This last conclusion has several consequences including reparation that should be awarded or the penal liabilities that could be pursued). The facts are undisputed, but the legal qualification of the facts is at stake, and the legal qualification of the facts is something that belongs to the organ engaged in its supervisory role, in this case the Committee against Torture. Then, again, in this respect, the role of doctors and evidence presented will be very crucial, even if the facts are not disputed, but the quality of the lawyering that includes presentations based on sound evidence and forensic procedure are also important.

The second instance is one in which relevant facts were either never considered or were disregarded in the state's domestic proceedings. You cannot present a petition to the Committee against Torture if you did not try to solve the problem in your own country beforehand. The international community has a subsidiary role since we need to give an opportunity to the internal institutions and procedures to resolve an allegation internally. On the other hand, if it is not reasonable to exhaust domestic remedies (e.g., there is no access to them or they are unduly lengthy), you can go immediately to the Committee. In other circumstances, if known facts were never presented internally by a petitioner, the Committee will declare the case inadmissible. If, to the contrary, the facts were presented internally by the petitioner and the domestic judges failed to consider them, no deference can be paid to the domestic judiciary's determination of those facts because the judiciary did not determine them. Another possibility is that relevant facts were known later after completion of a process in a given country for no fault of the petitioners (e.g., relevant data became known because of a valid confession). In this situation the Committee will assess the facts and determine their legal consequences.

The third instance occurs when the complainant and the state party dispute relevant facts, e.g., whether a person was kept in isolation and the duration of such isolation. In those cases, the Committee gives considerable weight to the findings of fact made by the organs of the state party, unless it appears that the domestic proceedings did not meet minimum standards of due process. In accordance with well-established legal principles, the proof of facts belongs to the person who argues them. Accordingly, the initial burden of proving underlying facts belongs to the petitioner. Needless to say, again, the quality of forensic evidence will be very important in this respect.

If the internal process did not meet minimum standards of due process, no deference is due. What are those minimum standards? For example, independence and impartiality of the tribunals that made the determination that no torture took place. Important safeguards that need to be in place in order to achieve independence include that the organs were established by law, that they function independently from political branches of



government, that there is an appropriate system of appointments, terms of service, and procedures for appointments and removals and terms of judges in place. Other components of due process include: the right to a fair hearing, the right to independent defense counsel, the right to communicate with legal counsel, the right to confront adverse witnesses, the right of a person deprived of liberty to be afforded a reasonable opportunity to present his/her case, the right of judicial review, the right to be treated with humanity and respect for the inherent dignity of the human person, the right to be informed promptly of any charge, the right to be tried without delay. In my view, there are sound reasons for arguing that the Istanbul Protocol has turned into a normative instrument. In accordance with international law, the opinion of publicists is a source of law as it might be practice in some circumstances. Whether or not we consider the Istanbul Protocol a source of law, however, a lack of compliance with sound procedures to identify and determine facts creates, in my

view, a presumption of a violation. Of course, a presumption would only shift the burden of proof, and the other party could prove that presumption wrong.

## CONCLUSION

Let me conclude my comments by stating that in matters of interpretation of human rights treaties, we should be guided by principles of law, and a very important principle of human rights law is that the object and purpose of a treaty is humanitarian. In light of that, when we have a doubt, we choose the interpretation that affords more protection to human beings, as it has been established by the International Court of Justice and the European and Inter-American Courts of Human Rights. Accordingly, when in doubt if we choose the protection of human rights we are not only following a moral interpretation but also applying the law.

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## Remarks of Phil Shiner\*

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### INTRODUCTION

I'd like to echo the congratulations that have been expressed to the organizers of this event. I think it is a fascinating initiative to bring together the worlds of the legal and the psychological-forensic and the academic and the practitioner. Myself and my colleague attended a session in November in Copenhagen and it certainly got us thinking about how we can work much more effectively on behalf of our clients who have all experienced

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*\* Phil Shiner leads the team at Public Interest Lawyers (PIL). He is a lawyer with an international and national reputation for his work on issues concerning international, environmental and human rights law. He has been practicing as a solicitor in the UK since 1981. He has acted in some of the most constitutionally significant human rights test cases including Al Skeini, Al-Jedda, Gentle et Al. In addition Phil also represents the family of Baha Mousa and the survivors of the fateful incident in which Baha Mousa was killed in the Baha Mousa Inquiry. The report of the Inquiry Chair Sir William Gage was released on 8 September 2011. Mr. Shiner is also the solicitor representing the families of the deceased as well as the survivors of the notorious "Battle of Danny Boy" in an unprecedented second judicial Inquiry into the actions of UK forces in SE Iraq during their occupation. The Inquiry opening is expected to take place later this year. Further, he is acting in over 150 other cases presently before the Court of Appeal in which Iraqi civilians complain of torture and CIDT whilst in custody with UK Forces in South East Iraq. Phil was Liberty/Justice Human Rights Lawyer of the year 2004 for his work on Iraq and was the Law Society's Solicitor of the Year 2007. He is an honorary professor at the Metropolitan University of London and a Vice-President at the Haldane Society. He has written and spoken widely on the subject matter of his presentation to this meeting and is the co-editor of "The Iraq War and International Law" (with Williams, A), Hart Publications, 2008.*



terrible torture at the hands of the UK. I offer these thoughts today as the beginning of a process that can build on this project. I think there's a great deal to be done, and I want to spend quite a bit of time focusing on the case study of Al-Bazzouni.

I'd like to make some preliminary points. Firstly, be in no doubt that everything that you can imagine that the US has perpetrated at Guantanamo Bay, or Abu Ghraib, or Bagram, or in their secret sites, or anywhere else, that is what the UK has done. They were there alongside them, and bearing in mind our history of colonial wars going all the way back to mandated Palestine, it might be thought that we taught the US a lot more that they taught

us. And it is absolutely shocking to think that this is being done in the name of the UK state. Next point, this is all about the thesis that Darius Rejali promotes in his excellent book, *Torture and Democracy*,<sup>11</sup> that modern democracies leave no marks—stealth torture—we have heard that spoken about. One of the cases I’m going to focus on mainly is about hooding, which is a classic example of subjecting a person, a detainee, in incommunicado detention to torture, though it leaves no marks maybe but some abrasions on the face from the sandbag. It has to be noted that I think in the UK we are a long way behind in terms of dealing with torture cases and the psychological effects of that on a day-to-day basis because by and large our police do not do what other states, like Turkey and Russia, etc. do, so that in that respect we have a lot to learn. But in many respects we are ahead of you because there’s been a spate of very important litigation from the UK all arising from our invasion and subsequent occupation of Iraq.

Now why is that? Some of you lawyers may be aware of the Al Skeini case, which has dramatically changed the legal landscape in terms of where jurisdiction lies for the purposes of the European Convention, and that my friends, is a very important question because everything that I am saying to you about what I know about what the UK did, I can only say it because of the application of the European Convention of Human Rights.

Now why is that? Because one can secure accountability in this struggle against impunity through Articles 2 and 3 of the European Convention, the protection of the right to life and the prohibition on torture,<sup>12</sup> which are protected by a long line of Strasbourg cases by the duty of a state breaching Articles 2 or 3 to hold a prompt, impartial, effective, independent investigation that involves the relatives to get to the bottom of what went wrong, what reforms are necessary, and what lessons can be learned.

Now, the combination of three factors here are very important in terms of what is happening in the UK. First, our judicial review process whereby a person can come to the UK court and say that a public authority has committed a public wrong, and we want you, the UK court, to review that. That is what happened in the Al-Bazzouni case. Second, is because we brought into domestic effect the European Convention on Human Rights through the Human Rights Act. Third, because we have a civil legal aid system so that lawyers like ourselves at Public Interest Lawyers can actually run a law practice to bring these sort of cases. So those are some preliminary remarks.

### THE AL-BAZZOUNI AND BAHU MOUSA CASES

I want to focus on the Al-Bazzouni case because it is a good example of what can be achieved when the legal world meets the psychological-forensic world. It is tab 6 in the material, which can be downloaded. It concerns an Iraqi civilian who had been hooded whilst in detention with UK forces. He wasn’t presently being hooded, or being detained and he brought a challenge to government guidance, published in July 2010 that we said permitted hooding to continue, and I’ll demonstrate that. He said I have standing because I was once hooded, and the court found in

paragraph five of the judgment that indeed he did have standing, he didn’t need to be a victim of ongoing hooding. He said that the Guidance failed to prohibit the use of hooding of detainees in any or all circumstances, and impliedly authorized UK personnel abroad to use hooding, and condoned other states’ use of hooding where deemed necessary for security reasons.

So I need to go to the offending document, and it is just a small passage I need to read out from an annex. It helps define from the government’s point of view, to personnel abroad, what is and isn’t cruel, degrading, or inhuman treatment (CIDT). It says that is a term that is used in some international treaties but is not defined in UK law. “In the context of this Guidance, the UK Government considers the following practices, which is not an exhaustive list, could constitute cruel, inhuman, or degrading treatment or punishment.... Methods of obscuring vision or hooding,” and then this exception in brackets, “except where these do not pose a risk to the detainee’s physical or mental health, and is necessary for security reasons during arrest or transit.” So there are two aspects to that exception. Does it pose a risk, and is it necessary for security reasons during transit or arrest? We argued that this represented a very slippery slope because the historical context of the UK continuing to use hooding all the way through the time in Iraq was indeed for security justifications. We said, this is going to lead to subjective decisions on the ground by untrained personnel in the so-called heat of battle as to whether there is a risk to a detainee’s physical or mental health. We said that it contradicts a Ministry of Defence policy that said there was an absolute ban on hooding, and that it preempted the findings which were due in the Baha Mousa inquiry.

I need to stop and say a few words about Baha Mousa. Baha Mousa was killed by UK forces in September 2003, and as a result of domestic litigation which ruled on those duties that protect Articles 2 and 3, we were able to force the UK Government against its will to hold a lengthy inquiry as to what went wrong. One of the things that the inquiry had to look at was how on earth it came about that we, the UK, were still hooding and subjecting people to stress positions, and food and water deprivation, and other things that had been banned by the Edward Heath government in 1972. So we were extremely concerned about all of that. Now the medical effects of hooding are important for me to focus upon. Firstly, let’s look at what was actually going on in Iraq. People were being hooded with one or two or even three sandbags in temperatures that sometimes rose as high as sixty degrees centigrade, and at times were an average temperature of thirty-eight degrees centigrade. So very hot climate conditions for very prolonged periods of hours or even days. Baha Mousa survived thirty-six hours in a facility and the government had to admit that he was hooded for at least twenty-three hours and forty minutes of that thirty-six hour period. In every case that we know about, and we know about well over 150 cases where we are acting, hooding was combined with many other techniques and practices that would exacerbate the known effects of hooding on its own. So we said that these UK practices were apt to induce a number of medical effects. This is where we sought and received the important help of the IRCT, which published a statement online by its international forensic expert group, which was subsequently

published, and we made sure that statement was available to the court.

I think it is worth spending some moments just focusing on what hooding does. Firstly, this is a medical officer from 2004 reporting to the Ministry of Defense in the UK, and I just want to read this passage because it gives eight effects:

*"If the air supply through the nasal pharynx is hindered as would be the case if one were to hood an individual, one could expect the adoption of a state of asphyxia in that individual, which would if unrelieved cause death. This will then give rise to a state of hypercarbia, increased carbon dioxide level, and hypoxia, reduced oxygen concentration. This will then produce a state of relative hypoxemia, decreased blood-oxygen concentration. In a hot and humid environment, this effect would only be heightened. Also, hooding an individual reduces heat loss by thirty percent, greatly reducing the chance of heat-related illness. The increased levels of stress, both physiological and psychological, surrounding these events would further compound matters and hence be an added detriment to most healthy individuals. If one had a past medical history of respiratory or cardiac disorders, then these effects could be more severe."*<sup>13</sup>

That medical officer is noting eight different effects. One of the experts in the Baha Mousa inquiry added in a ninth, which is he recognized that hooding could be a contributing factor in Baha Mousa's death, and noted the possibility that the hood placed on his head may have resulted in reflex cardiac or respiratory arrest due to having been pulled or tightened. So we are at number nine.

Now I'll go to the expert group statement of the IRCT for the next twelve. Number ten, the impairment of hearing. Number eleven, impairment of the sense of smell. Number twelve, impairment of balance and coordination. Number thirteen, the exacerbation of impaired respiration (oxygen and carbon dioxide exchange) by preexisting medical conditions or psychological disorders such as anxiety or claustrophobia. Number fourteen, the inducement of fear. Number fifteen, the inducement of anxiety. Number sixteen, the inducement of high levels of stress. Number seventeen, the inducement of disorientation, especially in respect to time and location. Number eighteen, a sense of loss of control and powerlessness. Number nineteen, impairment of individual psychological coping mechanisms. Number twenty, the effect of the tendency of the hooding serving as a means of disengagement for the torturer, and thus the potential to intensify additional acts of torture, and of course it makes it difficult if someone is hooded to identify their perpetrators.

And lastly, what we submitted in court was what we called the Abu Ghraib effect, i.e. the images of hooding in Abu Ghraib were so horrific to the Iraqis that they had irreversibly increased the capacity of the use of hooding to degrade, insult, humiliate, and instill fear in its victim. Many of our clients complain that it was made clear to them that if they didn't cooperate, they'd be sent to Abu Ghraib. So, in the light of all of those factors, it is absolutely

clear to me at least that hooding alone in those conditions, represents not just CIDT, but torture. Hooding was part of a process trained and implemented to soften up a detainee for interrogation. So hooding was not punishment here; hooding was part of what was referred to repeatedly in the Baha Mousa inquiry as "maintaining the shock of capture or conditioning."<sup>14</sup> It was part of a systemic approach to softening up the detainees so they were more likely to give the intelligence that was sought. So that involves physical or mental pain and suffering, it is intentionally inflicted for such purposes as obtaining from him information, or intimidating or coercing him, etc. There is no doubt in my mind that this is, plain and simple, torture. And, a lovely quote, to the Baha Mousa inquiry, from the Deputy Head of Intelligence at what was called Permanent Joint Headquarters in 2004. Commodore Massey, on hooding, says, "I have serious concerns. There is surely no way that ministers will or should be invited to contemplate the rehabilitation of this archaic, emotive, baggage laden practice. One may just as well try to justify the reintroduction of selective torture on the same highly dubious grounds of operational and force protection reasons. Forget it. Leave this sort of thing to King Canute." Well said, that man.

The context of hooding here was that it is supposed to have been banned. Edward Heath made the statement to Parliament in 1972. That was then put to the European Court of Human Rights in the Ireland v. UK case from 1978.<sup>15</sup> It was said on the record that if it was ever discovered that any people were using these techniques, that is, hooding, stress positions, food and water deprivation, sleep deprivation and the use of noise, then they would be prosecuted. So how was it that we went into Iraq and everyone was hooding, a standard operating procedure, all battle groups, at all times. How was that? Well, I haven't got time to answer that question properly, but of course it is highly significant that we were going into an illegal invasion with the US. Some of the things that were said about that relationship on the record in the Baha Mousa inquiry—someone said "well the European Convention on Human Rights cuts no ice with the US. And anyway, what's all the fuss about? Hooding is the milder end of the spectrum as far as that other state was concerned." It was all being trained, there were no training records that were conveniently lost, so we can't be sure as to exactly what was going on. There were systemic problems, but as I said, all battle groups were using hooding and no operational ban when we were in Iraq was ever going to stop it.

So what did the court in Al-Bazzouni have to say about the medical effects of hooding? Well they said this. Short and simple. "Mr. Al-Bazzouni says that hooding is to be regarded without exception as CIDT, which will always by its nature pose a risk to the detainee's physical or mental health. He has convincing, uncontradicted evidence to this latter effect."<sup>16</sup> That was the end of that. Of course, that convincing evidence included the IRCT's expert group statement. They didn't really need to say a lot more because as far as they were concerned, it was out of bounds. They then went on and said, well we have been referred to some selected evidence given to the Baha Mousa inquiry to the effect that hooding may have been used by UK forces in Iraq that hooding can very often restrict breathing and have other serious physiological and psychological consequences and this was recognized quite clearly in the Ministry of Defense in 2003.



We do not propose to address or evaluate this evidence for a number of reasons. First, it is necessarily incomplete and has been fully addressed in the Baha Mousa inquiry. I'd ask you to note that the Al-Bazzouni judgment of October 3 was handed down just three weeks or so after the publication of the Baha Mousa report. Then they said, "second, the Prime Ministers March 1972 statement to Parliament and the unqualified prohibition of hooding in the Joint Defence Policy publication, that is quite sufficient for our purposes. We are unimpressed by the government's attempt in these proceedings to read qualifications into the 1972 statement."<sup>17</sup> We had severely criticized them of the MOD because they had tried to say that it doesn't mean what it says on the tin. This is something different, it is about overseas operations, it is only dealing with internal law enforcement, etc. The court wasn't having any of that, and they agreed with us that what this was doing was introducing confusion and expecting personnel on the ground to decide without any means of doing so, without any qualifications, whether what was happening was indeed a risk to the detainee's physical or mental health. So what's the effect of all of this? Well Al-Bazzouni needs to be looked at alongside the Baha Mousa inquiry report, which was published in September. It is three volumes. There are extensive findings on the systemic issues I've been hinting at as to why all these matters were going on. They make a number of recommendations, and a great number of them are focused on the five techniques I've referred to—hooding, stress positions, food and water deprivation, etc. So what we can now conclude is that the combination of the Baha Mousa Inquiry Report and the Al-Bazzouni judgment means that no UK personnel, armed forces, or intelligence services, anywhere in the world in the future may for any reason be associated in any way, including through a third state, with hooding. So at long last, an absolute prohibition for legal reasons, not policy reasons. And that would mean that any personnel employed by the UK who thought that another state may have hooded a person would be bound to withdraw from that situation and report the matter personally to the head of their agency or department. So that is

Al-Bazzouni, and that points nicely to what I think is a rich vein of work that can continue—the association between the world of law and the world of medicine.

## THE AL-SWEADY CASE

So the next matter up is the Al-Sweady Inquiry, which is inquiry number two. This concerns allegations that on the 14th and 15th of May 2004, UK personnel executed a number of Iraqis in a battlefield and in a military facility and tortured nine survivors. Now the Al-Sweady Inquiry thought it would be useful to have some professional input on how to deal with the witnesses, and they produced an expert, Professor Wesley. But the trouble is that he concentrated on the psychiatric effects of what was happening, and accordingly focused almost exclusively on post-traumatic stress disorder. We all know that an emphasis on PTSD carries the risk of misdiagnosing the psychological effects. Relying on the Istanbul Protocol and its guides, we have now produced a situation where the Al-Sweady Inquiry accept that they're going to now need expert evidence as to what all of this means for the victims of torture and the victims of the other human rights violations in this incident, and they're going to commission expert evidence on that point. In the future though, there is going to have to be a further lengthy inquiry into the UK's detention policy in Iraq. We are acting in over 150 other cases and we won a Court of Appeal case at the end of last year, which finally demolishes the Ministry of Defence's [sic] attempts to kick all of this into the long grass. I foresee that we are going to need in the UK in our work, intense input from experts in this room on the psychosocial aspects of all of this. We are going to need help to get the interviews set up correctly with these witnesses. We are going to need evidence on psychological trauma. There are issues of vicarious traumatization, etc. I can see from my standpoint that the work I have been talking about has only just begun, and I think there's a great more to be achieved. I look forward to contributing to the panel discussion this afternoon.

## ENDNOTES: Session One: Using Forensic Medical Evidence in Court

<sup>1</sup> U.N. Office of the High Comm'r for Human Rights, *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol)*, 2004, HR/P/PT/8/Rev.1, available at: <http://www.unhcr.org/refworld/docid/4638aca62.html>.

<sup>2</sup> U.N. *Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (Minnesota Protocol)*, U.N. Doc. E/ST/CSDHA/12 (1991), available at <http://www1.umn.edu/humanrts/instree/executioninvestigation-91.html>.

<sup>3</sup> International Forensic Expert Group, *Statement on Hooding, Torture: J. ON REHAB. OF TORTURE VICTIMS AND PREVENTION OF TORTURE*, 2011, at 186, available at <http://www.irct.org/Files/Filer/news/Statements%20letters%20declarations/2011-09.pdf>.

<sup>4</sup> Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. A/RES/57/199, entered into force June 22, 2006 [reprinted in 42 I.L.M. 26 (2003)].

<sup>5</sup> *Selmouni v. France*, App No. 25803/94, Eur. Ct. H.R. (1999).

<sup>6</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Committee Against Torture, General Comment 1, U.N. Doc. A/53/44, annex IX at 52 (1998), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 279 (2003).

<sup>10</sup> *Id.*

<sup>11</sup> DARIUS REJALI, *TORTURE AND DEMOCRACY* (2007).

<sup>12</sup> [European] Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, and 8 which entered into force on 21 September 1970, 20 December 1971 and 1 January 1990 respectively.

<sup>13</sup> THE BAHA MOUSA PUBLIC INQUIRY REPORT, 2011, H.C. 1452-III (U.K.).

<sup>14</sup> *Id.*

<sup>15</sup> *Ireland v. The United Kingdom*, App. No. 5310/71, Eur. Ct. H.R. (1978).

<sup>16</sup> *The Equality and Human Rights Commission v. The Prime Minister and others and Alaa' Nassif Jassim Al Bazzouni v. The Prime Minister*, High Court (Queen's Bench Division) Administrative Court Judgment, [2011] EWHC 2401 (Admin).

<sup>17</sup> *Id.*