



# SITUATION IN IRAQ/UK

## FINAL REPORT

9 December 2020

## TABLE OF CONTENTS

	<b>LIST OF ABBREVIATIONS</b> .....	<b>3</b>
<b>I.</b>	<b>EXECUTIVE SUMMARY</b> .....	<b>4</b>
<b>II.</b>	<b>PROCEDURAL HISTORY</b> .....	<b>9</b>
<b>III.</b>	<b>EXAMINATION OF THE INFORMATION AVAILABLE</b> .....	<b>11</b>
<b>IV.</b>	<b>BACKGROUND</b> .....	<b>16</b>
	A. THE IRAQ WAR.....	16
	B. OPERATION TELIC.....	18
	C. INTERNMENT AND INTERROGATION POLICIES .....	20
<b>V.</b>	<b>JURISDICTION</b> .....	<b>30</b>
	A. UNDERLYING ACTS .....	31
	B. OTHER ALLEGED CRIMES .....	43
	C. CONCLUSION .....	45
<b>VI.</b>	<b>ADMISSIBILITY</b> .....	<b>46</b>
<b>VII.</b>	<b>GRAVITY</b> .....	<b>46</b>
	A. SCALE.....	49
	B. NATURE.....	50
	C. MANNER OF COMMISSION .....	52
	D. IMPACT .....	54
<b>VIII.</b>	<b>COMPLEMENTARITY</b> .....	<b>55</b>
<b>IX.</b>	<b>INACTION</b> .....	<b>56</b>
	A. INSTITUTIONAL MECHANISMS .....	57
	B. IRAQ HISTORIC ALLEGATIONS TEAM (IHAT) .....	59
	C. SERVICE POLICY LEGACY INVESTIGATIONS (SPLI) .....	67
	D. SERVICE PROSECUTING AUTHORITY (SPA) .....	70
	E. INDIVIDUAL CASES .....	74
	F. SYSTEMIC ISSUES .....	86
	G. NON-CRIMINAL MECHANISMS .....	92
	H. CONCLUSION ON INACTION .....	101
<b>X.</b>	<b>UNWILLINGNESS GENUINELY TO PROCEED</b> .....	<b>103</b>
	A. INTENT TO SHIELD .....	107
	B. UNJUSTIFIED DELAY.....	147
	C. LACK OF INDEPENDENCE AND IMPARTIALITY.....	158
	D. CONCLUSION ON GENUINENESS .....	176
<b>XI.</b>	<b>CONCLUSION</b> .....	<b>180</b>

## LIST OF ABBREVIATIONS

1 BW	1 Black Watch
1 QLR	1 Queen's Lancashire Regiment
CPA	Coalition Provisional Authority
DJEP	Director of Judicial Engagement Policy
DSP	Director of Service Prosecutions
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECCHR	European Center for Constitutional and Human Rights
FOI	Freedom of Information
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IFI	Iraq Fatality Investigations
IHAP	Iraq Historic Allegations Panel
IHAPT	Iraq Historic Allegations Prosecution Team
IHAT	Iraq Historic Allegations Team
JCRP	Joint Case Review Panel
MND-SE	Multi-National Division (South East)
MNF-I	Multinational Force-Iraq
MoD	Ministry of Defence
NGO	Non-Governmental Organization
OTP	Office of the Prosecutor
PIL	Public Interest Lawyers
PLT	Public Liability Team
PTC	Pre-Trial Chamber
RAF	Royal Air Force
RAFP	Royal Air Force Police
RMP	Royal Military Police
RNP	Royal Navy Police
SDT	Solicitor Disciplinary Tribunal
SIB	Special Investigations Branch
SIWG	Systemic Issues Working Group
SPA	Service Prosecuting Authority
SPLI	Service Police Legacy Investigations
UK	United Kingdom
USAF	United States Air Force

## I. EXECUTIVE SUMMARY

1. On 13 May 2014, the Prosecutor re-opened the preliminary examination into the situation in Iraq/United Kingdom (UK). In its 2017 Report on Preliminary Examination Activities, the Office announced that, following a thorough factual and legal assessment of the information available, it had reached the conclusion that there was a reasonable basis to believe that members of UK armed forces committed war crimes within the jurisdiction of the Court against persons in their custody. The Office's admissibility assessment has now been completed. For the reasons set out in this report, the Prosecutor does not conclude that the UK authorities have been unwilling genuinely to carry out relevant investigative inquiries and/or prosecutions (article 17(1)(a)) or that decisions not to prosecute in specific cases resulted from unwillingness genuinely to prosecute (article 17(1)(b)). On this basis, having exhausted reasonable lines of enquiry arising from the information available, the Office has determined that the only appropriate decision is to close the preliminary examination without seeking authorisation to initiate an investigation.
2. The preliminary examination has found that there is a reasonable basis to believe that various forms of abuse were committed by members of UK armed forces against Iraqi civilians in detention. In particular, as set out below, there is a reasonable basis to believe that from April 2003 through September 2003 members of UK armed forces in Iraq committed the war crime of wilful killing/murder pursuant to article 8(2)(a)(i) or article 8(2)(c)(i)), at a minimum, against seven persons in their custody. The information available provides a reasonable basis to believe that from 20 March 2003 through 28 July 2009 members of UK armed forces committed the war crime of torture and inhuman/cruel treatment (article 8(2)(a)(ii) or article 8(2)(c)(i)); and the war crime of outrages upon personal dignity (article 8(2)(b)(xxi) or article 8(2)(c)(ii)) against at least 54 persons in their custody. The information available further provides a reasonable basis to believe that members of UK armed forces committed the war crime of rape and/or other forms of sexual violence article 8(2)(b)(xxii) or article 8(2)(e)(vi), at a minimum, against the seven victims, while they were detained at Camp Breadbasket in May 2003.
3. These crimes, while not exhaustive, were sufficiently well supported to enable a subject-matter determination on crimes within the jurisdiction of the Court. In this respect, the Office recalls the wider body of findings by other public authorities and institutions in the UK that hundreds of Iraqi detainees were subjected to conditions of detention and practices which amounted to inhuman or degrading treatment. Although the Office's findings may not be fully representative of the overall scale of

the victimisation, they appear to correspond to the most serious allegations of violence against persons in UK custody.

4. The Office has not identified evidence of an affirmative plan or policy on the part of the Ministry of Defence (MoD) or UK Government to subject detainees to the forms of conduct set out in this report. Nonetheless, the Office has found that several levels of institutional civilian supervisory, and military command, failures contributed to the commission of crimes against detainees by UK soldiers in Iraq. As set out in this report, despite the existence of standards of procedure in the MoD requiring detainees to be treated humanely, a number of techniques found unlawful in UK domestic law in 1972 and banned from use – especially in interrogations – re-entered practice through gradual attrition of institutional memory and lack of clear guidance. As the Baha Mousa Inquiry found, by the time of the Iraq war, the MoD had no generally available written doctrine on the interrogation of prisoners of war, other than at a high level of generality.<sup>1</sup> Instead, doctrine had largely become restricted to what was taught during interrogation courses, with varying degrees of understanding of what was permissible, as well as variations in emphasis and interpretation between different instructors.<sup>2</sup> This spilled over into the early rotations of Operation Telic (“Op TELIC”), with UK service members holding differing views on what was permissible.<sup>3</sup> But even if doctrinal shortcomings may have contributed to such processes, as domestic public inquiries have stressed, this could not excuse or mitigate the serious and gratuitous forms of violence inflicted in some of the incidents concerned. Indeed, as set out below, a key aspect of the Iraq Historic Allegations Team (IHAT)’s work following the ECtHR’s 2011 ruling in *Al Skeini* and the High Court’s 2013 ruling in *Ali Zaki Mousa and others*, was to determine whether evidence available supported referring criminal charges against commanders and other superiors for the underlying conduct.
5. The Office’s findings that some members of UK armed forces subjected Iraqi detainees to forms of abuse are not new or unique. Other public bodies and judicial reviews examining the body of evidence relating to the conduct of members of British forces have reached the same conclusion. Nor is it controversial to conclude that the initial response of the British Army in theatre at the time of the alleged offences was inadequate and vitiated by a lack of a genuine effort to carry out relevant investigations independently or impartially. The institution of public inquiries and the subsequent creation of IHAT were a response to the admitted failures of the British army at the time to conduct effective

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<sup>1</sup> See below, para. 56.

<sup>2</sup> See below, paras. 56-58.

<sup>3</sup> See below, para. 59.

investigations into allegations of wilful killing and abuse of detainees in Iraq.<sup>4</sup> As such, one of the key areas of focus for the Office's preliminary examination into the situation in Iraq/UK, which was re-opened in 2014, was to examine the relevance and genuineness of subsequent investigations into historical allegations by Iraq Historic Allegations Team (IHAT), and later the Service Police Legacy Investigations (SPLI), and of decisions by the Service Prosecuting Authority (SPA) on the submission of cases for prosecution.

6. The outcome of the more than ten year long domestic process, involving the examination of thousands of allegations, has resulted in not one single case being submitted for prosecution: a result that has deprived the victims of justice. Although IHAT and SPLI did refer a handful of cases to the SPA for prosecution, the SPA declined to prosecute in each instance on the grounds that the cases failed to meet the evidential test or the public and service interest component of the 'full code test'.<sup>5</sup> This outcome might trigger apprehension that either the claims submitted were frivolous and vexatious, or, conversely, that the UK process was not genuine and was designed to intentionally shield alleged perpetrators from criminal responsibility. Unpacking these issues has proven more complex than might immediately be expected.
7. From the information available, there is a reasonable basis to believe that, in the incidents which form the basis of the Office's findings, the Iraqi detainees concerned were subjected to forms of abuse with varying levels of severity that would amount to torture, cruel treatment or outrages against personal dignity, and in some cases wilful killing. One incident involving seven victims included the rape of one person and the commission of sexual violence against others. That the allegations investigated by IHAT and SPLI did not result in prosecutions by the SPA does not mean that these claims were all vexatious. At most, it means either that IHAT or the SPLI were not satisfied that there was sufficient credible evidence to refer the cases to the SPA, or that the SPA was not confident that those cases which were referred had a realistic prospect of conviction in a criminal trial. As IHAT noted to the Office, a significant and recurrent weakness in the cases that it investigated was the dearth of forensic evidence and inconsistencies in witness testimony given the historical nature of the investigations, years after the events. It should be noted, in this respect, that this was also due – at least in part – to the inadequacies of the

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<sup>4</sup> As set out below, The creation of IHAT was deemed necessary to discharge the implicit duty to investigate set out in sections 116 and 113, of the Armed Forces Act 2006 ('the Act'), as well as the procedural duty under articles 2 and 3 of the ECHR. See Sir David Calvert-Smith, [Review of the Iraq Historic Allegations Team](#), 15 September 2016, para. 3.4. See also UK EWHC, [R \(Ali Zaki Mousa and others\) v. Secretary of State for Defence No. 2](#), [2013] EWHC 1412 (Admin), 24 May 2013, para. 147.

<sup>5</sup> See below, Section IX.E (Individual Cases).

initial investigations conducted by the British army in theatre. This is a recurrent feature of historical criminal investigations. At the same time, the dearth of criminal prosecutions contrasts with the large number of civil claims resolved either before the High Court, where evidence has been challenged and tested, or through out of court settlement. These have involved claims with respect to hundreds of victims alleged to have suffered conditions of detention and practices amounting to inhuman or degrading treatment. Other public inquiries, commissioned reviews and policy mechanisms within the MoD have concluded that practices which occurred during the early rotations of Op TELIC in particular fell below the required standards of conduct. This in turn led to several rounds of amendment to matters of policy and practice, some of which were revised following further judicial review, and some of which are ongoing. To characterise these various processes as arising from vexatious claims would appear to mischaracterise the events, as well as to misjudge the distinct question of whether, years after the events, there is sufficient evidence to convict in criminal case.

8. With respect to genuineness, the preliminary examination has engaged in a detailed and complex assessment of numerous stages in the investigative and prosecutorial process leading to cases being filtered out or discontinued. In particular, the Office focussed on the filtering criteria applied by IHAT/SPLI at different junctures in the process. The Office also examined the extent to which IHAT/SPLI looked at systemic issues and related questions of command and supervisory responsibility. Finally, the Office conducted its own separate inquiry into allegations made by a number of former staff members of IHAT, publicised by the BBC Panorama documentary programme and the Sunday Times newspaper, of intentional disregarding, falsification, and/or destruction of evidence during the course of IHAT's work, as well as the impeding or prevention of certain investigative inquiries and the premature termination of cases. In conducting its assessment, the Office identified numerous concerns with respect to how IHAT/SPLI and/or the SPA had made decisions on certain matters. The report sets out the Office's views on how the Prosecutor might have proceeded differently in some instances.
9. However, the reason that these concerns did not trigger a decision by the Prosecutor to seek authorisation to open an investigation ultimately turned on the nature of the ICC's admissibility regime. As the Court has emphasised, the ICC is not a human rights body called upon to decide whether in domestic proceedings the

requirements of human rights law or domestic law have been violated.<sup>6</sup> Rather it is tasked with determining whether it should exercise its own competence in a criminal case, in place of the primary duty which belongs to a State. To do so, the Court must be satisfied that no relevant proceedings have been undertaken, or if they have, that those proceedings were not genuine, either because the State is unable to undertake genuine proceedings, or because the State is unwilling to do so in the sense that it has taken steps to shield perpetrators from criminal justice. Given that the allegations before the Office have been subjected to domestic criminal inquiry by IHAT/SPLI, and therefore that the authorities were not ‘unable’ to proceed, the focus of the Office’s inquiries has been to determine whether the information and evidence shows that the UK authorities have been unwilling genuinely to investigate and prosecute – namely whether they have engaged in shielding perpetrators from criminal justice.<sup>7</sup>

10. Bearing in mind the purpose of article 17(2), the Office considers that the relevant test is not whether the Prosecutor or a Chamber of this Court would have come to a different conclusion to that of IHAT/SPLI or the SPA on the evidence and proceeded differently, but whether the facts, on their face, demonstrate an intent to shield persons from criminal responsibility. To do otherwise would be to substitute the Prosecutor’s own assessment of what might constitute a realistic prospect of obtaining sufficient evidence to satisfy the evidence sufficiency test, or a realistic prospect of conviction to support a prosecution before UK courts, in place of the assessment of the competent national prosecuting service--and to interpret that difference as a lack of genuine intent to bring the person concerned to justice. And since the ‘proceedings’ referred to in article 17 occur in the context of the domestic legal framework and domestic investigative and prosecutorial practice, it is against the domestic backdrop that the assessment must be made, rather than an abstract assessment of how the Prosecutor might have proceeded under the Rome Statute.
11. Acknowledging some scope for how a domestic authority appreciates what may constitute a realistic prospect of a conviction domestically does not mean that the ICC must take at face value propositions made by domestic authorities. The Office has had to conduct its own examination of the underlying claims as a means of bias control/verification in order to assess whether the application by UK authorities of

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<sup>6</sup> [Al-Senussi Admissibility AJ](#), para 190; further observing, at para.219: “the Court was not established to be an international court of human rights, sitting in judgment over domestic legal systems to ensure that they are compliant with international standards of human rights” and at para.229: “...the Appeals Chamber considers that article 17 was not designed to make principles of human rights *per se* determinative of admissibility.”

<sup>7</sup> See below Section X (Unwillingness Genuinely to Proceed), setting out the relevant the tests under article 17(2)(a)-(c), which are all concerned with aspects related to shielding.

those tests to the actual claims resulted in outcomes that appear manifestly inconsistent with the material available to the Office.

12. Having assessed the information before it, and despite the concerns expressed in this report, the Office does not ultimately conclude that the UK authorities have been unwilling genuinely to carry out relevant investigative inquiries and/or prosecutions (article 17(1)(a)) or that decisions not to prosecute in specific cases resulted from unwillingness genuinely to prosecute (article 17(1)(b)).
13. On this basis, having exhausted reasonable lines of enquiry arising from the information available, the Office has determined that the only appropriate decision is to close the preliminary examination and to inform the senders of communications. While this decision might be met with dismay by some stakeholders, while viewed as an endorsement of the UK's approach by others, the reasons set out in this report should temper both extremes.

## II. PROCEDURAL HISTORY

14. The situation in Iraq/UK has been under preliminary examination since 13 May 2014. The Office has received a total of 236 communications or additional submissions pursuant to article 15 in relation to the situation in Iraq/UK.
15. On 10 January 2014, the European Center for Constitutional and Human Rights (ECCHR) together with Public Interest Lawyers (PIL) submitted an article 15 communication alleging the responsibility of members of UK armed forces and United Kingdom (UK) officials for war crimes involving systematic detainee abuse in Iraq from 2003 until 2008 ('First article 15 communication').<sup>8</sup>
16. On 13 May 2014, the Prosecutor announced that the preliminary examination of the situation in Iraq, previously concluded in 2006, was re-opened in the light of the submission of new information on alleged crimes. The Office noted "new information received by the Office alleges the responsibility of officials of the United Kingdom for war crimes involving systematic detainee abuse in Iraq from 2003 until 2008".<sup>9</sup>

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<sup>8</sup> ECCHR and PIL, [First article 15 communication](#), 10 January 2014.

<sup>9</sup> ICC OTP, [Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq](#), 13 May 2014.

17. The Office received a second article 15 communication submitted jointly by PIL and ECCHR in September 2015, ('Second article 15 communication'), as well as additional submissions provided by PIL containing more than 1000 individual claims against British personnel.
18. Throughout the preliminary examination, the Office has engaged with a variety of relevant stakeholders, including the senders of article 15 communications and the UK Government and has received multiple submissions, in the context of missions to the UK, meetings held at the seat of the Court, and virtual online meetings. Notably, the Office has held extensive meetings with the main communication senders PIL and ECCHR, as well as their Iraq-based intermediaries. The Office has also held a number of meetings with officials of the UK Government, and relevant investigative and prosecutorial bodies including Iraq Historic Allegations Team (IHAT), the Service Police Legacy Investigations (SPLI) and the Service Prosecuting Authority (SPA). The Office separately sought additional information from a number of former staff of IHAT at different levels and functions. The Office has also maintained contact with a range of other actors from civil society, academia and the media.
19. Between May 2014 and October 2020, the Office made a number of requests for information to the UK authorities and received responses on multiple issues pursuant to article 15(2) and rule 104 in relation to the work of IHAT, SPLI and SPA, including with respect to: working methodologies for the assessment of claims; specific investigative steps undertaken; data on overall caseloads and individual case files; and investigative/prosecutorial prospects concerning systemic and command issues. In response, the Office received five main batches of additional information between June 2014 and August 2018. The Office sought and received additional information from different communication senders and other stakeholders during the course of the preliminary examination.
20. Separate from the IHAT led criminal inquiries, the Office was contacted during the course of the preliminary examination by the chair of the Iraq Fatality Investigations (IFI), who was conducting a judicial inquiry into the circumstances surrounding Iraqi deaths involving British forces. In response to individualised requests made to it, the Office issued eight non-use undertakings with respect to evidence given to the IFI by soldiers alleged to have participated in the immediate circumstances leading to the deaths under investigation.

21. The Office has provided public annual updates on the situation in Iraq/UK in its yearly Report on Preliminary Examination Activities.<sup>10</sup>

### III. EXAMINATION OF THE INFORMATION AVAILABLE

22. The Office has evaluated sources and their information following a consistent methodology based on criteria such as relevance (usefulness of the information to determining the commission of crimes within the jurisdiction of the Court), reliability (trustworthiness of the provider of the information as such), credibility (quality of the information in itself, to be evaluated by criteria of immediacy, internal consistency and external verification), and completeness (the extent of the source's knowledge or coverage vis-à-vis the whole scope of relevant facts). It has endeavoured to corroborate the information provided with information available from reliable open and other sources.
23. The Office has received and gathered a significant volume of information on alleged crimes from a number of reliable sources, including human rights reports, the findings of public inquiries in the UK and data pertaining to out-of-court compensation settlements. On the whole, the Office has considered the information available sufficient in volume and quality to enable a determination on the "reasonable basis" standard. In this respect, the Office has been mindful of the nature of the preliminary examination process, the low threshold applicable, as well as the object and purpose of the article 15 procedure.
24. Collectively, the article 15 communications allege: acts of torture and other forms of ill-treatment against at least 1071 Iraqi detainees; 319 unlawful killings (267 in military operations and 52 against persons in UK custody); and rape and/or other forms of sexual violence against 21 male detainees in 24 instances.
25. In summarising the new facts and evidence which had become available since 2006, the First article 15 communication alleged serious incidents of abuse in military detention facilities and other locations, including: "hooding of detainees, sensory deprivation and isolation; sleep deprivation; food and water deprivation; the use of prolonged stress positions; use of the 'harshing' technique (sustained aggressive shouting in close proximity); a wide range of physical assault, including beating, burning and electrocution or electric shocks; both direct and implied threats to the health and safety of the detainee and/or friends and family, including mock

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<sup>10</sup> Relevant annual reports can be accessed at <https://www.icc-cpi.int/iraq>.

executions and threats of rape, death, torture, indefinite detention and further violence; environmental manipulation, such as exposure to extreme temperatures; forced exertion; cultural and religious humiliation; as well as wide-ranging sexual assault and humiliation, including forced nakedness, sexual taunts and attempted seduction, touching of genitalia, forced or simulated sexual acts, as well as forced exposure to pornography and sexual acts between soldiers”.<sup>11</sup>

26. The communication alleged that “[b]etween them, these victims make thousands of allegations of mistreatment amounting to war crimes of torture, or cruel, inhuman or degrading treatment, as well as wilfully causing great suffering, or serious injury” and that “[c]lear patterns emerge of the same techniques being used for the same purposes in a variety of different UK facilities, over the whole period that UK Services Personnel were in Iraq, from 2003 to 2008. Available evidence suggests that failures to follow-up on or ensure accountability for ending such practices became a cause of further abuse. The obvious conclusion is that such mistreatment was systematic and had a systemic cause, which further suggests that there are hundreds more such victims. There are considerable reasons to allege that those who bear the greatest responsibility for the crimes are situated at the highest levels, including all the way up the chain of command of the UK Army, and implicating former Secretaries of State for Defence and Ministers for the Armed Forces Personnel.”<sup>12</sup> It further asserted that the UK Government was unwilling to genuinely investigate and prosecute low-level perpetrators, while no efforts have been made to investigate and prosecute high-level perpetrators.<sup>13</sup>
  
27. In its April 2015 response to the Office, the UK Government submitted that all of the allegations set out in the First article 15 communication were being assessed by the IHAT in accordance with its procedures to ascertain which cases would result in investigations. It submitted that there was no reasonable basis to suggest that the allegations are not being investigated by the national authorities and that the ICC’s intervention is required, and that there was “no basis to argue that the national authorities are in any way shielding any persons at any level of the military or political hierarchy”, and that “[t]he UK national system possesses highly effective and robust investigative and prosecutorial arms that are plainly capable of, and are, implementing a genuine and effective strategy for investigating all allegations of war crimes. The Communication has not identified any credible evidence that the

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<sup>11</sup> ECCHR and PIL, [First article 15 communication](#), 10 January 2014, p. 6.

<sup>12</sup> ECCHR and PIL, [First article 15 communication](#), 10 January 2014, p. 6.

<sup>13</sup> ECCHR and PIL, [First article 15 communication](#), 10 January 2014, pp. 6-7.

current system and proceedings would in any way be insufficient to justify the ICC having to conduct its own investigation. There is certainly no basis to argue that the national authorities are in any way shielding any persons at any level of the military or political hierarchy.”<sup>14</sup> In relation to gravity, the UK Government submitted that, even taking into account the new allegations filed in the communications and subsequently, the gravity threshold in accordance with article 8(1) and articles 17 and 53 had not been satisfied and that the preliminary examination “should now be concluded on the grounds that despite the allegations being very serious and requiring full investigation by the national authorities, they do not reach the requisite gravity threshold to be admissible at the ICC.”<sup>15</sup> The 2015 response urged the OTP to complete its preliminary examination without delay, stating “[t]here are no proper reasons to justify continuing with the Preliminary Examination when no deficiencies or shortcomings in the national system have been identified and particularly when none of the potential cases would meet the high gravity threshold of the ICC.”<sup>16</sup> While the UK Government continued to cooperate with the Office during the course of the preliminary examination, it also stressed its view that the Office should conclude its assessment promptly and without delay.<sup>17</sup>

28. In assessing the information provided by communication senders and the responses of the UK authorities, the Office has faced a number of challenges, including the security situation on the ground for conducting missions to Iraq to meet relevant stakeholders, the nature of the allegations related to the treatment of conflict-related detainees in individual incidents in confined settings with limited third-party corroboration or supporting forensic/documentary information and the passage of time since the alleged occurrence of the events. To overcome these challenges, the Office focussed on a sample pool of incidents which, while not reflecting the full scale of the alleged crimes relevant to the situation, were sufficiently well supported to meet the reasonable basis standard and allow the Office to reach a determination on subject-matter jurisdiction.
  
29. Moreover, the Office also notes that despite the large volume of allegations of detainee abuse, even though such offences might constitute crimes under domestic law or constitute violations of relevant human rights standards, not all of the alleged conduct would constitute war crimes within the jurisdiction of the Court.

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<sup>14</sup> Information received from the UK authorities, 2 April 2015, paras. 7-8.

<sup>15</sup> *Id.*, para. 11.

<sup>16</sup> *Id.*, para. 12.

<sup>17</sup> Information received from the UK authorities, 29 July 2020.

While some of the forms of conduct alleged would per se constitute war crimes, others would not except where committed in combination with other acts as part of a course of conduct and to the requisite level of severity.<sup>18</sup>

30. As for the volume of allegations, the Office also observes that the communications submitted typically counted each category of alleged acts separately, such that an incident at one location involving a number of different underlying acts against a single victim is represented by multiple allegations. For example, in their First communication, PIL/ECCHR refers to 109 victims in 85 cases which give rise to 2,193 separate allegations of abuse in custody. To illustrate, each alleged abuse technique is given a number and counted as a separate allegation. For instance, one victim who is alleged by PIL/ECCHR to have been subjected inter alia to prolonged kneeling (technique number 15), hooding (technique number 1) and forced nakedness (technique number 36) is counted as three allegations. Repeated allegations of the same category of underlying acts in the same location are nonetheless counted once: for example, a victim who is repeatedly subjected to hooding in location A is counted as one allegation of hooding, whereas of a victim subjected to hooding in location A followed by hooding of the same victim in location B is counted as two allegations. While the Office has found this useful in allowing it to segregate those acts that might constitute war crimes (including act occurring in combination) from those that would not, such disaggregation of individual alleged acts forming part of the same conduct or course of conduct comes at the risk of duplication and increasing the overall volume of allegations requiring assessment.
31. In terms of complementarity, the Office faced several challenges analysing the complex landscape of different types of proceedings that have been undertaken at the national level, whether in the form of out-of-court compensation settlements, military court-martial trials, or subsequent inquiries and evidentiary assessments by the IHAT/SPLI or the SPA, as well as related litigation before the UK High Court and the European Court of Human Rights. The Office has also had to consider the impact of the findings of the Solicitors Disciplinary Tribunal against PIL and its principal, Phil Shiner, from whom the largest bulk of article 15 communications were received, as well as another ruling by a separate Solicitors Disciplinary Tribunal which cleared the firm Leigh Day and three of its solicitors (who had acted with PIL in bringing many of the domestic claims) of all wrongdoing.<sup>19</sup> The fact-heavy and legally novel issues arising from the admissibility assessment

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<sup>18</sup> See below paras. 82-83.

<sup>19</sup> See below, paras. 313-350.

necessitated several rounds of internal peer review, reconsideration and decision-making.

32. Lastly, in the autumn of 2019, the Office was contacted for comment by investigative journalists from the BBC Panorama programme examining, jointly with a team from the Sunday Times newspaper (UK), on alleged efforts domestically within the UK to shield the conduct of British troops in Iraq and Afghanistan from criminal accountability. The BBC Panorama and Sunday Times reports, which were based on interviews with former IHAT investigators and army personnel, alleged that there had been intentional disregarding, falsification, and/or destruction of evidence as well as the impeding or prevention of certain investigative inquiries and the premature termination of cases.<sup>20</sup> The Office announced that these allegations appeared, on their face, highly relevant to its assessment of the genuineness of national proceedings, but that it would have to independently assess their veracity for the purpose of article 17. This process was overseen during 2020 by a small team within the OTP led by a Senior Trial Lawyer and a Senior Investigator and supported by staff from the Preliminary Examination Section and the Investigation Division. It involved hearing from former IHAT personnel who were willing to speak to the Office, as well as hearing from the now former Director of IHAT (Mark Warwick), the former Deputy Head of IHAT (Jack Hawkins), the Officer in Command of SPLI (Tony Day) and the Director of Service Prosecutions (Andrew Cayley).
33. The Office also assessed the impact of a proposal, put forward in May 2019 by the then Defence Secretary, Penny Mordaunt, calling for “a statutory presumption against prosecution of current or former personnel for alleged offences committed outside the UK in the course of duty more than 10 years previously, and which have been the subject of a previous investigation”.<sup>21</sup> During 2020, the Office examined the potential impact of the draft legislation, as it currently stands, on the ability of the UK authorities to investigate and/or prosecute crimes allegedly committed by members of UK armed forces in Iraq, against the standards of inactivity and genuineness set out in article 17 of the Statute.
34. Accordingly, the length of the preliminary examination has been determined by the complex challenges in verifying allegations relating to subject-matter jurisdiction, levels of attribution, the pace of obtaining responses to its requests from the national authorities and other information providers, issues related to the genuineness of relevant national proceedings, including more recent allegations

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<sup>20</sup> See below, paras. 372-412.

<sup>21</sup> MoD, [Statement made by Penny Mordaunt, Secretary of State for Defence](#), 21 May 2019.

emerging from former staff within IHAT, as well as developments related to the introduction of the proposed new legislation on statutory time limits.

35. Finally, with respect to the scope of the preliminary examination, the Office recalls since Iraq is not a State Party to the ICC Statute, the Court does not have territorial jurisdiction in Iraq on the basis of article 12(2)(a), meaning that the vast majority of alleged crimes committed on the territory of Iraq currently fall outside of the jurisdiction of the Court. As a result, the preliminary examination has been necessarily limited, on the basis of article 12(2)(b), to the conduct of nationals of States Parties in Iraq, in particular those of the UK. Finally, although a number of communication senders have also made allegations relating to decision of the UK authorities to launch the armed conflict, the Office takes no position on legality of war given the non-applicability of the crime of aggression at the material time.

## IV. BACKGROUND

### A. THE IRAQ WAR

36. After the January 1991 Gulf War, the Security Council adopted a resolution setting out ceasefire terms, including ending production of weapons of mass destruction and permitting inspection teams on the territory of Iraq.<sup>22</sup> In September 2002, the US and UK argued that Iraq was in material breach of the relevant resolutions and was seeking to develop weapons of mass destruction.<sup>23</sup> UN weapons inspectors stated they had not found any “smoking gun” in their search for weapons of mass destruction, but noted that this was “no guarantee that prohibited stocks or activities could not exist at other sites, whether above ground, underground or in mobile units”.<sup>24</sup> The US gathered a coalition of 48 countries, including the UK, for the stated purpose of searching and destroying alleged weapons of mass destruction in Iraq.<sup>25</sup>
37. On 20 March 2003, an armed conflict began between a US and UK-led coalition and Iraqi armed forces, with two rounds of air strikes followed by deployment of

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<sup>22</sup> UN Security Council, Resolution 699, [S/RES/699](#) (1991).

<sup>23</sup> UK Government, [Iraq's Weapons of Mass Destruction: The Assessment of the British Government](#), September 2002, para. 8; US Office of the Press Secretary, [Remarks by the President on the United Nations Security Council Resolution](#), 8 November 2002.

<sup>24</sup> Executive Chairman of the United Nations Monitoring, Verification, and Inspection Commission, [Notes for briefing the Security Council](#), 9 January 2003.

<sup>25</sup> The National Security Archive, [Iraq and Weapons of Mass Destruction](#), 11 February 2004.

ground troops.<sup>26</sup> On 7 April 2003, UK armed forces took control of Basra, and on 9 April 2003, US forces took control of Baghdad, although sporadic fighting continued.<sup>27</sup> On 16 April 2003, the Coalition Provisional Authority disestablished the Ba'ath Party of Iraq, resulting in the removal of Ba'ath leadership from positions of authority within Iraqi society.<sup>28</sup>

38. On 8 May 2003, the US and UK Governments notified the President of the United Nations Security Council about their specific authorities, responsibilities, and obligations under applicable international law as Occupying Powers under unified command. The occupying States, acting through the Commander of Coalition Forces, created the Coalition Provisional Authority (CPA) to act as a “caretaker administration” with power, inter alia, to issue legislation until an Iraqi government could be established.<sup>29</sup>
39. On 8 June 2004, the UN Security Council adopted Resolution 1546 stipulating that the occupation would end and the Interim Government of Iraq would assume full responsibility and authority for Iraq by 30 June 2004.<sup>30</sup> This transfer of authority took place on 28 June 2004 when the Interim Government, created by the Governing Council, assumed the control of Iraq and the CPA consequently ceased to exist.<sup>31</sup> Thereafter, the Multinational Force-Iraq (MNF-I), including a large contingent from the UK, remained in Iraq pursuant to United Nations Security Council authorisation and the request of the Government of the Republic of Iraq.<sup>32</sup> At the expiry of this mandate on 30 December 2008, foreign forces still present in Iraq remained with the consent of the Government of Iraq.<sup>33</sup>

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<sup>26</sup> MoD, [Operations in Iraq – First Reflections](#), July 2003, paras. 3.3-3.4; UK Government, [Letter dated 20 March 2003 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council](#), S/2003/350, 20 March 2003; United Nations Secretary-General, [Statement by the Secretary-General on Iraq](#), 20 March 2003.

<sup>27</sup> MoD, [Operations in Iraq – First Reflections](#), July 2003, paras. 3.9-3.10.

<sup>28</sup> Iraq Inquiry, [Chilcot report](#), Section 11.1, 6 July 2016, paras. 23, 56-62.

<sup>29</sup> On 1 May 2003, the US had declared an end to major combat operations, turning their subsequent efforts towards reconstruction and peace support. UK Government, [Letter dated 8 May 2003 from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the Security Council](#), S/2003/538, 8 May 2003; ECtHR, [Al-Skeini and others v United Kingdom](#), no. 55721/07, Judgment, 7 July 2011, para. 2.

<sup>30</sup> UN Security Council, Resolution 1546, [S/RES/1546](#) (2004).

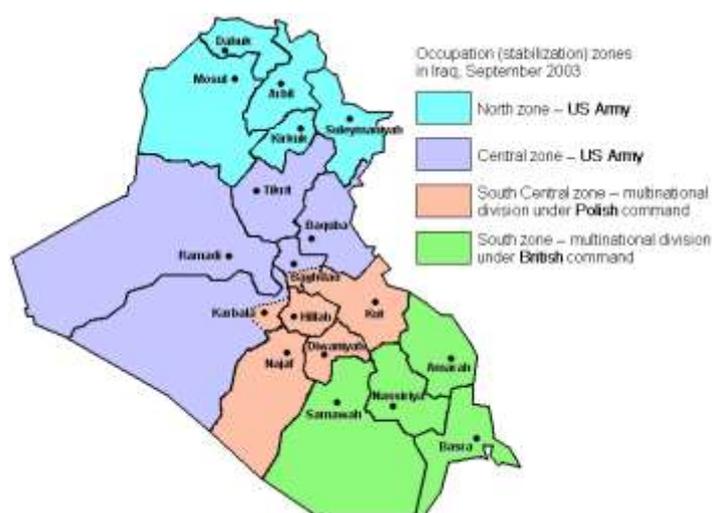
<sup>31</sup> Iraq Inquiry, [Chilcot report](#), Section 11.1, 6 July 2016, para. 152.

<sup>32</sup> UN Security Council, Resolution 1546, [S/RES/1546](#) (2004); Iraq Inquiry, [Chilcot report](#), Section 9.2, 6 July 2016, para. 1087.

<sup>33</sup> Iraq Inquiry, [Chilcot report](#), Section 9.7, 6 July 2016, para. 305.

## B. OPERATION TELIC

40. British military operations in Iraq between the start of the invasion on 20 March 2003 and the withdrawal of the last remaining British forces on 22 May 2011 were conducted under the codename Op TELIC.<sup>34</sup> The Operation constituted one of the largest deployments of British forces since World War II, involving significant military capabilities from all three armed services and a total of nearly 149,000 personnel deployed from the beginning of the conflict to May 2011. The invasion phase (Op TELIC 1) alone involved the deployment of some 46,000 personnel as well as 19 warships, 14 Royal Fleet Auxiliary vessels, 15,000 vehicles, 115 fixed-wing aircraft and nearly 100 helicopters.<sup>35</sup> Op TELIC comprised thirteen tours of duty (or roulements), each lasting approximately six months, and each numbered sequentially.<sup>36</sup>
41. During Op TELIC, UK troops were deployed to the South Zone, an area of Iraq covering the four southern provinces Al Muthanna, Maysan, Al Basra and Dhi Qar, an area of 96,000 square kilometres with a population of 4.6 million.<sup>37</sup> This area came under the British command of the Multi-National Division (South East) (“MND-SE”), whose headquarters were at Basra Palace in Basra province.<sup>38</sup>



Source: Al Sweady Inquiry Vol. I, para. 1.178

<sup>34</sup> National Audit Office, Ministry of Defence: Operation TELIC - United Kingdom Military Operations in Iraq, [Report by the Comptroller and Auditor General, HC 60 Session 2003-2004](#), 11 December 2003, para. 1.1.

<sup>35</sup> MoD, [Letter Reference FOI 2015 01104](#), 25 February 2015 (issued in response to request for information under the Freedom of Information Act 2000), p. 3. See also National Audit Office, Ministry of Defence: Operation TELIC - United Kingdom Military Operations in Iraq, [Report by the Comptroller and Auditor General, HC 60 Session 2003-2004](#), 11 December 2003, para. 1.

<sup>36</sup> Al Sweady Inquiry, [Report: Volume I](#), December 2014, para. 1.177.

<sup>37</sup> ECtHR, [Al-Skeini and others v United Kingdom](#), no. 55721/07, Judgment, 7 July 2011, para. 20.

<sup>38</sup> Al Sweady Inquiry, [Report: Volume I](#), December 2014, para. 1.178.

42. During the nearly six years of involvement in Op TELIC, the UK performed a wide range of roles and missions in support of the coalition's efforts. This ranged from full-scale combat operations and counter-insurgency operations to support for civilian reconstruction and development, and included the set up and running of a network of interrogation, internment and/or detention facilities, at least one of which had the initial use of prisoner of war camp.<sup>39</sup>
43. In the occupation phase between May 2003 and June 2004, there were 14,500 coalition troops stationed in the MND-SE, including 8,150 UK troops, confronted by an increasingly violent insurgency. The main theatres for operations by United Kingdom forces in MND-SE were the Al-Basrah and Maysan provinces, with a total population of about 2.75 million people. Just over 8,000 British troops were deployed there, of whom just over 5,000 had operational responsibilities.<sup>40</sup>
44. The main security task of UK forces was re-establishing the Iraqi police and other Iraqi security forces. Other tasks included patrols, arrests, anti-terrorist operations, policing of civil demonstrations, protection of essential utilities and infrastructure and protecting police stations. The second main function of British forces was to provide support to the civil administration in Iraq in a variety of ways, including assisting with the rebuilding of the infrastructure.<sup>41</sup>
45. The British military leadership described the post-major conflict situation in Iraq as a "state of virtual anarchy."<sup>42</sup> UK military records show that, as at 30 June 2004, there had been approximately 178 demonstrations and 1,050 violent attacks against Coalition forces in MND-SE since 1 May 2003. The violent attacks consisted of five anti-aircraft attacks, 12 grenade attacks, 101 attacks using improvised explosive devices, 52 attempted attacks using improvised explosive devices, 145 mortar attacks, 147 rocket propelled grenade attacks, 535 shootings and 53 others. The same records show that, between May 2003 and March 2004, 49 Iraqis were known to have been killed in incidents in which British troops used force.<sup>43</sup>

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<sup>39</sup> Stephen Carney, [Allied Participation in Operation Iraqi Freedom](#), Center of Military History, United States Army, pp. 119-123; House of Commons Defence Committee, [UK Land Operations in Iraq 2007](#), First Report of Session 2007-08, Report, together with formal minutes, oral and written evidence, p. 28.

<sup>40</sup> ECtHR, [Al-Skeini and others v United Kingdom](#), no. 55721/07, Judgment, 7 July 2011, para. 20.

<sup>41</sup> ECtHR, [Al-Skeini and others v United Kingdom](#), no. 55721/07, Judgment, 7 July 2011, para. 21.

<sup>42</sup> UK Army, [The Aitken Report: An investigation into cases of deliberate abuse and unlawful killing in Iraq in 2003 and 2004](#), 25 January 2008, para. 8.

<sup>43</sup> ECtHR, [Al-Skeini and others v United Kingdom](#), no. 55721/07, Judgment, 7 July 2011, para. 23.

46. Violent attacks against the British Forces continued over the following years in the post-occupation phase.<sup>44</sup> Notably, for most of 2007, UK forces encountered a large-scale siege of their bases in Basra by the Mahdi Army, a radical militia commanded by Muqtada Al-Sadr. Insurgents' tactics included mortar and rocket attacks against the Al Basrah airport as well as ambushes and IED attacks against UK patrols and convoys that attempted to resupply the Al Basrah palace garrison. Eventually, on 3 September 2007, UK troops withdrew their troops from Basra Palace to the airport, leaving the city in the hands of the militia.<sup>45</sup>

### C. INTERNMENT AND INTERROGATION POLICIES

47. Since the preliminary examination of the situation in Iraq/UK was re-opened based on information alleging "the responsibility of officials of the United Kingdom for war crimes involving systematic detainee abuse in Iraq from 2003 until 2008",<sup>46</sup> a central focus of the Office's analysis has been on whether the conduct alleged was consistent with sanctioned or otherwise tolerated internment and interrogation policies or practices of the UK armed forces.

48. The section below relies largely on the findings of the Baha Mousa Inquiry which was mandated, among its principal tasks, to determine "where responsibility lay for approving the practice of conditioning detainees".<sup>47</sup> This question arose as a result of a judicial review following the findings of the court martial proceedings against seven service members following the death of Baha Mousa in custody, where the Judge Advocate, Mr Justice McKinnon, accepted that the men had been required to 'condition' detainees.<sup>48</sup>

49. As set out in the report of the Baha Mousa Inquiry:

Conditioning is a term which was used to describe the treatment of military and civilian personnel detained before they were interrogated. When a prisoner of war or a civilian was detained it was believed that most if not all would be in a condition described as the "shock of capture". This is taken to indicate general anxiety by a detained person about what may happen to him or her. For some years intelligence personnel and others who have sought information from such individuals endeavoured to use the anxiety generated by the shock of capture to assist in obtaining information from them. It was believed that vulnerability arising from the

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<sup>44</sup> See, e.g. UK Government, [British Fatalities: Operations in Iraq](#).

<sup>45</sup> US Army, Center of Military History, [Allied Participation in Operation Iraqi Freedom](#), 2011, pp. 122-123.

<sup>46</sup> ICC OTP, [Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq](#), 13 May 2014.

<sup>47</sup> Baha Mousa Inquiry, [Report: Volume I](#), 8 September 2011, para. 1.4.

<sup>48</sup> See e.g. *R v Payne*, [Sentencing Hearing Transcript](#), 30 April 2007, p. 17.

shock of capture assisted in the process of interrogation. Conditioning is a generic term to describe the techniques used to prolong, maintain or enhance the shock of capture.<sup>49</sup>

50. As noted in the report, the use of techniques by the UK armed forces in a number of different deployments around the world after WWII as well as in Northern Ireland, led to a series of public inquiries and reports on the way intelligence was gathered from civilians.<sup>50</sup> This included the Bowen Inquiry of 1966 into procedures used in Aden, as well as the Compton Inquiry and Report of 1971 and the subsequent Parker Inquiry report of 1972.<sup>51</sup> In particular, the Compton and Parker reports both concerned internment and interrogation in Northern Ireland and focussed on the techniques of wall postures,<sup>52</sup> hooding,<sup>53</sup> noise,<sup>54</sup> deprivation of sleep,<sup>55</sup> and deprivation of food and water,<sup>56</sup> which came to be collectively known as “the five techniques”.<sup>57</sup> As noted in the report of the Baha Mousa Inquiry, some or all of these five techniques appear to have been in use for many years before their use in Northern Ireland.<sup>58</sup>
51. Although the authors of the Parker Report were divided on whether such techniques were unjustified in all circumstances,<sup>59</sup> the Prime Minister at the time, Edward Heath, announced in the House of Commons on 2 March 1972 that “[t]he government, having reviewed the whole matter with great care and with particular reference to any future operations, have decided that the techniques which the Committee examined will not be used in the future as an aid to interrogation”,

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<sup>49</sup> Baha Mousa Inquiry, [Report: Volume I](#), 8 September 2011, para. 1.36

<sup>50</sup> Baha Mousa Inquiry, [Report: Volume I](#), 8 September 2011, para. 1.37. For discussion of the historical use of such techniques see Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, paras. 4.8-4:10.

<sup>51</sup> Baha Mousa Inquiry, [Report: Volume I](#), 8 September 2011, paras. 4.25-4.37.

<sup>52</sup> Compton Report as cited in Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, para. 4.35. *See also* ECtHR, *Ireland v. United Kingdom*, [no. 5310/71](#), Judgment, 18 January 1978, para. 96, describing “wall-standing: forcing the detainees to remain for periods of some hours in a “stress position”, described by those who underwent it as being “spread eagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers”;

<sup>53</sup> *See also* ECtHR, *Ireland v. United Kingdom*, [no. 5310/71](#), Judgment, 18 January 1978, para. 96, describing, “hooding: putting a black or navy coloured bag over the detainees’ heads and, at least initially, keeping it there all the time except during interrogation”.

<sup>54</sup> *See also* ECtHR, *Ireland v. United Kingdom*, [no. 5310/71](#), Judgment, 18 January 1978, para. 96, describing, “subjection to noise: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise”.

<sup>55</sup> *See also* ECtHR, *Ireland v. United Kingdom*, [no. 5310/71](#), Judgment, 18 January 1978, para. 96, describing, “deprivation of sleep: pending their interrogations, depriving the detainees of sleep”

<sup>56</sup> *See also* ECtHR, *Ireland v. United Kingdom*, [no. 5310/71](#), Judgment, 18 January 1978, para. 96, describing, “deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations”.

<sup>57</sup> Baha Mousa Inquiry, [Report: Volume I](#), 8 September 2011, para. 1.37; Compton; *Ireland v. United Kingdom* (no. 5310/71), ECtHR, Judgment, 18 January 1978, para. 96.

<sup>58</sup> Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, paras. 4.9-4.10.

<sup>59</sup> Majority considered; Minority held. For an overview *see* Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, paras. 4.53-4.70.

adding in response to questions “[t]he statement that I have made covers all future circumstances”.<sup>60</sup>

52. In proceedings subsequently brought with respect to the ill-treatment of eleven men who had undergone in-depth interrogation and who had formed the principal focus of the Compton Report, the European Court of Human Rights (ECtHR) held that the use of the five techniques in Northern Ireland amounted to a breach of the prohibition of inhuman and degrading treatment under article 3 of the European Convention on Human Rights.<sup>61</sup> Prior to the judgment, at a hearing before the ECtHR on 8 February 1977, the United Kingdom Attorney-General made the following declaration: “The Government of the United Kingdom have considered the question of the use of the ‘five techniques’ with very great care and with particular regard to Article 3 (art. 3) of the Convention. They now give this unqualified undertaking, that the ‘five techniques’ will not in any circumstances be reintroduced as an aid to interrogation.”<sup>62</sup>
53. The policy of the UK government set out by Prime Minister Heath in 1972 was incorporated, inter alia, by: amendments to the standing Joint directive on military interrogation in internal security operations overseas, the 1965 Directive that contained general guidance relating to interrogation, resulting in a new 1972 Directive, Part I of which contained specific prohibitions on the use of the five techniques during internal security operations;<sup>63</sup> a signed order of 1 March 1972 sent from the Chief of the General Staff to the General Officer Commanding Northern Ireland directing that the five techniques should no longer be used as an aid to interrogation;<sup>64</sup> and by a letter sent on 30 March 1972 to Governors and High

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<sup>60</sup> Baha Mousa Inquiry, [Report: Volume I](#), 8 September 2011, para. 1.39.

<sup>61</sup> ECtHR, *Ireland v. United Kingdom*, [no. 5310/71](#), Judgment, 18 January 1978. As the ECtHR observed, at paras. 166-167: “Although never authorised in writing in any official document, the five techniques were taught orally by the English Intelligence Centre to members of the RUC at a seminar held in April 1971. There was accordingly a practice./ The five techniques were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation. They accordingly fell into the category of inhuman treatment within the meaning of Article 3 (art. 3). The techniques were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance .... Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.”

<sup>62</sup> ECtHR, *Ireland v. United Kingdom*, [no. 5310/71](#), Judgment, 18 January 1978, paras. 102 and 153.

<sup>63</sup> Joint Directive on Military Interrogation in Internal Security Operations Overseas (JIC(65)15), JIC, February 1965 as cited in Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, paras. 4.93-4.115.

<sup>64</sup> Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, paras. 4.70, 4.92.

Commissioners of British Dependent Territories and Protectorates referred to the order sent to the General Officer Commanding Northern Ireland.<sup>65</sup>

54. Nonetheless, as observed in the report of the Baha Mousa Inquiry, already by 1973 there was a lack of clarity over whether the prohibition of the five techniques extended beyond internal security operations to interrogation in wartime.<sup>66</sup> As a result, the Inquiry found that over the course of subsequent decades, no clear guidance was provided by the MoD to make the illegality of the use of the five prohibited techniques in warfare clear.<sup>67</sup>
55. A review of MoD policy that took place in 1996/1997 accelerated the apparent gradual loss of the doctrine within the UK armed forces in the years leading up to the Iraq war.<sup>68</sup> As the MoD acknowledged in its closing submissions to the Baha Mousa Inquiry, although the use of the five techniques during interrogation had been expressly prohibited in Part I of the 1972 Directive with respect to internal security operations, “[t]here was no corresponding written doctrine for interrogation in times of international armed conflict”, for which the MoD went on to “...accept its corporate responsibility for the gap in doctrine”.<sup>69</sup>
56. As the Baha Mousa Inquiry concluded: “By 2003, the MoD simply had no generally available written doctrine on the interrogation of prisoners of war other than NATO publications at a high level of generality. Doctrine had largely become restricted to what was taught at Chicksands [Joint Services Intelligence Organisation

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<sup>65</sup> Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, paras. 4.91-4.92.

<sup>66</sup> Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, paras. 4.116-4.164. As summarised in the Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011 at para 4.173 (sub-paragraph numbering omitted): “...at the time when the 1972 Directive was finalised, the doctrine for general prisoner of war handling was contained in the 1951 Regulations and for interrogation of prisoners of war in the 1955 pamphlet; the outdated nature of the 1955 prisoner of war interrogation pamphlet was drawn to the attention of the Vice Chief of the General Staff who in September 1973 instructed that it be updated by the JSIW Ashford, with close attention being paid to the 1972 Directive; ... following the Vice Chief of the General Staff’s request, it took nearly six years for an updated prisoner of war interrogation manual to be produced. When it was finalised in 1978, JSP 120(6) contained no reference to the prohibition on the five techniques, in apparent breach of the Vice Chief of the General Staff’s much earlier instruction. It did, however, contain a short passage referring to blindfolding on security grounds; in 1990 the 1951 Regulations were replaced by JSP 391 which did not refer to the five prohibited techniques and did not address sight deprivation of prisoners of war at all; and there was completely separate doctrine on interrogation in internal security operations (the 1972 Directive) and in warfare (JSP 120(6)). The five techniques were expressly prohibited in the former but not in the latter.”

<sup>67</sup> Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, para. 4.157; stating further at para. 4.158 “the MoD failed to ensure that the updated guidance on interrogation of prisoners of war included a reference to the prohibition on the five techniques ... this historical failure contributed to the entirely unacceptable situation that no Op Telic Order, nor any readily accessible MoD doctrine at the time of Baha Mousa’s death, referred to the prohibition on the five techniques”.

<sup>68</sup> Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, para. 4.174.

<sup>69</sup> Closing Submissions on modules 1-3 on behalf of the Ministry of Defence, 25 June 2010, SUB000947, at pp. 112-113 (SUB001058-9) cited in the Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, para. 5.27; *see also* Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, paras. 5.76, 5.142, 5.151.

interrogation courses].”<sup>70</sup> The Inquiry further concluded that “the absence of a clear statement in the [Human Intelligence (HUMINT)] Directive that the five techniques were prohibited as aids to interrogation may have contributed to the failure to prevent their use.”<sup>71</sup>

57. Concerning the training given on the law of armed conflict and prisoner handling exercises, while the Baha Mousa Inquiry found there was considerable evidence that the basic message that soldiers were to treat prisoners “humanely” had been conveyed to all ranks, such training was conducted at the level of broad generality and did not cover the specific prohibition on the five techniques.<sup>72</sup>
58. Other aspects of the training and the way this was understood and implemented in theatre, in particular, referred to maintaining or prolonging the “shock of capture”, either as a goal or a by-product of detainee handling, without this being viewed as inconsistent with the requirement for humane treatment.<sup>73</sup> Because the exercises on prisoner handling taught as part of the general law of armed conflict training was focussed on the point of capture, moreover, limited distinction appears to have been conveyed between what may be appropriate at the initial stage of capture as a security precaution, compared to later stages of detainee treatment. As the Inquiry found, “there was an obvious risk of hooding [and/or other ‘shock of capture’ methods] at the point of capture being continued later in the prisoner handling process and in circumstances where it could all too easily become part of the tactical questioning or interrogation process.”<sup>74</sup> The result is that students of such courses came away with varying understandings of what was permissible, with variations existing also in emphasis and interpretation between different instructors.<sup>75</sup>

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<sup>70</sup> Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, para. 5.141. Similarly at para. 5.150: “As a result of the above, by the time of Op Telic, the position was as follows, firstly there was no proper MoD-endorsed doctrine on interrogation of prisoners of war that was generally available. The proper limits of interrogation had become confined to teaching materials at Chicksands. ... Secondly, practical knowledge of the 1997 policy requiring a detailed directive had been lost. Thirdly, while varying knowledge of the Heath Statement and Ireland v UK remained, Part I of the 1972 of the Directive on internal security operations as a policy document containing the prohibition on the five techniques had also largely been lost. Fourthly, JWP 1-10 [a high level joint doctrine publication entitled ‘Prisoners of War Handling’] was the leading doctrinal publication. It contained many clear and appropriate instructions. But it gave no guidance on sight deprivation of prisoners and did not mention the prohibition on the five techniques.” See also House of Commons Defence Committee, ‘[Who guards the guardians? MoD support for former and serving personnel](#)’, 10 February 2017, paras. 84-85.

<sup>71</sup> Baha Mousa Inquiry, [Report: Volume III](#), 8 September 2011, para. 356.

<sup>72</sup> Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, paras. 6.45-6.73, 6.341.

<sup>73</sup> See, *inter alia*, Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, paras. 6.26-6.27, 6.51, 6.59, 6.60-6.61 (hooding), 6.62 (stress positions), 6.184-6.185, 6.201 (sight deprivation), 6.224-6.232 (sight deprivation, stress positions, noise), 6.245-6.262 (sight deprivation), 6.284-6.291 (harshing), 6.292-6.311, 6.328 (shock of capture and lack of sleep as an aid to interrogation, but see para. 6.337), 7.78, 8.79-8.102.

<sup>74</sup> Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, paras. 6.64, 6.71, square brackets added in the light of discussion in Baha Mousa Inquiry paragraphs above.

<sup>75</sup> Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, paras. 6.342-6.349. See also paras. 6.350-6.397, concerning training related to Conduct After Capture (CAC) and Resistance to Interrogation, discussing the risk of

59. Early in the first roulement of Op TELIC (Op TELIC I), certain practices – namely the hooding of detainees, and to a lesser extent the use of stress positions, keeping prisoners awake and their exposure to the sun for lengthy periods of time - triggered the concern of some British officers, although service members held differing views on whether such measures were permissible.<sup>76</sup> On hooding, for example, which might involve the use of hessian and plastic-weave sandbags,<sup>77</sup> sometimes double hooded,<sup>78</sup> or plastic hoods or bags,<sup>79</sup> for periods of up to 24 hours,<sup>80</sup> there were differences of legal view between lawyers at the Prisoner of War Handling Organisation (Battalion Headquarters of the Queen’s Dragoons Guards)<sup>81</sup> and at the National Contingent Command Headquarters (based in Qatar),<sup>82</sup> with justification offered on the basis of assessments of operational security needs and their use within constraint.<sup>83</sup>
60. On or about 1-3 April 2003, the National Contingent Commander, Air Marshal Brian Burridge, and the Divisional General Officer Commanding (1 (UK) Armoured Division), Major General Brims, issued verbal orders banning the use of hooding.<sup>84</sup> Oral orders were the prime means by which orders were given at this time and would ordinarily have cascaded down to units within the division without needing to be followed up by a written order.<sup>85</sup> Nonetheless, the reception of the order was described as “patchy” by those involved in its dissemination, such that some personnel, including at the level of the Brigade Commander of 7 Armoured Brigade and his Chief of Staff as well as some of those closely involved in the discussions

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‘contamination’, as “those undergoing CAC training may have learnt of prisoner handling techniques that would be unlawful and/or contrary to UK policy if used on prisoners taken by British Forces, without fully understanding that they must not be used by British service personnel”; and concluding that while the “clear majority” of students would have understood this distinction, “a minority misunderstanding” was too great a risk to run in this highly sensitive area.

<sup>76</sup> See e.g. Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, paras. 8.493.

<sup>77</sup> See e.g. Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, paras. 8.464, 8.466, 8.486.

<sup>78</sup> See e.g. Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, paras. 8.203, 8.464.

<sup>79</sup> See e.g. Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, paras. 8.178 including use of plastic cement bags.

<sup>80</sup> See e.g. Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, paras. 8.65, 8.82, 8.91, 8.99, 8.203, 8.214, 8.420, 8.464.

<sup>81</sup> See Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, para 8.5: “UK’s Prisoner of War Handling Organisation set up a facility for prisoners of war about 1 to 2 kms outside the town of Um Qasr. Initially this was known as Camp Freddie, later changing its name to Camp Bucca. It was also known as the Temporary Detention Facility (TDF) and later the Theatre Internment Facility (TIF).”

<sup>82</sup> Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, para. 8.152. See generally paras. 8.116-8.183 and paras. 8.213- 8.251.

<sup>83</sup> Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, para. 8.482.

<sup>84</sup> Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, para. 8.199. Notably, the order was not given based on specific the unlawfulness of the five prohibited techniques, but instead on the basis of a policy assessment of the Brims, as General Commanding Officer (GOC), that “hooding should cease because it seemed to him to contradict the style of operations he was anxious to achieve” but could be overridden “should circumstances require it.”; paras. 8.146, 8.266. NCHQ similarly viewed the matter as falling within the discretion of the GOC to regulate, rather than an awareness of an express prohibition, paras. 8.153, 8.492.

<sup>85</sup> Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, paras. 8.269, 8.275, 8.290-8.291.

about hooding, were unaware of the order banning hooding.<sup>86</sup> As a result, “there was an unfortunate level of confusion and miscommunication surrounding the prohibition on the use of hoods, and the debate in relation to it.”<sup>87</sup> This meant that even after oral orders banning hooding, the practice partially continued in the Joint Field Interrogation Team and certain units, while the debate about the use of hooding also continued.<sup>88</sup>

61. Renewed written guidance on the detention of civilians, including the prohibition of hooding, was subsequently issued on 20 May 2003 by 1 (UK) Division’s Daily Miscellaneous Fragmentary Order (FRAGO) 152.<sup>89</sup> The attached guidance directed “under no circumstances should their faces be covered as this might impair breathing”.<sup>90</sup> It recalled that in accordance with the law of armed conflict civilians were to be “treated humanely at all times and protected against all acts of violence or threats of violence”. It further cautioned: “If a civilian is assaulted or mistreated in any way this could amount to a breach of Military Law which could result in disciplinary action being taken. If a detainee is assaulted, excessive force used or the detained civilian suffers injury or death as a result of not receiving humane treatment then disciplinary action will probably follow.”<sup>91</sup>
62. Although FRAGO 152 appears to have been received by all units, some sub-units continued the practice of hooding.<sup>92</sup> Knowledge of FRAGO 152 appears to have deteriorated with the handover between the Op TELIC 1 formations and units to their Op TELIC 2 counterparts. For example, members of 1 Queen’s Lancashire Regiment (1 QLR) reported that they adopted the procedure of hooding because they had seen it in use by 1 Black Watch (1 BW) at the time of the handover of tours of duty,<sup>93</sup> while the evidence also suggested that hooding was a method already

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<sup>86</sup> Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, paras. 8.279-8.283, 8.293.

<sup>87</sup> Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, para. 8.292.

<sup>88</sup> Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, paras. 8.316-8.352; 8.353-8.362; 8.499-8.501, 390-393. *See* para. 8.501, it “should have been a clear warning that the hooding ban had not been adequately received and implemented”. With respect to the degree to which the issue of hooding and related lack of doctrine concerning interrogation was raised up the chain of command beyond those in theatre, the inquiry found that more could have been done by some of the lawyers involved to ensure that the legal issue regarding hooding received further consideration and that the intelligence branch at PJHQ might have reacted more proactively to the realisation that that doctrine in relation to interrogation, including the use of hooding, was scarce; paras. 394-395.

<sup>89</sup> Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, para. 9.25. The order was reproduced at Brigade level by 7th Armoured Brigade FRAGO 63 of 21 May 2003: para. 9.27.

<sup>90</sup> Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, para. 9.165.

<sup>91</sup> Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, para. 9.26.

<sup>92</sup> Baha Mousa Inquiry, [Report: Volume III](#), 8 September 2011, para. 422, referring to some sub-units of 1 BW.

<sup>93</sup> Baha Mousa Inquiry, [Report: Volume III](#), 8 September 2011, para. 423. *See also* paras. 427-441 summarising the gaps in the transfer of knowledge at the Brigade and Divisional level following the handover of tours of duty, concluding at para. 441: “It is both an exaggeration and an over-simplification to suggest, as some have done, that the prohibition on hooding was lost in the handovers between Op Telic 1 and Op Telic 2. Knowledge of the ban on hooding was not as widespread as it should have been even before the handovers. It is certainly right, however, that the level of knowledge of the ban on hooding diminished as a result of inadequacies in the handovers at every level.

applied by units prior to their deployment in Iraq.<sup>94</sup> As the Inquiry further observed, “1 QLR was by no means the only Op TELIC 2 Battlegroup to use hooding”.<sup>95</sup> This meant that at the time of Baha Mousa’s death, the unit detaining him (1 QLR) “were employing as a standard procedure the process of ‘conditioning’ some detainees before tactical questioning, a process including the use of hoods to deprive prisoners of their sight and stress positions”,<sup>96</sup> while “other Battlegroups under 19 Mech Bde also used sandbags to hood detainees, in some cases with an apparent understanding that it helped maintain the shock of capture”.<sup>97</sup> Moreover some unit level officers, such as the Battlegroup Internment Review Officer of 1 QLR, believed that assurance had been provided by the Brigade level that the use of hooding and stress positions before questioning was permissible (and apparently passed this belief on to other 1 QLR personnel), although the Inquiry did not find that there was a formal sanction by 19 Mechanised Brigade (19 Mech Bde) of the use of hooding or stress positions.<sup>98</sup>

63. By October 2003, the ban of hooding was set out in a theatre issued Divisional order Standard Operating Instruction 390, as well as a higher level prohibition issued by Lt Gen Reith, the Chief of Joint Operations at Permanent Joint Headquarters (Northwood, UK), to both the Chief of Defence Intelligence and to the General Officer Commanding of MND-SE.<sup>99</sup> By this time, the post mortem report produced on 31 September 2003 by the pathologist concerning the death in custody of Baha Mousa concluded that the cause of death was positional asphyxia.<sup>100</sup> Medical advice provided in the context of a later policy review on the use of hooding instigated by Lord Walker, the Chief of the Defence Staff, in late May 2004, similarly pointed to the risks of asphyxia, hypercarbia and hypoxia, with increased risks in hot and humid environments and compounded by the physiological and psychological stress of being hooded.<sup>101</sup>

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This effect was most pronounced at Battlegroup level but it extended to higher formations as well.” Further observing at para. 457: “... in the sequence of orders during Op Telic 2, from the Divisional handover right through to Baha Mousa’s death, it is striking that none referred in any way to the prohibition on hooding or stress positions. Had they done so it is doubtful that the 1 QLR process of conditioning would have developed or continued in the way that it did.”

<sup>94</sup> Baha Mousa Inquiry, [Report: Volume III](#), 8 September 2011, para. 426.

<sup>95</sup> Baha Mousa Inquiry, [Report: Volume III](#), 8 September 2011, para. 474: “In addition to 1 QLR, it is clear that other Op Telic 2 Battlegroups used hooding ... the evidence suggests that 1 The King’s Regiment (Kings) and probably to a slightly lesser extent 1 King’s Own Scottish Borderers (KOSB) and 40 Regt RA did use hooding in the early part of Op Telic 2.”

<sup>96</sup> Baha Mousa Inquiry, [Report: Volume III](#), 8 September 2011, para. 475.

<sup>97</sup> Baha Mousa Inquiry, [Report: Volume III](#), 8 September 2011, para. 488.

<sup>98</sup> Baha Mousa Inquiry, [Report: Volume I](#), 8 September 2011, paras. 2.1614-2.1615, 2.1632, 13.1-13.97.

<sup>99</sup> Baha Mousa Inquiry, [Report: Volume III](#), 8 September 2011, paras. 15.15-15.27.

<sup>100</sup> Baha Mousa Inquiry, [Report: Volume III](#), 8 September 2011, paras. 15.180.

<sup>101</sup> Baha Mousa Inquiry, [Report: Volume III](#), 8 September 2011, para. 15.180.

64. Other than hooding, uncertainty also appears to have still existed in later tours of duty with respect to the permissibility of other techniques. This led to situations such as those described by the Al Sweady Inquiry which found that during Op TELIC 4 (25 April 2004 to 1 November 2004) the Colour Sergeant responsible for tactical questioning of the detainees employed techniques which he considered permissible, but which should have been understood as prohibited conduct.<sup>102</sup>
65. Specific prohibition of the use of all five techniques was not addressed in the joint doctrine until the issuance of the updated joint doctrine on prisoners of war, Joint Warfare Publication (JWP) 1-10 (2<sup>nd</sup> ed, 2010).<sup>103</sup>
66. Even thereafter, however, the UK Government, in its Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees ('Consolidated Guidance'), maintained its view that certain exceptions applied to what might be considered constitute cruel, inhuman and degrading treatment, referring to: "methods of obscuring vision or hooding (except where these do not pose a risk to the detainee's physical or mental health and is necessary for security reasons during arrest or transit)".<sup>104</sup> The lawfulness of the exception was challenged in *R (Al Bazzouni) v Prime Minister*, where the Divisional Court concluded that although it was conceivable that in certain factual circumstances hooding might not be unlawful, the exception in the guidance was unworkable, observing: "officers on the ground should not be encouraged or required to make any judgment which might possibly enable them to go along with it" and that "the series of difficult and confusing judgments which the exception [...] requires for its conceivably lawful operation is too great to expect officers on the ground to give effect to it without risking personal liability". As such, the Divisional Court found that the guidance should be changed to omit hooding from the ambit of the exception.<sup>105</sup> The absolute prohibition on hooding at any time for any purpose was

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<sup>102</sup> Al Sweady Inquiry, [Report: Volume II](#), December 2014, paras. 3.330-3.384.

<sup>103</sup> Baha Mousa Inquiry, [Report: Volume III](#), 8 September 2011, paras. 16.34-16.38; Joint Warfare Publication ([JWP](#)) [1-10](#), 2010.

<sup>104</sup> UK Government, [Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees](#), July 2010, Annex, para. d(iii), as cited in UK EWHC, *R (Al Bazzouni) v Prime Minister* [2011] EWHC 2401 (Admin), [2012] 1 WLR 1389, para. 28. The Office notes the official version of the 2010 Guidance as it appears on the UK Government's website incorporates all subsequent updates to the original version of 5 August 2010 adopted since. Notably, the sub-paragraph cited in the above judgment was later amended in 2019 (*see* para. 56 *infra*), such that hooding now appears in the text after the exception, *see* [Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees](#), July 2010, Annex, para. d(iii). *See* Government of the UK, [Guidance, UK involvement with detainees in overseas counter-terrorism operations, Related statement, guidance and correspondence](#), published 5 August 2010, last Updated 24 September 2019.

<sup>105</sup> UK EWHC, *R (Al Bazzouni) v Prime Minister* [2011] EWHC 2401 (Admin), [2012] 1 WLR 1389, paras. 90-94.

set out in the January 2015 edition of the MoD's Joint Doctrine Publication 1-10 on Captured Persons (JDP 1-10).<sup>106</sup>

67. Despite its unequivocal published policy, the MoD nonetheless continued to argue in support of the permissibility of hooding for short periods of time during transit for reasons of operational security in civil proceedings before the High Court. As Justice Leggatt observed in the 2017 judgement in *Alseran & Others v Ministry of Defence*:

It is disappointing that the MOD appears to regard its published doctrine on this practice as a form of abstinence on its part which is more honoured in the breach than the observance. As the lessons of Northern Ireland, the Baha Mousa inquiry and the Al-Bazzouni case do not seem to have been fully absorbed by the MOD, I consider that the court should now make it clear in unequivocal terms that putting sandbags (or other hoods) over the heads of prisoners at any time and for whatever purpose is a form of degrading treatment which insults human dignity and violates article 3 of the European Convention. It is also, in the context of an international armed conflict, a violation of article 13 of Geneva III, which requires prisoners to be humanely treated at all times ... An incantation of "operational security" cannot justify treating prisoners in a degrading manner.<sup>107</sup>

68. Following the introduction of the Investigatory Powers Act (2016), Prime Minister Theresa May directed that from 1 September 2017 oversight of the Consolidated Guidance be carried out by the Investigatory Powers Commissioner's Office, this function having previously been carried out by the Intelligence Services Commissioner.<sup>108</sup> In June 2018, the Prime Minister additionally asked the Investigatory Powers Commissioner, Sir Adrian Fulford, to review the Consolidated Guidance to make proposals as to how guidance could be improved.<sup>109</sup> The revised guidance following these recommendations was published in July 2019. Notably, the new guidance explicitly distinguishes between hooding, which is listed without exception and is impermissible at all times, from methods of obscuring vision which may be lawful "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".<sup>110</sup>

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<sup>106</sup> Joint Doctrine Publication 1-10 on Captured Persons ([JDP 1-10](#)), January 2015, para. 218.

<sup>107</sup> UK EWHC, *Alseran & Others v Ministry of Defence* [2017] EWHC 3289 (QB), 14 December 2017, paras. 495-496.

<sup>108</sup> UK, [Investigatory Powers Commissioner \(Additional Directed Oversight Functions\) \(Consolidated Guidance\) Direction 2017](#).

<sup>109</sup> UK Parliament, [ISC Detainee Reports: Written statement: HCWS808](#), 8 June 2018.

<sup>110</sup> UK Government, [The Principle relating to the detention and interviewing of detainees overseas and the passing and receipt of intelligence relating to detainees](#), July 2019, Annex B, paras. 3(iii)-(iv), p. 14.

## V. JURISDICTION

69. Because Iraq is not a State Party to the Rome Statute and has not lodged a declaration under article 12(3) accepting the exercise of jurisdiction of the Court, the Office cannot examine all alleged Rome Statute crimes occurring on the territory of Iraq. Instead, by virtue of article 12(2)(b), the Court may only exercise its jurisdiction with respect to the conduct of nationals of States Parties or the nationals of any State that has lodged a declaration with the Court pursuant to article 12(3).
70. The UK deposited its instrument of ratification to the Rome Statute on 4 October 2001. The ICC therefore may exercise its jurisdiction, from 1 July 2002 onwards, over alleged acts of war crimes, crimes against humanity and genocide committed either on UK territory or by UK nationals on the territory of other States.
71. As set out more fully below, on the basis of the information available, there is a reasonable basis to believe that, at a minimum, the following war crimes have been committed by members of UK armed forces: wilful killing/murder under article 8(2)(a)(i) or article 8(2)(c)(i); torture and inhuman/cruel treatment under article 8(2)(a)(ii) or article 8(2)(c)(i); outrages upon personal dignity under article 8(2)(b)(xxi) or article 8(2)(c)(ii); rape and/or other forms of sexual violence under article 8(2)(b)(xxii) or article 8(2)(e)(vi).
72. The above crimes are alleged to have been committed by members of UK armed forces against persons who were civilians or hors de combat on the territory of Iraq, in the zone placed under the command of British-led Multi-National Division (South East) ('MND (SE)') during the period of 20 March 2003 to 28 July 2009, primarily in detention facilities operated under the control of UK armed forces.<sup>111</sup>
73. In this respect, the Office recalls that the internment and treatment of civilians, one of the most fundamental pillars of the law of armed conflict, is subject to strict standards of treatment designed to ensure that the human person is respected under the circumstances where it appears to be in greatest danger.<sup>112</sup> Allegations of abuse of detained civilians attributable to an Occupying Power warrant particular

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<sup>111</sup> During the occupation period, the territory placed under the command of MND SE broadly coincided with CPA (Coalition Provisional Authority) South region, with headquarters in the southern Iraqi city of Basra. The CPA was dissolved on 28 June 2004.

<sup>112</sup> Pictet (ed.), *Commentary to Geneva Convention IV*, ICRC, 1958, p. 207. The ICTY Appeals Chamber has similarly affirmed that "internment of civilians" is one of the "most severe measures that may be inflicted on protected persons" under Geneva Convention IV, and consequently is "subject to strict rules": *Prosecutor v. Prlić et al.*, [Appeals Judgment: Volume I](#), IT-04-74-A, 29 November 2017, para. 514.

attention — and arguably may be considered more grave than other allegations of detainee abuse not committed in the context of occupation — in order to reinforce and give effect to the important body of express rules contained in Geneva Convention IV.

74. The alleged crimes were committed in the context of and were associated with the armed conflicts that took place in the territory of Iraq in the period from 20 March 2003 to 28 July 2009. In particular, the relevant crimes were committed during the international armed conflict between the Coalition Forces, of which the British Armed Forces were a component, and the Government of Iraq between 20 March 2003 and 28 June 2004; and during a non-international armed conflict from 28 June 2004 until 28 July 2009 between the Iraqi government forces and the Multinational Force-Iraq (MNF-I), on one hand, and non-State armed groups, including Al-Qaeda Organization in the Land of the Two Rivers (“Al-Qaeda in Iraq”), Islamic Army in Iraq, Ansar al-Islam and the Mahdi Army, on the other. Following the official withdrawal from Iraq of multi-national forces on 31 December 2008, the non-international armed conflict continued between the Iraqi Government and US and UK armed forces, on one side, and armed groups, on the other. The UK remained a party to the armed conflict until 28 July 2009 when British combat troops completed their withdrawal from Iraq.

#### **A. UNDERLYING ACTS**

75. For the purpose of its subject-matter assessment the Office focussed on a sample pool of incidents which, while not reflecting the full scale of the alleged crimes relevant to the situation, are sufficiently well supported to meet the reasonable basis standard and allow the Office to reach a determination.<sup>113</sup>

##### **1. Wilful killing/murder**

76. The information available provides a reasonable basis to believe that in the period from April 2003 through September 2003 members of UK armed forces in Iraq committed the war crime of wilful killing/murder pursuant to article 8(2)(a)(i) or article 8(2)(c)(i) against at least seven persons in their custody.
77. The precise number of deaths of detainees in British custody for the period from March 2003 through July 2009 is unknown. In its 2014 response to a request for information under the Freedom of Information Act 2000, the MoD explained that

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<sup>113</sup> See above, Section III (Examination of the Information Available).

some of the information on cases of death in custody of UK forces has been withheld from the public in order to protect personal information as governed by the Data Protection Act 1998. With regard to the information that was disclosed, the reply of the MoD states that “a total of three people died while being formally detained in a UK detention facility or an Enemy Prisoner of War Holding Area, at the time of death, in Iraq between 2003 and 2009 (...) each of the three deaths was investigated and the outcomes were as follows: One established that no crime had been committed; one resulted in a soldier being sentenced to 12 months imprisonment and dismissed from HM Armed Forces; and in the other the RMP concluded that it was impossible to establish whether a crime had been committed”.<sup>114</sup> According to PIL, the MoD informed it that 9 deaths in custody were attributed to UK authorities excluding incidents of deaths where MoD found a lack of credible evidence to support the allegations.<sup>115</sup> PIL and ECCHR claim that British personnel were responsible for 52 unlawful killings of persons in their custody. These include 28 individuals who died following release from detention while one individual went missing and is presumed dead.<sup>116</sup>

78. Based on the information available, the Office has found a reasonable basis to believe that at least seven persons were the victims of unlawful killing constituting war crimes while in British custody between April and September 2003. This includes the following four individuals who died in UK custody: Rhadi Nama and Abdul Jabbar Mossa Ali died shortly after being detained by soldiers of the Black Watch Regiment at Camp Stephen, Basra in May 2003; Baha Mousa died between 14 and 16 September 2003 while in British custody at the Battlegroup Main camp (BG Main) in Basra; Tariq Sabri Mahmud died in April 2003 while being transported with nine other prisoners in a helicopter by the 2nd Squadron of the Royal Air Force (RAF) Regiment. The information available also provides a reasonable basis to believe that the following three individuals died outside of detention, but while under the control of UK armed forces: Naheem Abdullah died from a blow or blows to the left side of his head inflicted by one or more British soldiers on 11 May 2003 at a road block control north of Basra; and Ahmed Jabber Kareem Ali and Sayeed Shabram drowned in the Shatt-Al-Arab river after being detained by British troops on 8 and 24 May 2003, respectively.

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<sup>114</sup> See e.g. UK Ministry of Defence, [Letter Reference: FOI2014/01925](#), 1 July 2014 (issued in response to request for information under the *Freedom of Information Act 2000*).

<sup>115</sup> Second Article 15 Communication, September 2015.

<sup>116</sup> Second Article 15 Communication, September 2015.

79. In each of the seven incidents, the assessment has been made on the basis of multiple and consistent sources of information, including from article 15 submissions, the ECtHR's factual determinations, the findings of domestic judicial, quasi-judicial and parliamentary inquiries in the UK, international NGOs reports and investigative journalism. The Office further notes, in this context, that all of these incidents were examined as part of its previous 2006 assessment, although more information is available now. The alleged killing of the seven victims overlaps with periods of both international and non-international armed conflict in Iraq.<sup>117</sup>
80. For three other cases of alleged deaths in custody, the Office did not reach a reasonable basis finding either because the allegations were not substantiated, or the information available did not attribute responsibility to the UK armed forces. The Office also analysed allegations concerning 29 other persons who died after being released from custody or are otherwise presumed dead. The reported cause of death in 9 of these cases was heart-related issues (3), suicide (1), cancer (1), kidney failure (1), lung infection (1), unspecified causes based on ill-treatment suffered during arrest and/or detention (2), and was otherwise unknown or unclear in its linkage to the treatment suffered in the remaining cases (20). Having considered the allegations, the information available in these 29 cases was not sufficiently substantiated to enable the Office to determine, to the reasonable basis standard, whether these deaths were caused by acts or omissions of British detaining authorities during the period of custody.

## **2. Torture, inhuman/cruel treatment and outrages upon personal dignity**

81. The information available provides a reasonable basis to believe that in the period from 20 March 2003 through 28 July 2009 members of UK armed forces committed the war crime of torture and inhuman/cruel treatment (article 8(2)(a)(ii) or article 8(2)(c)(i)); the war crime of outrages upon personal dignity (article 8(2)(b)(xxi) or article 8(2)(c)(ii)) against at least 54 persons in their custody.
82. In particular, there is a reasonable basis to believe that the following techniques, among others, were used against one or more detainees by members of UK armed forces, typically cumulatively in varying combinations:
- (i) imposition of "stress positions" designed to induce muscle fatigue, including by requiring detainees to stand against a wall with their

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<sup>117</sup> The crimes allegedly committed by the UK forces occurred in the context of an international armed conflict in Iraq from 20 March 2003 until 28 June 2004, and in the context of non-international armed conflict from 28 June 2004 until 28 July 2009. The UK Government was a party to these armed conflicts over the entire time period.

body weight resting against their hands and feet or making them to squat with their hands resting on the head for extended periods of time;<sup>118</sup>

- (ii) sensory deprivation, including by means of hooding and very tight handcuffing;<sup>119</sup>
- (iii) sensory overstimulation, including by exposure to loud music, other forms of noise, and shouting at detainees at close range for prolonged period of times;<sup>120</sup>
- (iv) sleep deprivation and/or manipulation, brought about through a variety of means including stress positions, loud noise or music, bright lights;<sup>121</sup>
- (v) deprivation or inadequate provision of food and water;<sup>122</sup>
- (vi) varying degrees of physical assault, including grasping, slaps, blows or kicks, banging detainees against the wall, and other forms of harsh or rough treatment, often in combination with other techniques;<sup>123</sup> and
- (vii) sexual humiliation and sexual violence.<sup>124</sup>

83. A number of these techniques per se meet the threshold of severity and thus amount to torture or cruel treatment, as they necessarily cause severe pain or suffering.<sup>125</sup> These include the use of sexual violence,<sup>126</sup> severe isolation,<sup>127</sup> hooding under conditions which impede breathing,<sup>128</sup> and threats of torture.<sup>129</sup> Other techniques

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<sup>118</sup> Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, para. 8.185; Baha Mousa Inquiry, [Report: Volume III](#), 8 September 2011, para. 143; SIWG, [Second Report](#), July 2015, p. 6.

<sup>119</sup> Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, paras. 8.178, 8.203-8.206, 8.464, 8.466; Al Sweady Inquiry, [Report: Executive Summary](#), 17 December 2014, paras. 383, 472-474; UK EWHC, [Alseran & Others v Ministry of Defence](#) [2017] EWHC 3289 (QB), 14 December 2017, paras. 499, 719; SIWG, [First Report](#), July 2014, p. 7; SIWG, [Second Report](#), July 2015, p. 11.

<sup>120</sup> Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, paras. 6.284-6.288; SIWG, [First Report](#), July 2014, p. 8; SIWG, [Second Report](#), July 2015, p. 17.

<sup>121</sup> Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, paras. 8.466 ; SIWG, [First Report](#), July 2014, p. 7; SIWG, [Second Report](#), July 2015, p. 17; SIWG, [Fourth Report](#), August 2018, pp. 15-17; UK EWHC, [Alseran & Others v Ministry of Defence](#) [2017] EWHC 3289 (QB), 14 December 2017, para. 719.

<sup>122</sup> Baha Mousa Inquiry, [Report: Volume III](#), 8 September 2011, para. 143 (finding that Baha Mousa's cause of death included lack of food and water); Al Sweady Inquiry, [Report: Volume II](#), December 2014, para. 3.705 (on the "overall failure to provide the detainees with adequate and/or sufficient food or meals at any stage during their detention"); SIWG, [First Report](#), July 2014, pp. 6-7; SIWG, [Second Report](#), July 2015, pp. 4, 15.

<sup>123</sup> Baha Mousa Inquiry, [Report: Volume III](#), 8 September 2011, para. 143; Camp Breadbasket Court Martial Transcript, 2005, pp. 147-148; UK EWHC, [Alseran & Others v Ministry of Defence](#) [2017] EWHC 3289 (QB), 14 December 2017, paras. 233, 482-485, 500, 657, 719; SIWG, [First Report](#), July 2014, p. 8; SIWG, [Second Report](#), July 2015, p. 17; SIWG, [Fourth Report](#), August 2018, pp. 22-24; UK Army, [The Aitken Report: An investigation into cases of deliberate abuse and unlawful killing in Iraq in 2003 and 2004](#), 25 January 2008, pp. 3-4.

<sup>124</sup> Camp Breadbasket Court Martial Transcript, 2005, pp. 148.

<sup>125</sup> Elements of Crimes, article 8(2)(c)(i)-3 and 8(2)(c)(i)-4.

<sup>126</sup> ICTY, [Kunarac Appeals Judgement](#), paras. 150-151; [Delalić Trial Judgement](#), paras. 495-496.

<sup>127</sup> ECtHR, [Babar Ahmad and others vs. The United Kingdom](#), Appl. No. 24027/07, [Judgment](#), 24 September 2012, para. 206.

<sup>128</sup> UN Committee against Torture, "Concluding observations, Israel", [A/52/44](#), 10 September 1997, paras. 255-257, referring to "hooding under special conditions", in apparent response allegation by victims and to the Government's report that the use of hoods which impeded the wearer's breathing, or otherwise dirty or suffocating hoods were prohibited; Committee against Torture, Special report of Israel, CAT/C/SR.296, 15 May 1997, para. 18.

may amount to torture or cruel treatment when used for prolonged periods of time or in combination with other acts. These include stress positions,<sup>130</sup> sensory deprivation,<sup>131</sup> sensory overstimulation,<sup>132</sup> sleep deprivation,<sup>133</sup> and food deprivation.<sup>134</sup>

84. The Office recalls in this context that there is no requirement that the threshold of severity is met by each single act of torture or cruel treatment; the severity of pain and suffering of the victim may instead result from a consistent course of conduct.<sup>135</sup> As the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) has held, when assessing the seriousness of the acts charged as torture, a Chamber must take into account all the circumstances of the case, including both objective and subjective factors. This includes the nature and context of the infliction of pain, the premeditation and institutionalisation of the ill-treatment, the physical condition of the victim, the physical or mental effect of the treatment on the victim, the manner and method used, and the position of inferiority of the victim, and the social, cultural and religious background of the victim.
85. In particular, to the extent that an individual has been mistreated over a prolonged period of time, or that he or she has been subjected to repeated or various forms of mistreatment, the severity of the acts should be assessed as a whole to the extent that it can be shown that this lasting period or the repetition of acts are inter-related, follow a pattern or are directed towards the same prohibited goal.<sup>136</sup>

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<sup>129</sup> Inter-American Court of Human Rights (“IACtHR”), *Tibi v. Ecuador*, [Judgment](#), 7 September 2004, para. 147; *See also* IACtHR, *Baldeón-García v. Peru*, [Judgment](#), 6 April 2006, para. 119; and Human Rights Committee, *Miguel Angel Estrella v. Uruguay*, Communication No.74/1980, Views, A/38/40, 29 March 1983, paras. 8.3 and 10, in *Selected Decisions of the Human Rights Committee under the Optional Protocol*, Volume 2, [CCPR/C/OP/2](#) at pp. 93-98.

<sup>130</sup> “Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: Mission to China”, [E/CN.4/2006/6/Add.6](#), 10 March 2006, para. 45.

<sup>131</sup> “Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr. P. Kooijmans”, [E/CN.4/1986/15](#), 19 February 1986, para. 119; [Krnjelac Trial Judgment](#), para. 183.

<sup>132</sup> Committee against Torture, “Concluding observations, Israel”, [A/52/44](#), 10 September 1997, paras. 255-257.

<sup>133</sup> Committee against Torture, “Concluding observations, Israel”, [A/52/44](#), 10 September 1997, paras. 255-257.

<sup>134</sup> [Krnjelac Trial Judgment](#), para. 183.

<sup>135</sup> *Prosecutor v. Krnjelac*, ICTY Trial Chamber II, [Judgment](#), IT-97-25-T, 15 March 2002 (“Krnjelac Trial Judgment”), paras. 182-183. *See also*, *Prosecutor v. Brđanin*, ICTY Appeals Chamber, [Judgment](#), IT-99-36-A, 3 April 2007, para. 251, citing *Prosecutor v. Naletilić and Martinović*, ICTY Appeals Chamber, [Judgment](#), IT-98-34-A, 3 May 2006 (“Naletilić and Martinović Appeals Judgment”), para. 299; *Prosecutor v. Delalić et al.*, ICTY Trial Chamber, [Judgment](#), IT-96-21-T, 16 November 1998 (“Delalić Trial Judgment”), para. 467; ECtHR, *Ireland v. United Kingdom*, Case no. 5310/71, [Judgment](#), 18 January 1978, para. 162.

<sup>136</sup> *Prosecutor v. Kvočka et al.*, ICTY Trial Chamber, [Judgment](#), IT-98-30/1-T, 2 November 2001 (“Kvočka Trial Judgment”), para. 143; *Prosecutor v. Mrkšić et al.*, ICTY Trial Chamber, [Judgment](#), IT-95-13/1-T, 27 September 2007, para. 514; [Krnjelac Trial Judgment](#), para. 182; *Prosecutor v. Limaj et al.*, ICTY Trial Chamber, [Judgment](#), IT-03-66-T, 30 November 2005, para. 237; *Prosecutor v. Haradinaj et al.*, ICTY Trial Chamber, [Public Judgment with Confidential Annex](#), IT-04-84bis-T, 29 November 2012, para. 417; [Naletilić and Martinović Appeals Judgment](#), para. 300; *Prosecutor v. Brđanin*, ICTY Trial Chamber, [Judgment](#), IT-99-36-T, 1 September 2004 (“Brđanin Trial Judgment”), para. 484; and *Prosecutor v. Martić*, Trial Chamber, [Judgment](#), IT-95-11-T, 12 June 2007, para. 75.

86. Permanent injury is not a requirement for torture; evidence of the suffering need not even be visible after the commission of the act;<sup>137</sup> while damage to mental health must also be taken into account.<sup>138</sup> Moreover, the conditions of detention may, in and of themselves, constitute cruel treatment.<sup>139</sup> In relation to humiliating and degrading treatment, moreover, the Office recalls that the elements of this crime take into account “the relevant aspects of the cultural background of the victim.”<sup>140</sup>
87. The information available suggests that a number of these techniques were used to exploit and build upon the physiological and mental effects of maintaining the ‘shock of capture’ through deliberate manipulation of the environment and the conditions of detention,<sup>141</sup> for the purpose of either extracting information and/or for punishment and/or intimidation.
88. In one well-known example, the information available indicates that members of UK armed forces committed the war crime of torture and inhuman/cruel treatment against at least 7 Iraqi victims detained on suspicion of looting at Camp Breadbasket, near Basra, on 15 May 2003.<sup>142</sup> According to the information available, the victims were subjected to stress positions, severe beatings, and sexual violence. The ‘Camp Breadbasket incident’ was widely reported on after photos depicting detainee abuse were released to the media in January 2005.<sup>143</sup> The photographs documented Iraqis being forced to simulate oral and anal sex, as well as a man tied up in a cargo net and suspended from a forklift truck. The Victim Statement of PIL 22 similarly depicts treatment involving protracted humiliation and continuous

<sup>137</sup> [Brđanin Trial Judgement](#), para. 484.

<sup>138</sup> [Kvočka Trial Judgement](#), para. 149.

<sup>139</sup> In the context of the grave breach of inhumane treatment, see *Prosecutor v. Kordić & Čerkez*, ICTY Trial Chamber, [Judgement](#), IT-95-14/2-T, 26 February 2001, para. 800 (and accompanying factual findings at paras. 774, 783, 790, 794, 795; *Prosecutor v. Blaškić*, ICTY Trial Chamber, [Judgement](#), IT-95-14-T, 3 March 2000, para. 700 (and accompanying factual findings at paras. 688, 690, 692, 694, 695, 697, 698); *Prlić et al.*, Trial Judgement, para. 115, 117-120. See also [Delalić Trial Judgement](#), para. 443, holding “[t]he offence of cruel treatment under common article 3 carries the same meaning as inhuman treatment in the context of the “grave breaches” provisions.” The content of the crime of inhuman treatment under art 8(2)(a)(ii) and cruel treatment under article 8(2)(c)(i) are also treated identically in the Elements of Crimes; see A. Zimmermann/R. Geiß, ‘Article 8’, in O. Triffterer/ K Ambos (eds.), *The Rome Statute of the International Criminal Court, A Commentary*, (C.H. Beck/Hart/Nomos, 3rd ed., 2016), p. 551 at mn.894.

<sup>140</sup> Elements of Crimes, article 8(2)(b)(xxi), fn. 49; article 8(2)(c)(ii), fn.57.

<sup>141</sup> See for instance Baha Mousa Inquiry, [Report: Volume III](#), 8 September 2011, para. 119, 316, 319, 368, 374.

<sup>142</sup> While the overall number of persons abused in the Camp Breadbasket incident remains unclear, there is information available with respect to 7 alleged victims (PIL 16 to PIL 22). PIL 19 and PIL 22 were 17 and 13 years old respectively at the time. In the subsequent court martial sentencing, Judge Advocate Michael Hunter said it was “quite possible” that more Iraqis were “hit” and “assaulted” during Operation Ali Baba, which was intended to round up and put looters to work, and that other perpetrators of abuse had not been brought to justice. See Camp Breadbasket Court Martial Transcript, 2005, p. 147.

<sup>143</sup> BBC, [Profiles: Iraq abuse soldiers](#), 25 February 2005. See UK Army, [The Aitken Report: An investigation into cases of deliberate abuse and unlawful killing in Iraq in 2003 and 2004](#), 25 January 2008, p. 3.

beating with fists, boots, sticks and aials.<sup>144</sup> As set out below, one victim was reportedly subjected to rape.<sup>145</sup>

89. During the subsequent court martial hearings, the Quartermaster of Camp Breadbasket, who at the time of the incidents was a Captain, gave evidence that a group of soldiers was brought to the camp to deal with the problem of looting. Captain Taylor devised a plan, 'Operation Ali Baba', in which soldiers armed with a rifle and camouflage poles were sent to round up looters and put them to work on menial duties, "to be worked hard".<sup>146</sup>
90. The Camp Breadbasket court martial convicted Lance Corporal Cooley for using an Iraqi detainee on a forklift to amuse himself and for simulating the punch of an Iraqi detainee for a trophy photograph.<sup>147</sup> Corporal Kenyon was convicted for his role in the scheme to take trophy photographs, while Lance Corporal Larkin pled guilty to assaulting a detainee.<sup>148</sup> In articulating the reasons for sentencing, the Judge Advocate acknowledged that the persons accused in the court martial were not those responsible for "perhaps the worst of these offences" at the camp: that is, forcing detainees to simulate oral and anal sex.<sup>149</sup>
91. Several notable features stand out from the Camp Breadbasket court martial. First, although multiple military personnel knew about the alleged abuses (including the alleged sexual crimes), each failed in their duty to report them.<sup>150</sup> The conduct only came to light when one of the soldiers involved in taking trophy photographs had the photographs developed in a civilian shop and the shop assistant reported the conduct to civilian police, who made an arrest.<sup>151</sup> Second, during his testimony, when asked why he had not reported alleged criminal conduct at Camp Breadbasket, Corporal Kenyon asserted that, "there was no point in passing anything up the chain of command, because it was the chain of command who was, in my eyes, doing a wrongdoing to the Iraqis to start off with, and they were passing Iraqis down to us, for us to do the same things basically".<sup>152</sup>
92. It was further reported that the court heard that Brigadier of 20 Armoured Brigade, in a letter sent to Captain Taylor, stated that although there was evidence that he

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<sup>144</sup> PIL, Iraq Abuse Handbook, p. 859.

<sup>145</sup> See below, para. 102.

<sup>146</sup> Camp Breadbasket Court Martial Transcript, 2005, pp. 13, 79, 147.

<sup>147</sup> Camp Breadbasket Court Martial Transcript, 2005, pp. 147-150.

<sup>148</sup> Camp Breadbasket Court Martial Transcript, 2005, pp. 147-150.

<sup>149</sup> Camp Breadbasket Court Martial Transcript, 2005, pp. 148.

<sup>150</sup> See e.g. Camp Breadbasket Court Martial Transcript, 2005, p. 101.

<sup>151</sup> Camp Breadbasket Court Martial Transcript, 2005, p. 18.

<sup>152</sup> Camp Breadbasket Court Martial Transcript, - Kenyon Testimony, 2005, p. 978.

had ordered Iraqi civilians, protected persons under Geneva Convention VI, to be compelled to undertake unremunerated manual work, it was his view that the order given “albeit unlawful was not to be undertaken in an inhumane manner” and that he believed that Taylor had “acted with well-meaning and sincere but misguided zeal.”<sup>153</sup> By the time of the court martial, Taylor had been promoted from Captain to Major.<sup>154</sup>

93. In another publicised incident, the information available indicates that members of UK armed forces committed the war crime of torture and inhuman/cruel treatment against at least 4 Iraqis detained at the margins of a riot in Al-Amarah in April 2004. Specifically, the victims, including at least two children, are alleged to have been subjected to prolonged beating inflicted with particular cruelty. On 12 February 2006, the now-defunct UK newspaper ‘News of the World’ released still images from a video footage reportedly provided by a whistle-blower depicting British soldiers assaulting Iraqi civilians in April 2004 in Al-Amarah, Iraq.<sup>155</sup> The MoD confirmed it had opened an urgent Royal Military Police (“RMP”) investigation into the conduct shown in the videotape.<sup>156</sup> It appeared that four Iraqi civilians, including at least two teenagers, had been snatched from a rioting crowd and brought inside a military compound where they were assaulted.<sup>157</sup>
94. According to the ‘News of the World’ report, the video footage depicted soldiers “beating [the captured teenagers] senseless with vicious blows from batons, boots and fists” before “what appears to be an officer” delivered a “full-force kick in the genitals of a cringing lad pinned to the ground” and a cameraman delivered a “commentary urging his mates on...”.<sup>158</sup> According to the UK army press release on the incident, the video footage shows an alleged kick to the body of a deceased Iraqi civilian.<sup>159</sup> Although no official version of the video has been published to date, the Office reviewed open source footage available online with the stamp ‘News of the World’ that was consistent with the details in the media report.

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<sup>153</sup> Guardian, [Army cleared major who gave illegal order](#), 22 January 2005.

<sup>154</sup> Camp Breadbasket Court Martial Transcript, 2005, p. 79.

<sup>155</sup> See BBC news, [Video fallout hits UK Iraq troops](#), 19 February 2006; Evening Standard, [Soldiers in Iraq escape prosecution despite video of beatings](#), 4 January 2007.

<sup>156</sup> Guardian, [British troops videoed 'beating Iraqis'](#), 12 February 2006.

<sup>157</sup> Guardian, [British troops videoed 'beating Iraqis'](#), 12 February 2006; UK Army, Press Release regarding the Al-Amarah incident, 15 December 2016, available on Redress, [UK Army in Iraq – Time to come clean on civilian torture](#), October 2007, pp. 21-22; UK Army, [The Aitken Report: An investigation into cases of deliberate abuse and unlawful killing in Iraq in 2003 and 2004](#), 25 January 2008, p. 3.

<sup>158</sup> Redress, [UK Army in Iraq – Time to come clean on civilian torture](#), October 2007, pp. 14, 20-22.

<sup>159</sup> UK Army, Press Release regarding the Al-Amarah incident, 15 December 2016, available in Redress, [UK Army in Iraq – Time to come clean on civilian torture](#), October 2007, pp. 15, 21-22.

95. In another well-known incident, there is a reasonable basis to believe that members of UK armed forces committed the war crime of torture and inhuman/cruel treatment against 8 persons co-detained with Baha Mousa on 14-15 September 2003. Notably, the victims were subjected to multiple instances of severe beatings, stress positions, hooding, and sleep deprivation. Furthermore, the information available suggest that acts of abuse were inflicted to obtain information or a confession and/or as a form of coercion and punishment.
96. According to the resulting court martial proceedings, on 14 September 2003 a number of Iraqi civilians were arrested following a raid on the Haitham in Basra by soldiers of 1 QLR in an action known as 'Operation Salerno.' After arrest, they were taken to the 1 QLR Battlegroup Main Headquarters and detained there in a Temporary Detention Facility in anticipation of a decision to be made as to whether they should be interned on the basis that they posed a threat to the Coalition forces. They were detained in the Temporary Detention Facility for about 48 hours before being taken to the Theatre Internment Facility.<sup>160</sup> The court martial centred on the treatment of the Iraqi civilians while held in the Temporary Detention Facility. Over the thirty-six-hour period, they were repeatedly beaten by being kicked and punched when handcuffed and hooded, made to maintain stress positions for long periods of time, deprived of sleep, continually shouted at and generally abused in temperatures rising to almost 60 degrees centigrade. During most of this time the detainees were hooded with one or two Hessian sacks.<sup>161</sup>
97. As set out earlier, the mistreatment of Baha Mousa and his co-detainees was also documented at length by the subsequent Public Inquiry, based on medical records and other forensic material. The Inquiry found that detainees were subjected to multiple assaults, hooding, stress position, sleep deprivation, and harsh noises almost constantly during detention.<sup>162</sup> In addition, the UK Government acknowledged the abuses and is said to have paid in total about £200,000 in compensation to the victims.
98. In relation to a further incident following the battle of 'Danny Boy', the information available provides a reasonable basis to believe that members of UK armed forces committed the war crime of outrages upon personal dignity by deliberately degrading and humiliating the dignity of 9 Iraqi nationals detained between May

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<sup>160</sup> General Court Martial, Regina v Payne held at Military Court Centre Bulford, UK, (H DEP 2007/411), Sentencing Hearing Transcript, 30 April 2007. *See also* summary of Asser Institute, "[Regina v. Payne](#)", 30 April 2007.

<sup>161</sup> General Court Martial, Regina v Payne held at Military Court Centre Bulford, UK, (H DEP 2007/411), Sentencing Hearing Transcript, 30 April 2007. *See also* summary of Asser Institute, "[Regina v. Payne](#)", 30 April 2007.

<sup>162</sup> Baha Mousa Inquiry, [Report: Volume I](#), 8 September 2011, paras. 2.1314, 2.239, 2.343, 2.370, 2.371.

and September 2004 after a fire fight with British soldiers in Iraq on 14 May 2004 (the so called Al Sweady incident). The information available also indicates that members of UK armed forces inflicted severe physical or mental pain amounting to inhuman/cruel treatment against at least one of the victims by subjecting him to severe and protracted beating. The alleged detention of the 9 victims overlaps both periods of international and non-international armed conflict in Iraq.<sup>163</sup>

99. Based on information available, the nine Iraqis were detained overnight at Camp Abu Naji and, the following day, transferred to the Divisional Temporary Detention Facility at Shaibah, where they were detained for just over four months before being handed over to the Iraqi Criminal Justice System.<sup>164</sup> While dismissing the most serious allegations of murder and torture, the Al Sweady Inquiry opined that “certain aspects of the way in which nine Iraqi detainees, with whom this Inquiry is primarily concerned, were treated by the British military, during the time they were in British custody during 2004, amounted to actual or possible ill-treatment”.<sup>165</sup> The report confirmed in particular near continuous deprivation of sight,<sup>166</sup> the use of sleep deprivation,<sup>167</sup> menacing and threatening invasion of detainees’ personal space,<sup>168</sup> ‘harshing’ techniques,<sup>169</sup> and the inadequate provision of food,<sup>170</sup> although

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<sup>163</sup> As noted above, the crimes allegedly committed by the UK forces occurred in the context of an international armed conflict in Iraq from 20 March 2003 until 28 June 2004, and in the context of non-international armed conflict from 28 June 2004 until 28 July 2009. The UK Government was a party to these armed conflicts over the entire time period.

<sup>164</sup> Al Sweady Inquiry, [Report: Executive Summary](#), 17 December 2014, para. 735.

<sup>165</sup> Al Sweady Inquiry, [Report: Executive Summary](#), 17 December 2014, para. 741.

<sup>166</sup> Al Sweady Inquiry, [Report: Volume II](#), December 2014, para. 3.779 “I am therefore satisfied that the almost continual deprivation of the detainees’ sight at Camp Abu Naji during 14/15 May 2004 was very unsatisfactory and amounted to a form of ill-treatment.”

<sup>167</sup> Al Sweady Inquiry, [Report: Volume II](#), December 2014, para. 3.736: “In the event, I am satisfied that the detainees were kept awake until they had been tactically questioned that night, although they were allowed to sleep after that. In my view, it was wholly inappropriate to prevent the detainees from sleeping for such a reason and until such a late hour. I am satisfied that such a practice was wrong in principle and amounted to a form of ill-treatment.”

<sup>168</sup> Al Sweady Inquiry, [Report: Volume II](#), December 2014, para. 3.358 “On the basis of this evidence, I am satisfied that the technique of striking the tent peg on the table in the manner described, did amount to a form of ill-treatment. It was a technique designed to scare the detainee and clearly involved an obvious risk of putting the detainee in immediate fear of physical violence. It was thus conduct that was contrary to the provisions of Common Article 3 and Article 17 of the 1949 Third Geneva Convention, because it effectively amounted to a threat.”; *Id.*, paras. 3.347 and 3.350 “it seems to me that the way in which this technique was actually employed in relation to these nine detainees, during their tactical questioning sessions on 14/15 May 2004, did amount to a form of ill-treatment ... slowly walking around the blindfolded detainee in silence and blowing gently on the back of his neck amounted to a form of ill-treatment ... use of this technique in such circumstances would have seemed full of menace to the detainee on the receiving end. I am quite sure that the detainee would have been intimidated by it. It would have heightened his existing anxiety considerably and might well have led him to fear that he was about to be subjected to some form of physical violence.”

<sup>169</sup> Al Sweady Inquiry, [Report: Volume II](#), December 2014, para. 3.372 “Although it is not possible for me to say whether, when considered in isolation, the “harshing” actually used by M004 in any particular case that night did amount to ill-treatment of the detainee in question, I am satisfied that it was an integral part of an overall process of tactical questioning that, when considered as a whole, did amount to a form of ill-treatment, for the reasons already given with regard to its various constituent elements.”

<sup>170</sup> Al Sweady Inquiry, [Report: Volume II](#), December 2014, para. 3.705 “I have no doubt that the overall failure to provide the detainees with adequate and/or sufficient food or meals at any stage during their detention at Camp Abu

none of the above, and in particular sensory deprivation via the use of blindfolding, appear to have been used for prolonged periods of time or in combination with other violent acts.

100. The Office has documented 19 other incidents of detainee abuse involving a further 22 victims, occurring between March 2003 and July 2008, mainly at internment camp Umm Qasr/Camp Bucca or Basra Air Station, involving episodes of beating, restraining, and harshing prior to interrogation.<sup>171</sup> These incidents are supported by either documentary records,<sup>172</sup> data on the compensation paid by MoD in out-of-court settlements, or findings by IHAT.<sup>173</sup> The Office also notes the MoD's explanation that "proven or at least credible" claims of ill-treatment during detention resulted in the claimant being paid additional compensation.<sup>174</sup> As noted earlier, the information available, including the information on out-of-court settlements agreed, as well as those civil cases settled in court, suggests that the actual scale of victimisation may be much larger.<sup>175</sup> The House of Commons Defence Committee similarly has emphasised: "[i]t is not disputed that there were incidents of abuse of Iraqi prisoners by British armed forces service personnel".<sup>176</sup>

### 3. Rape and other forms of sexual violence

101. The information available provides a reasonable basis to believe that members of UK armed forces committed the war crimes of rape and/or other forms of sexual violence under article 8(2)(b)(xxii) or article 8(2)(e)(vi).
102. The information available provides a reasonable basis to believe that members of UK armed forces committed the war crimes of other forms of sexual violence in one incident against, at a minimum, seven detainees at Camp Breadbasket in May 2003 who were also victims of torture as described above, and furthermore subjected one of those detainees to rape.<sup>177</sup> According to the detailed account of one victim, PIL 16,

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Naji on 14/15 May 2004 could amount to a form of ill-treatment. If so, I am satisfied that this was the result of imperfect administration and not a deliberate form of ill-treatment."

<sup>171</sup> See e.g. PIL, Iraq Abuse Handbook, pp. 251, 462. The victims also allege electrocution, without elaboration.

<sup>172</sup> See e.g. PIL, Iraq Abuse Handbook, pp. 251, 474-475, 627-628, 674-675, 909-910.

<sup>173</sup> IHAT 97, see IHAT, [Table of work completed](#), updated October 2017, p. 4.

<sup>174</sup> The MoD acknowledged, in relation to claims dealt with in the year 2012-2013, that "many such claims further allege that the claimant suffered ill-treatment while being detained (...)" and that "where these claims are proven or at least credible, the claimant will be paid additional compensation". See MoD, [Claims Annual Report](#), 2012/2013, p. 6. The annual report 2008-2009 explicitly states that PLT paid compensation to Iraqi civilians "who were the victims of torture and abuse whilst held in detention by British Forces during Operation TELIC". MoD, [Claims Annual Report](#), 2008/2009, p. 8.

<sup>175</sup> See e.g. paras. 263-273.

<sup>176</sup> House of Commons Defence Committee, '[Who guards the guardians? MoD support for former and serving personnel](#)', 10 February 2017, para. 83.

<sup>177</sup> See above, paras. 88-92.

the violence started when he entered a room where one British soldier “was performing oral sex on” another soldier. PIL 16 was allegedly forced to the floor under the threat of a knife, brutally undressed, and raped by the two soldiers in turn. After the rape, the victim alleges that the soldiers started to punch him and cut his arms with the knife. He was then taken to the hospital and subsequently released. PIL 16 complained that his anus bled for a week and that he suffered from panic attacks as a result of the incident.<sup>178</sup> The Office understands that this allegation has not resulted in prosecution and that the IHAT/SPLI’s investigation into Camp Breadbasket was closed due to insufficient evidence.

103. As noted earlier, photographs widely circulated in the media at the time also showed other Iraqis being forced to simulate oral and anal sexual intercourse.<sup>179</sup> The level of severity of such conduct is comparable in gravity to conduct constituting the war crime of “outrages upon personal dignity, in particular humiliating and degrading treatment” under article 8(2)(c)(ii) of the Statute.<sup>180</sup> The sexual and gender-based component of the conduct just described, nonetheless, is more accurately reflected as the crime of “other forms of sexual violence”, given the nature of the conduct and its context, its manner of commission, and impact.<sup>181</sup> Moreover, the conduct appears to have been inflicted with the specific intention to sexually humiliate the detainees concerned, in order to cause offence, distress, and shame.
104. Chambers of the International Criminal Tribunal for Rwanda (“ICTR”) and ICTY have held that acts of sexual violence, considered within the meaning of outrages upon personal dignity, humiliating and degrading treatment, need not be limited to physical invasion of the body or even physical contact.<sup>182</sup> A trial chamber of the Special Court for Sierra Leone has further held that sexual acts constituting outrages upon personal dignity can be aggravated by the addition of a public element that deepens the humiliation and degradation.<sup>183</sup>
105. There is a reasonable basis to believe that the acts of rape and/or other forms of sexual violence set out in this section occurred in a coercive environment, in which

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<sup>178</sup> PIL, Iraq Abuse Handbook, pp. 40-41.

<sup>179</sup> BBC, [Profiles: Iraq abuse soldiers](#), 25 February 2005. See UK Army, [The Aitken Report: An investigation into cases of deliberate abuse and unlawful killing in Iraq in 2003 and 2004](#), 25 January 2008, p. 3.

<sup>180</sup> Elements of Crimes, article 8(2)(e)(vi)-6, para. 2.

<sup>181</sup> With regard to a different set of facts see separately [Muthaura Confirmation Decision](#), paras. 264-266.

<sup>182</sup> *Prosecutor v. Akayesu*, ICTR Trial Chamber, [Judgement](#), ICTR-96-4-T, 2 September 1998, para. 688; *Prosecutor v. Furundžija*, ICTY Trial Chamber, [Judgement](#), IT-95-17/1, 10 December 1998 (“Furundžija Trial Judgement”), para. 186; [Kunarac Appeals Judgement](#), para. 159; *Prosecutor v. Stakic*, ICTY Trial Chamber, [Judgement](#), IT-97-24-T, 31 July 2003, para. 757.

<sup>183</sup> *Prosecutor v. Charles Ghankay Taylor*, SCSL Trial Chamber, [Judgement](#), SCSL-03-01-T, 18 May 2012, para. 1196.

the detainees experienced fear of violence, duress, and psychological oppression. Furthermore, these acts occurred in circumstances that negated the detainee's ability to consent, and in some instances by force, when the detainee was restrained in a vulnerable position.

## **B. OTHER ALLEGED CRIMES**

106. The Office has also examined allegations that members of UK armed forces wilfully killed civilians in the course of air strikes and combat operations, the majority of which had been previously reviewed in the context of the Office's 2006 preliminary examination of the situation in Iraq. In respect of these incidents, the new information available has not altered the Office's previous determination that, in the absence of information indicating that British servicemen intentionally directed attacks against the civilian population or civilian objects, or with the knowledge they would cause clearly excessive civilian damage or casualties, there is no reasonable basis to believe that war crimes within the jurisdiction of the Court were committed. The same conclusion has been reached with respect to the additional incidents newly brought to the Office's attention.
107. With respect to alleged crimes of unlawful attacks under articles 8(2)(b)(i)-(iv) and article 8(2)(e)(i), the Office received information on 23 incidents of air-to-ground strikes attributed to UK armed forces in the context of the international armed conflict between the Coalition States and Iraq, resulting in 62 deaths.<sup>184</sup> The Office also received information on 15 instances of civilian deaths caused by air strikes in 15 separate incidents conducted by UK armed forces in the course of the non-international armed conflict in Iraq.
108. The information available indicates that victims in these incidents were civilians not taking direct participation in hostilities. They appear to have been located inside or in close vicinity to objects that appear to have had civilian status at the moment of the attack, such as civilian dwellings, boats and shops. The victims appear to have been killed by munitions launched into the air from mortars or by rockets. Nonetheless, the factual circumstances of these incidents remain unclear. In particular, there is a lack of sufficient information on the nature of targets, circumstances of attacks, and scale of the damage caused relevant to establishing

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<sup>184</sup> See above, para. 24.

whether the object of the attack was civilians and whether the perpetrator intended such civilians to be the object of the attack, as required under the Rome Statute.

109. Nearly all incidents are based on very limited information, as claims were presented in the form of short summaries. The information typically provides only a brief description of the UK airstrike allegedly hitting the victim, the victim's house or other whereabouts, and information available from third source did not enable the Office to cross-check or corroborate individual incidents alleged in the crimes. In some cases, the information available indicates that UK forces carried out an air strike to support their own troops engaged in ongoing military confrontation with insurgents or other antagonist armed groups. Some claims describe the type of weaponry used in the strike, for example, cluster munitions, but the information (understandably) remains extremely scant in terms of such factors as the scale and quantity of munitions employed vis-à-vis the target of the attack. No information is available, however, on the other factual circumstances of the alleged killings, including the scale of weaponry used, the full extent of destruction caused, as well as the possible presence of clashes or armed opponents in the area or in the building.
110. The information in relation to the scale of civilian and military injuries and damage caused by the attacks, nature of intended targets, and planning of particular attacks in areas where damage occurred, is also insufficient to assess the elements of the required proportionality test, and in particular what concrete and direct military advantage was anticipated and actually gained by UK armed forces. In addition, for a number of incidents there is a lack of information relevant to attribute the alleged crimes to UK armed forces.
111. As a result, although British military operations resulted in incidental loss of civilian life and harm to civilians and civilian objects, the information available at this stage does not provide a reasonable basis to believe that UK armed forces intended the civilian population as such or individual civilians not taking direct part in hostilities and/or civilian objects to be the object of the attack, within the meaning of articles 8(2)(b)(i)/8(2)(e)(i) and 8(2)(b)(ii), or intentionally launched an attack in the knowledge that it would cause incidental loss of life or injury to civilians or damage to civilian objects which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated, within the meaning of article 8(2)(b)(iv).

112. With respect to the alleged crime of wilful killing/murder under articles 8(2)(a)(i) and 8(2)(c)(i), concerning escalation-of-force and cross-fire incidents, the newly available information does not indicate that civilian deaths or injuries caused in these incidents resulted in intentional or reckless killing. Instead, the available information suggests that the deaths were caused by combat operations carried out in compliance with the law of armed conflict. This includes instances of mistake of fact where civilians were thought to be combatants or members of armed groups, or were incidental deaths in cross-fire. In some cases, the status of the victim at the time of death is unclear, while in other cases there is very limited information on attribution or the location where the incidents occurred. The information available is thus insufficient to establish that the UK armed forces failed to take the necessary precautions to verify the target's status. Accordingly, the information available does not provide a reasonable basis to believe that UK armed forces committed the war crime of wilful killing/murder under article 8(2)(a)(i)/article 8(2)(c)(i) other than in the context of arrest and detention.

### C. CONCLUSION

113. The information available provides a reasonable basis to believe that in the period from April 2003 through September 2003 members of UK armed forces in Iraq committed the war crime of wilful killing/murder pursuant to article 8(2)(a)(i) or article 8(2)(c)(i)), at a minimum, against seven persons in their custody. The information available provides a reasonable basis to believe that in the period from 20 March 2003 through 28 July 2009 members of UK armed forces committed the war crime of torture and inhuman/cruel treatment (article 8(2)(a)(ii) or article 8(2)(c)(i)); and the war crime of outrages upon personal dignity (article 8(2)(b)(xxi) or article 8(2)(c)(ii)) against at least 54 persons in their custody. The information available further provides a reasonable basis to believe that members of UK armed forces committed the war crime of other forms of sexual violence, at a minimum, against the seven victims as well as the war crime of rape against one of those seven victims while they were detained at Camp Breadbasket in May 2003. Where such detainee abuse occurred, this typically arose in the early stages of the internment process, such as upon capture, initial internment and during 'tactical questioning'.

114. As noted above, the findings set out above are a sample pool of incidents which, while not reflecting the full scale of the alleged crimes relevant to the situation, were sufficiently well supported to meet the reasonable basis standard and allow the Office to reach a determination on subject-matter jurisdiction.

## VI. ADMISSIBILITY

115. The factor set out in article 53(1)(b), applied via rule 48, provides that in determining whether there is a reasonable basis to proceed, the Prosecutor shall consider whether “the case is or would be admissible under Article 17”. As set out below, this requires that the Office is satisfied with respect to both the complementarity, under article 17(1)(a)-(c), and gravity, under article 17(1)(d).
116. Although the Appeals Chamber has recently held that admissibility does not form part of the Pre-Trial Chamber’s determination under article 15(4), it nonetheless stressed the persisting duty of the Prosecutor, under rule 48, to be satisfied that all of the factors relevant to the opening an investigation, including admissibility, are met before proceeding with an article 15 application.<sup>185</sup> Such a requirement is not only a prosecutorial duty, but also helps anticipate possible deferral requests under article 18 of the Statute.<sup>186</sup>
117. In this respect, previous decisions resolving the Prosecutor’s request to authorise investigations have held that admissibility at the article 15 stage should be assessed against certain criteria defining a ‘potential case’ such as: (i) the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s).<sup>187</sup>
118. The sections that follow set out the Office’s determination with respect to gravity, followed by complementarity.

## VII. GRAVITY

119. In its 2006 response to communications received concerning Iraq, the Office stated that the gravity requirement was not met at the time because the number of alleged victims of crimes “was of a different order than the number of victims found in other situations under investigation or analysis by the Office”. The 2006 response noted, for example, that the three situations then under investigation in the DRC,

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<sup>185</sup> [Afghanistan AJ](#), paras. 35-40.

<sup>186</sup> See [Afghanistan AJ](#), paras. 42-43.

<sup>187</sup> [Burundi Article 15 Decision](#), para. 143; [Kenya Article 15 Decision](#), para. 59; [Côte d’Ivoire Article 15 Decision](#), para. 190-191. See also [Afghanistan AJ](#), paras. 40-42, confirming the continuing relevance of the notion of “potential cases”.

Uganda and Darfur each involved thousands of wilful killings, as well as intentional and large-scale sexual violence and abductions.<sup>188</sup>

120. Since that response was issued, the Court has developed its case law on the gravity threshold in article 17(1)(d) of the Statute. In particular, in several article 15 decisions on the authorisation of investigations, Pre-Trial Chambers of the Court have consistently held that the gravity assessment must be conducted against the parameters of potential cases likely to arise from an investigation into a situation,<sup>189</sup> rather than involving a comparative assessment of total levels of criminality across different situations.
121. In particular, Chambers have held that the defining parameters of potential cases, for the purpose of a gravity assessment at the article 15 stage, include: (i) whether the persons or groups of persons that are likely to be the object of an investigation include those who may bear the greatest responsibility for the alleged crimes committed; and (ii) the gravity of the crimes allegedly committed during the incidents which are likely to be the object of an investigation.<sup>190</sup>
122. Moreover, the gravity assessment, whether for potential cases (at the article 15 stage) or for concrete cases (at the article 58 stage), is conducted against the same test, as set out in article 17(1)(d), namely: whether the given case is of sufficient gravity to justify further action by the Court. As such, the same factors that have been used for the assessment of gravity at the case-specific stage have been used for the assessment of the gravity of potential cases.
123. These factors include the scale, nature, manner of commission of the crimes, and their impact.<sup>191</sup> This involves a holistic consideration of both quantitative and qualitative considerations. As the Appeals Chamber has observed, “quantitative criterion alone, including the number of victims, are not determinative of the gravity of a given case.”<sup>192</sup>

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<sup>188</sup> ICC-OTP, [OTP response to communications received concerning Iraq](#), 9 February 2006, p. 9.

<sup>189</sup> [Kenya Article 15 Decision](#), paras. 48-50 ; [Burundi Article 15 Decision](#), para. 143; [Afghanistan AJ](#), para. 40.

<sup>190</sup> [Kenya Article 15 Decision](#), para. 188; [Côte d’Ivoire Article 15 Decision](#), paras. 203-205; [Burundi Article 15 Decision](#), para. 184.

<sup>191</sup> *Prosecutor v. Bahar Idriss Abu Garda*, Pre-Trial Chamber I, “Decision on the Confirmation of Charges”, ICC-02/05-02/09-243-Red, 8 February 2010, para. 31; ICC-01/09-19-Corr, para. 188; ICC-02/11-14, paras. 203-204. *See also* Regulation 29(2) of the Regulations of the Office of the Prosecutor.

<sup>192</sup> [Al Hassan Admissibility Judgment](#), paras. 2, 127(iii).

124. In this regard, the Appeals Chamber has observed that all crimes under the Court's jurisdiction are in principle of sufficient gravity, and the gravity threshold serves to ensure that only cases of exceptional or unusual marginal gravity are inadmissible as a matter of law.<sup>193</sup> The Appeals Chamber has further observed that consideration of the contextual elements of the crimes as "constituent elements of the crimes" is also appropriate in assessing the gravity of a case.<sup>194</sup>
125. Accordingly, in the light of judicial practice on gravity at the article 15 stage that has emerged since 2010, the Office has consistently conducted its gravity assessment at the preliminary examination stage in relation to the potential case(s) likely to arise from an investigation into the situation, rather than a comparative assessment of total levels of victimisation across different situations. This practice was similarly reflected in the Office 2013 Policy Paper on Preliminary Examinations.<sup>195</sup>
126. Moreover, with respect to the difference between the Office's factual assessment in 2006 and its present assessment, the Office notes that although some of the incidents of wilful killing, including a number of those set out in section V.A.1., were also the focus of the Office's assessment in 2006, there is a much larger body of information that enables the Office to come to reasonable basis findings on both the particular circumstances of those killings, as well as a larger body of findings relating to torture, ill treatment, outrages upon personal dignity, rape and other forms of sexual violence. As set out below, the Office's findings also suggest that the specific incidents it relied upon to reach a reasonable basis determination on subject-matter jurisdiction are not exhaustive, but appear to represent a sample of the total alleged scale. Finally, as set out below, the Office now has more information on the command failures that led to such practices occurring.
127. The sub-sections that follow set out the Office's gravity assessment in view of the scale, nature, manner of commission and impact of crimes committed on victims.

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<sup>193</sup> *Id.*, paras. 1, 53-59.

<sup>194</sup> *Id.*, para. 67.

<sup>195</sup> ICC OTP, [Policy Paper on Preliminary Examinations](#), November 2013, paras. 43, 59. *See also* Afghanistan Appeals Judgment for confirmation of the continuing validity of the notion of 'potential cases' for the admissibility assessment by the Prosecutor, pursuant to rule 48, even though it held that Pre-Trial Chambers are not required to assess admissibly at the article 15 stage; [Afghanistan AJ](#), para. 40.

## A. SCALE

128. The Office recalls that – based on multiple sources, including article 15 communications, information from the UK government and open sources – the Office has documented 24 separate incidents where at least 54 victims of torture, inhuman and cruel treatment, outrages upon personal dignity and/or of rape and other forms of sexual violence were identified to the reasonable basis standard. The Office has also documented 7 victims of unlawful killings of individuals in the custody of UK forces throughout the relevant period.
129. These findings should not be considered exhaustive and are limited to the incidents for which the Office could reach a reasonable basis determination based on the limited information available at the preliminary examination stage. As set out earlier, the security situation on the ground for conducting missions to Iraq to meet relevant stakeholders, the nature of the allegations related to the treatment of conflict-related detainees in individual incidents in confined settings with limited third-party corroboration or supporting forensic/documentary information and the passage of time since the alleged occurrence of the events, were all factors that inhibited a more comprehensive review of alleged criminality. Thus, the Office focussed on a sample pool of incidents which, while not reflecting the full scale of the alleged crimes relevant to the situation, were sufficiently well supported to meet the reasonable basis standard and to allow the Office to reach a determination on subject-matter jurisdiction.<sup>196</sup> The Office notes, for example, that the UK High Court in civil claims on the evidence before it – applying a standard of proof which appears relevant to the reasonable basis standard applied by the Office at the preliminary examination stage – has made findings in relation to hundreds of Iraqi detainees that “conditions in which they were held and certain practices to which they were subjected amounted to inhuman or degrading treatment”.<sup>197</sup> The MoD has also settled numerous civil claims out of Court, including for ill-treatment where these claims were proven or at least credible.
130. In this respect, although the findings set out in this report may not be fully representative of the overall scale of the victimisation, the information available suggests that they include the most serious allegations of violence against persons in UK custody.

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<sup>196</sup> See above, Section III (Examination of the Information Available).

<sup>197</sup> UK EWHC, [Alseran & Others v Ministry of Defence](#) [2017] EWHC 3289 (QB), 14 December 2017, para. 983. See generally below, paras. 263-274.

131. Most of the alleged acts also appear to have occurred over a limited time period, during the early phases of Op Telic in 2003 and early 2004. Nonetheless, the acts allegedly committed were serious in their nature and in their effect, and implemented by members of UK armed forces across different battlegroups.
132. All instances of unlawful killings documented were committed between March and September 2003. Of the incidents involving ill-treatment of detainees, some of which overlap with killings, incidents involving 40 victims occurred in the period from March 2003 to May 2004, after which greater efforts appear to have been taken to ensure the humane treatment of detainees.<sup>198</sup> A limited recurrence of alleged ill-treatment of detainees was also recorded in 2006 and 2007, concurrent with a surge in insurgency-related violence involving armed groups. Of the incidents for which the Office makes findings, 42 victims were detained for periods of up to two months, while 25 were released within 24 hours.
133. From the information available, there is a reasonable basis to believe that, in the incidents which form the basis of the Office's findings, the Iraqi detainees concerned were subjected to forms of abuse with varying levels of severity that would amount to torture, cruel treatment or outrages against personal dignity, and in some cases wilful killing. In a small number of cases, the forms of abuse involved instances of rape and/or sexual violence.

## **B. NATURE**

134. Crimes that were serious by their very nature were allegedly committed by members of UK armed forces against persons in their custody. From the information available, there is a reasonable basis to believe that, in the incidents which form the basis of the Office's findings, the Iraqi detainees concerned were subjected to forms of abuse with varying levels of severity that would amount to torture, cruel treatment or outrages against personal dignity, and in some cases wilful killing.<sup>199</sup> In a number of cases, the forms of treatment included rape and/or sexual violence, whose multi-faceted character and the resulting suffering, harm and impact has been taken into account by the Office in assessing gravity.<sup>200</sup>

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<sup>198</sup> Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, paras. 6.45-6.73, 6.341.

<sup>199</sup> *See above*, Section V.A (Underlying Acts).

<sup>200</sup> *See above*, paras. 101-105. *See also* OTP, [Policy Paper on Sexual and Gender-Based Crimes](#), June 2014, para. 45.

135. As set out earlier, the Office has found a reasonable basis to believe that the following war crimes were committed by members of UK armed forces in Iraq against civilians or persons who were hors de combat: wilful killing/murder (article 8(2)(a)(i) or article 8(2)(c)(i)); torture and inhuman/cruel treatment (article 8(2)(a)(ii) or article 8(2)(c)(i)); outrages upon personal dignity (article 8(2)(b)(xxi) or article 8(2)(c)(ii)); and rape and other forms of sexual violence (article 8(2)(b)(xxii)).
136. Given that conduct amounting to torture, inhuman treatment and outrages upon human dignity is the principal locus for the crimes set out in this report, the Prosecution recalls that the prohibition against torture, in particular, represents a peremptory norm of international law (*jus cogens*).<sup>201</sup> As the International Court of Justice has held, the prohibition is “grounded in a widespread international practice and on the *opinio juris* of States ... appears in numerous international instruments of universal application ... has been introduced into the domestic law of almost all States”, adding “acts of torture are regularly denounced within national and international fora”.<sup>202</sup>
137. The ICTY has held that the prohibition against torture “is absolute and non-derogable in any circumstances”<sup>203</sup> and “applies at all times”.<sup>204</sup> The United Nations Committee Against Torture, in its General Comment No. 2, has similarly observed that “no exceptional circumstances whatsoever may be invoked by a State Party to justify acts of torture in any territory under its jurisdiction”, including such justification as “a state of war or threat thereof, internal political instability or any other public emergency” or “any threat of terrorist acts or violent crime as well as armed conflict, international or non-international”. The Committee has also held that “amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability”, and further noted the “special gravity” of the crime of torture.<sup>205</sup>
138. The Committee Against Torture has further observed that the non-derogable character of the prohibition of torture is also reflected in the long-standing principle, embodied in article 2(3) of the Torture Convention, that an order of a

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<sup>201</sup> ICJ, [Questions Relating to the Obligation to Prosecute or Extradite \(Belgium v. Senegal\)](#), Judgment, ICJ Reports 2012, para. 99; [Furundžija Trial Judgement](#), paras. 153-154; [Delalic Trial Judgement](#), para. 454.

<sup>202</sup> ICJ, [Questions Relating to the Obligation to Prosecute or Extradite \(Belgium v. Senegal\)](#), Judgment, ICJ Reports 2012, para. 99.

<sup>203</sup> [Delalic Trial Judgement](#), para. 454.

<sup>204</sup> [Krnjelac Trial Judgement](#), para. 182. *See also* [Furundžija Trial Judgement](#), para. 139.

<sup>205</sup> Committee Against Torture, General Comment No. 2, [CAT/C/GC/2](#), 24 January 2008, paras. 5, 6, 11.

superior or public authority can never be invoked as a justification of torture. As the Committee has observed:

... subordinates may not seek refuge in superior authority and should be held to account individually. At the same time, those exercising superior authority - including public officials - cannot avoid accountability or escape criminal responsibility for torture or ill-treatment committed by subordinates where they knew or should have known that such impermissible conduct was occurring, or was likely to occur, and they failed to take reasonable and necessary preventive measures ... The Committee considers it essential that the responsibility of any superior officials, whether for direct instigation or encouragement of torture or ill-treatment or for consent or acquiescence therein, be fully investigated through competent, independent and impartial prosecutorial and judicial authorities.<sup>206</sup>

139. As the ICTY Appeals Chamber has affirmed, the internment of civilians, one of the “most severe measures that may be inflicted on protected persons” under Geneva Convention IV, is “subject to strict rules”.<sup>207</sup>

### C. MANNER OF COMMISSION

140. The manner in which these crimes are alleged to have been committed also appears to have been particularly cruel, prolonged and severe. Notably, in five cases of deaths in custody, the victims were allegedly tortured – or at least severely and repeatedly assaulted – by UK personnel who detained them prior to their death.<sup>208</sup> In the killing of Baha Mousa in September 2003, the victim was hooded for almost 24 hours during his 36 hours of custody and suffered at least 93 injuries prior to his death. The forms of conduct set out in this report also appear to have been committed in combination.

141. Regarding the ill-treatment of detainees, the Office documented instances of torture, inhuman treatment and outrages upon human dignity involving 54 victims, who were allegedly subjected to multiple instances of severe beatings, stress positions, hooding, sleep deprivation and inadequate provision of food.

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<sup>206</sup> Committee Against Torture, General Comment No. 2, [CAT/C/GC/2](#), 24 January 2008, para.26.

<sup>207</sup> ICTY, *Prosecutor v. Prlić et al*, [Appeals Judgment: Volume I](#), IT-04-74-A, 29 November 2017, para. 514. *See also* Pictet (ed.), *Commentary to Geneva Convention IV* (Geneva: ICRC, 1958), p. 207: “The experience of the Second World War has shown in tragic fashion that under such conditions [assigned residence or internment] there is a particularly great danger of offences against the human person. That is why the Convention, conscious of the danger, only accepts internment and assigned residence as measures to be adopted in the last extremity and makes them subject to strict rules (Articles 41 to 43 and Article 78); and why, furthermore, it lays down in great detail (Articles 79 to 135—treatment of internees) standards of treatment designed to ensure that the human person is respected under the circumstances where it appears to be in greatest danger”

<sup>208</sup> *See below* paras. 205-226.

142. With respect to the chapeau of article 8, the Office recalls that it is not a jurisdictional requirement that war crimes be committed as part of a plan or policy or as part of a large-scale commission of such crimes,<sup>209</sup> although this may be an added consideration for the gravity assessment.

143. The Office has not identified evidence of an affirmative plan or policy on the part of the MoD or the UK Government to subject detainees to the forms of conduct set out in this report. Nonetheless, the Office has found several levels of institutional civilian supervisory and military command failures contributed to the commission of crimes against detainees by UK soldiers in Iraq. As detailed elsewhere in this report, despite the existence of standards of procedure set out by the MoD requiring detainees to be treated humanely, a number of techniques that were found to be unlawful in UK domestic law in 1972 and banned from use – especially in interrogations – re-entered practice through gradual attrition of institutional memory and lack of clear guidance.<sup>210</sup> As the Baha Mousa Inquiry found, by the time of the Iraq war, the MoD had no generally available written doctrine on the interrogation of prisoners of war, other than at a high level of generality.<sup>211</sup> Instead, doctrine had largely become restricted to what was taught during interrogation courses, with varying degrees of understanding of what was permissible, as well as variations in emphasis and interpretation between different instructors.<sup>212</sup> This spilled over into the early rotations of Op TELIC, with UK service members holding differing views on what was permissible.<sup>213</sup> That formal direction and guidance in relation to tactical questioning was not accurately implemented, according to the Aitken report, until 2005,<sup>214</sup> and continued to require revision thereafter,<sup>215</sup> reflects

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<sup>209</sup> As the Appeals Chamber has previously confirmed, article 8(1) would be rendered ineffective if war crimes, that are not otherwise part of a plan or policy or large-scale in nature, could not be prosecuted at this Court: *Situation in the Democratic Republic of the Congo*, “Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’”, 13 July 2006, [ICC-01/04-169](#) (OA) paras. 70-71.

<sup>210</sup> See above paras. 50-68.

<sup>211</sup> See above para. 56.

<sup>212</sup> See above paras. 56-58.

<sup>213</sup> See above para. 59.

<sup>214</sup> UK Army, [The Aitken Report: An investigation into cases of deliberate abuse and unlawful killing in Iraq in 2003 and 2004](#), 25 January 2008 para. 20. See also House of Commons Defence Committee, ‘[Who guards the guardians? MoD support for former and serving personnel](#)’, 10 February 2017, paras. 84-86, concerning the acknowledgement by the then-Secretary of State Liam Fox that there were a number of serious defects and deficiencies in the way the MoD prepared people for the Iraq campaign, and the Defence Committee’s finding that the “admission that training material for interrogations contained information which could have placed service personnel outside of domestic or international law represents a failing of the highest order. We expect the MoD to confirm that no cases under consideration by IHAT are based on the actions of individuals who were following that flawed guidance. If there are, we ask the MoD to set out how it will support individuals who are subject to claims arising from actions which their training advised was lawful”.

<sup>215</sup> See above paras. 65-68.

supervisory and command failures in ensuring dissemination of and compliance with the minimum required standards for the humane treatment of detainees. But even if doctrinal shortcomings may have contributed to the process of unlawful ‘conditioning’<sup>216</sup> of detainees, as the Baha Mousa Inquiry stressed, nothing could have excused or mitigated the serious and gratuitous violence inflicted on detainees such as Baha Mousa, who was kicked, punched and beaten to death.

144. Accordingly, the Office considers as an aggravating factor the fact that the underlying conduct set out in this report arose, in part, from institutional factors related to unclear doctrine, training programmes that encouraged maintaining or prolonging the “shock of capture” without sufficient regard for humane treatment,<sup>217</sup> and from command and supervisory failings across the MoD and the British Army, particularly in the early phases of Op TELIC, to prevent the occurrence of such crimes. Indeed, as set out below, a key aspect of IHAT’s work following the ECtHR’s ruling in *Al Skeini* and the High Court’s 2013 ruling in *Ali Zaki Mousa and others*, was to determine whether evidence available supported referring criminal charges against commanders and other superiors for the underlying conduct.<sup>218</sup>

#### **D. IMPACT**

145. The alleged crimes appear to have had severe short-term and long-term impact on the physical and mental health of detainees, including permanent physical injuries, such as bodily scars from cuttings and beatings, fractured bones and teeth, chronic bodily pain, and the inability to engage in sexual activity and/or have children.

146. The information available suggests that a number of victims allegedly suffered from a range of resulting psychological injuries, including post-traumatic stress disorder (PTSD), suicidal ideation, panic disorders, anxiety, depression, and deep feelings of shame and humiliation. These injuries caused considerable disability to victims in personal care as well as to familial, occupational and social relationships.

147. Victims’ families were also deeply traumatised from witnessing the abuses and left in a state of despair, fearing for the fate of detainees. They have also allegedly faced severe economic hardship due to loss of employment in households where victims

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<sup>216</sup> For an explanation of the term ‘conditioning’, *see above* para. 49.

<sup>217</sup> *See above*, para.58.

<sup>218</sup> *See below*, paras. 230-247.

were the only income providers, as well as owing to the high costs of medical treatment that victims had to undertake in order to treat their injuries.

148. According to the information available, the crimes set out in the report, for which the Office makes findings at the reasonable basis to believe standard, are sufficiently grave to justify further action before the Court, having regard in particular to their scale, nature, manner of commission, and impact.

### VIII. COMPLEMENTARITY

149. The complementarity assessment in this preliminary examination has not been straightforward. The assessment has focussed on the genuineness of national proceedings in terms of the willingness of the competent UK authorities to carry out the relevant investigation or prosecution genuinely under article 17(2). This is the first time that a State's potential unwillingness has formed the primary focus of the Office's complementarity assessment. This particular assessment has concerned a complex array of domestic mechanisms and procedures.
150. The Office has had to determine how to assess the purported unwillingness of a State under article 17(2). Notwithstanding the case-specific nature of admissibility assessments, the Office's approach must be capable of application to other situations and other stages of proceedings including those under articles 18 and 19.
151. In the context of the Iraq/UK situation, the Office's assessment has examined both the initial steps taken by the RMP and/or Commanding Officers at the time of the alleged offences as well as the effectiveness of subsequent investigations by IHAT/SPLI and their referrals for prosecution to the SPA. More recently, the Office has also assessed allegations made by several former IHAT investigators on the genuineness of IHAT decision making, as well as the responses received by the Office from the current and former leadership of IHAT, SPLI and the SPA.
152. The Office has identified areas of concern relating to various aspects of the national proceedings and certain decisions taken by the competent authorities. These are set out in more detail below. Some issues have already been ventilated before relevant domestic bodies or the ECtHR, while others are more specific to the Office's admissibility assessment. The Office underscores that an admissibility assessment under article 17(2) requires a determination that the domestic proceedings were conducted for the purpose of shielding the perpetrators from criminal responsibility, or that they were inconsistent with an intent of bringing the person to justice, thereby rendering those potential cases admissible before the Court. It is

irrelevant that the Prosecutor would have taken different steps or would have assessed the evidence differently.<sup>219</sup>

153. In this regard, the purpose of the Office's complementarity is to fulfil the Prosecutor's duty, under rule 48, to be satisfied that all of the factors relevant to the opening an investigation, including admissibility, are met before proceeding with an article 15 application, as well as to help anticipate possible deferral requests under article 18 of the Statute.<sup>220</sup> As the Appeals Chamber recalled in its decision authorising the Prosecutor's investigation in Afghanistan, "[p]ursuant to [...] article [18], within one month of receipt of notification a State may inform the Court of its own investigations and, at the request of the State, the Prosecutor must defer to the State's investigation 'unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation'. [A]n interested State may present detailed information with respect to any question of admissibility allowing for an informed and meaningful assessment by a pre-trial chamber at this stage".<sup>221</sup>

154. The Appeals Chamber has held that the complementarity test under article 17 involves a two-step inquiry, involving a determination of whether the national authorities are active in relation to the same case (first step), and only if so, whether this activity is vitiated by unwillingness or inability of the authorities concerned to carry out the proceeding genuinely (second step).<sup>222</sup> Due to the complexity of issues, the Office has separately set out below its complementarity conclusions with respect to the two steps of admissibility assessment: inaction and genuineness.

## IX. INACTION

155. Explaining the first step of the complementarity test, the Appeals Chamber has observed that there must be a conflict of jurisdictions (between the Court and a national jurisdiction) concerning the same case.<sup>223</sup> In this context, the Appeals Chamber has said that a national investigation must "signify the taking of steps

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<sup>219</sup> Cf. [Gaddafi Admissibility Decision](#), para. 122 ("the Chamber is not called to determine whether such evidence is strong enough to establish the criminal responsibility of Mr Gaddafi but, instead, whether Libya is taking steps to investigate Mr Gaddafi's responsibility in relation to the same case. The Chamber's finding as to the latter would not be negated by the fact that, upon scrutiny, the evidence may be insufficient to support a conviction by the domestic authorities").

<sup>220</sup> See [Afghanistan AJ](#), paras. 35-40, 42-43.

<sup>221</sup> [Afghanistan AJ](#), para. 42.

<sup>222</sup> [Katanga, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009](#), para. 78.

<sup>223</sup> [Ruto Admissibility AJ](#), para. 37 ("Consequently, under article 17 (1) (a), first alternative, the question is not merely a question of 'investigation' in the abstract, but is whether the *same case* is being investigated by both the Court and a national jurisdiction", emphasis in the original); [Muthaura Admissibility Appeal Judgment](#), para. 36.

directed at ascertaining whether those suspects are responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses”;<sup>224</sup> for which it must be established that “tangible, concrete and progressive investigative steps are being undertaken”.<sup>225</sup>

156. The Office also recalls that its own policy paper on preliminary examinations states that “[i]nactivity in relation to a particular case may result from numerous factors, including the absence of an adequate legislative framework; the existence of laws that serve as a bar to domestic proceedings, such as amnesties, immunities or statutes of limitation; the deliberate focus of proceedings on low-level or marginal perpetrators despite evidence on those more responsible; or other, more general issues related to the lack of political will or judicial capacity.”<sup>226</sup>

157. The sections below examine the various responses in the UK to the allegations which form the subject of this report in order to determine whether the authorities may be found to have been inactive under article 17 in relation to the potential case(s) likely to arise from an investigation of the situation, namely: (i) the forms of conduct set out in this report; and (ii) the category of perpetrators that appear most responsible, including at the level of command/superior responsibility.

158. An overview is first given of the institutional mechanisms that have undertaken criminal investigations and/or prosecutions, as well as the status of cases to date, based on the information available. This is followed by an overview of other non-criminal mechanisms, to the extent that their activities had the capacity to trigger further criminal inquiries.

## A. INSTITUTIONAL MECHANISMS

159. Initially, where allegations of killings and abuse by UK armed forces in Iraq arose, the relevant commanding officer reviewed the circumstances of the alleged incident to determine whether or not the forces involved acted in accordance with their rules of engagement. If the commanding officer was satisfied that the soldier had acted lawfully within the rules of engagement, there was no requirement to launch an investigation. If the commanding officer was not so satisfied, or if s/he had insufficient information to

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<sup>224</sup> [Ruto Admissibility AJ](#), para. 41 (emphasis removed); [Muthaura Admissibility AJ](#), para. 40.

<sup>225</sup> [Simone Gbagbo Admissibility Decision](#), para. 65. See also [Simone Gbagbo Admissibility AJ](#), para. 122; [Ruto Admissibility AJ](#), para. 41, [Muthaura Admissibility AJ](#), para. 40; [Saif Al-Islam Gaddafi Admissibility AJ](#), para. 116.

<sup>226</sup> ICC OTP, [Policy Paper on Preliminary Examinations](#), November 2013, para. 48.

arrive at a decision, s/he was required to refer the situation to the Royal Military Police ('RMP') Special Investigations Branch ('SIB') for investigation. The RMP's mission is to "police the Force and provide police support to the Force", including investigating service offending.<sup>227</sup> From 24 April 2004, all shooting incidents involving UK armed forces which led to a civilian death were investigated by the SIB.<sup>228</sup> The SIB could also launch an investigation of its own initiative when it became aware of an incident by other means, although these investigations could be terminated if the SIB was instructed to stop by the Provost-Marshal or the commanding officer of the unit involved.<sup>229</sup> Once the investigation had been concluded, the SIB would report in writing to the commanding officer of the unit involved (including a decision on the facts and conclusion as to what had happened), and it was then for the commanding officer to decide whether or not to refer the case to the prosecuting authority for possible trial by court-martial.<sup>230</sup> Until 2009, when the Armed Forces Act 2006 came into force, the prosecutorial organs of the military system were separate (army, navy and air). The Armed Forces Act established one independent Service Prosecuting Authority (SPA), which is discussed further below.

160. The original RMP investigations have been widely criticised. In his MoD-commissioned Service Justice System Policing Review, Professor Jon Murphy noted that there had been gaps in the experience and knowledge of service justice police investigations, including in dealing with sex crimes.<sup>231</sup> He also criticised the delay in these investigations, asserting that it "is difficult to rationalise the unacceptable length of time taken to bring some investigations to conclusion when the ratio of investigators per crime is so much higher than in the civil system".<sup>232</sup>
161. The allegations of killing and ill treatment of Iraqi citizens by British service personnel in Iraq between 2003 and 2009 gave rise to a number of legal claims. In particular, judicial review was sought of the refusal of the Secretary of State for Defence (Minister of Defence) to order an immediate public inquiry into allegations that persons detained in Iraq were ill-treated in breach of article 3 of the European Convention on Human Rights ("ECHR") by members of UK armed forces. In 2008 and 2009, the UK Government set up two separate public inquiries to examine specific allegations of ill-treatment of detainees in Iraq, namely the Baha Mousa Inquiry and the Al Sweady Inquiry (see below). A further request for judicial

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<sup>227</sup> RMP, [About Us](#), (last accessed on 26 November 2020).

<sup>228</sup> ECtHR, [Al-Skeini and others v United Kingdom](#), no. 55721/07, Judgment, 7 July 2011, paras. 25-27; Rachel Kerr, *The Military on Trial: The British Army in Iraq*, Wolf Legal Publishers, 2008, p. 18.

<sup>229</sup> ECtHR, [Al-Skeini and others v United Kingdom](#), no. 55721/07, Judgment, 7 July 2011, para. 29.

<sup>230</sup> ECtHR, [Al-Skeini and others v United Kingdom](#), no. 55721/07, Judgment, 7 July 2011, para. 31.

<sup>231</sup> UK Government, [Service Justice System Policing Review \(Part 1\)](#), March 2019, paras. 62, 64, 95-98.

<sup>232</sup> UK Government, [Service Justice System Policing Review \(Part 1\)](#), March 2019, para. 65.

review, representative of a group of over 140 Iraqis who had brought civil claims for personal injury and/or made judicial review applications alleging they suffered such ill-treatment, urged the Secretary of State to set up a further public inquiry that would also encompass arguable systemic issues arising out of the individual allegations.<sup>233</sup>

162. Rather than establishing a further public inquiry, the UK Government decided to create IHAT “to investigate the allegations with a view to the identification and punishment of anyone responsible for wrongdoing”. A separate panel, the Iraq Historic Allegations Panel (“IHAP”), was also set up “to ensure proper and effective handling of information concerning cases subject to investigation by IHAT and to consider the results of IHAT’s investigations, any criminal or disciplinary proceedings brought in any of the cases, and any other judicial decisions concerning the cases, with a view to identifying any wider issues which should be brought to the attention of the Ministry or of Ministers personally”.<sup>234</sup> At the time, the Government had not “ruled out the possibility that, in the light of IHAT’s investigations and the outcome of the existing public inquiries, a public inquiry into systemic issues may be required in due course”.<sup>235</sup>

## **B. IRAQ HISTORIC ALLEGATIONS TEAM (IHAT)**

163. IHAT’s original mandate was to investigate cases of alleged death or ill-treatment of Iraqis in British custody which were the subject of claims for judicial review.<sup>236</sup> IHAT had an initial caseload of 165 cases, with a date for completion of 1 November 2012.<sup>237</sup> This mandate was later widened to also include the alleged unlawful killing by British service personnel of Iraqis who were not in custody.<sup>238</sup> Over time IHAT’s caseload expanded dramatically as new allegations of death or ill-treatment were

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<sup>233</sup> [Mousa, R \(on the application of\) v Secretary of State for Defence & Anor](#) [2011] EWCA Civ 1334, 22 November 2011, paras. 1-2. Specifically, the claimants called for an inquiry that would consist of “a comprehensive and single public inquiry that will cover the UK’s detention policy in South East Iraq, examining in particular the systemic use of coercive interrogation techniques which resulted in the Claimants’ ill-treatment and which makes it possible to learn lessons for the future action of the British military”; *Ibid*, para. 2.

<sup>234</sup> [Mousa, R \(on the application of\) v Secretary of State for Defence & Anor](#) [2011] EWCA Civ 1334, 22 November 2011, para. 3.

<sup>235</sup> [Mousa, R \(on the application of\) v Secretary of State for Defence & Anor](#) [2011] EWCA Civ 1334, 22 November 2011, para. 3. See also Arabella Lang, Iraq Historic Allegations Team, Commons Briefing papers [CBP-7478](#), 22 January 2016, p. 4; Sir David Calvert-Smith, [Review of the Iraq Historic Allegations Team](#), 15 September 2016, Appendix C, IHAT ‘Terms of Reference’ 2.0, May 2014, para. 2: “The IHAT is to investigate as expeditiously as possible those allegations of criminal conduct by HM Forces in Iraq allocated to it by the Provost Marshal (Navy) (PM(N)), in order to ensure that all those allegations are, or have been, investigated appropriately”.

<sup>236</sup> Arabella Lang, Iraq Historic Allegations Team, Commons Briefing papers [CBP-7478](#), 22 January 2016, p. 5.

<sup>237</sup> Sir David Calvert-Smith, [Review of the Iraq Historic Allegations Team](#), 15 September 2016, para. 3.5; House of Commons Defence Committee, ‘[Who guards the guardians? MoD support for former and serving personnel](#)’, 10 February 2017, para. 13.

<sup>238</sup> Arabella Lang, Iraq Historic Allegations Team, Commons Briefing papers [CBP-7478](#), 22 January 2016, p. 5.

received, and its mandate was extended first to December 2016 and then to December 2019.<sup>239</sup>

164. The creation of IHAT was deemed necessary to discharge the implicit duty to investigate set out in sections 116 and 113, of the Armed Forces Act 2006 ('the Act'), as well as the procedural duty under articles 2 and 3 of the ECHR.<sup>240</sup> Subsequent proceedings before the ECtHR in *Al Skeini and others v United Kingdom*, confirmed that the UK Government had a duty under the Convention to carry out an adequate and effective investigation into allegations involving British service personnel in Iraq as well as into wider matters regarding the planning and control of the operations and instructions, training and supervision of the soldiers.<sup>241</sup> The UK considered the IHAT investigations, and potential prosecutions, as necessary to satisfy the admissibility requirements of the Rome Statute.<sup>242</sup>
165. In 2011, after the Court of Appeal held that IHAT was not sufficiently independent because of the involvement of members of the RMP in the investigation of matters in which they had been involved in Iraq,<sup>243</sup> responsibility for IHAT was transferred to the Provost-Marshal (Navy), and RMP personnel were replaced by retired officers from civilian police forces or serving Royal Navy Police personnel.<sup>244</sup> On 1 May 2012, the Provost-Marshal (Navy) issued new terms of reference to IHAT. Under these, its objective was to: "Investigate as expeditiously as possible those allegations of mistreatment by HM Forces in Iraq allocated to it by the Provost-Marshal (Navy), including those matters set out at paragraph 6-8 below: in order to ensure that those allegations are, or have been investigated appropriately."<sup>245</sup>

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<sup>239</sup> Sir David Calvert-Smith, [Review of the Iraq Historic Allegations Team](#), 15 September 2016, para. 3.5.

<sup>240</sup> Sir David Calvert-Smith, [Review of the Iraq Historic Allegations Team](#), 15 September 2016, para. 3.4. *See also* UK EWHC, *R (Ali Zaki Mousa and others) v. Secretary of State for Defence No. 2*, [2013] EWHC 1412 (Admin), 24 May 2013, para. 147.

<sup>241</sup> ECtHR, *Al-Skeini and others v United Kingdom*, no. 55721/07, 7 July 2011, para. 163 ("[t]he investigation should also be broad enough to permit the investigating authorities to take into consideration not only the actions of the State agents who directly used lethal force but also all the surrounding circumstances, including such matters as the planning and control of the operations in question") and para. 174 (that an independent examination must also consider "broader issues of State responsibility, for the death, including the instructions, training and supervision given to soldiers undertaking tasks such as this in the aftermath of the invasion").

<sup>242</sup> Arabella Lang, Iraq Historic Allegations Team, Commons Briefing papers [CBP-7478](#), 22 January 2016, p. 4, citing [IHAT: What it is and what it does](#), MOD News Team, 13 January 2016: "The Iraq Historical Allegations Team (IHAT) was set up in 2010 to ensure that credible allegations are properly investigated and the facts established. This is a complex and time-consuming process but meets the UK's legal requirement to investigate allegations of human rights violations or war crimes by its Forces. Without IHAT's vital work, our Armed Forces would be open to referral to the International Criminal Court – something this Government is determined to avoid".

<sup>243</sup> *Mousa, R (on the application of) v Secretary of State for Defence & Anor*, [2011] EWCA Civ 1334, 22 November 2011.

<sup>244</sup> UK EWHC, *R (Ali Zaki Mousa and others) v. Secretary of State for Defence No. 2*, [2013] EWHC 1412 (Admin), 24 May 2013, paras. 24-25; Sir David Calvert-Smith, [Review of the Iraq Historic Allegations Team](#), 15 September 2016, para. 3.6.

<sup>245</sup> Cited in *R (Ali Zaki Mousa) v Secretary of State for Defence (No. 2)* [2013] EWHC 1412 (Admin), 24 May 2013, para. 26.

166. The matters referred to above were:

6. The IHAT shall investigate all the judicial review claims relating to abuse of Iraqi civilians by British service personnel in Iraq during the period from March 2003 to July 2009 issued or notified by way of a pre-action protocol letter as at 30 April 2010. Other cases of alleged mistreatment notified to the Secretary of State after this date will be considered on a case-by-case basis and may be subject to investigation by the IHAT. The PM(N) will direct the Head of IHAT as to any additional allegations that should be investigated by IHAT.

7. Additionally the IHAT is to investigate the specific cases which the United Kingdom now has an obligation to investigate following the judgment in July 2011 of the European Court of Human Rights in the case of Al-Skeini.

8. The IHAT is also to review the report of the Baha Mousa Public Inquiry by Sir William Gage, in order to assess whether more can be done to bring those responsible for the mistreatment of Baha Mousa to justice.<sup>246</sup>

167. As of the creation of IHAT, claims of unlawful killing and ill treatment were submitted to it for assessment. The work of IHAT evolved into a three-stage process: (i) initial assessment and recording (or 'sifting' process); (ii) pre-investigation (or 'screening' process); and (iii) investigation, which a view determining which cases should be referred for prosecution.<sup>247</sup>

168. The vast majority of claims submitted to IHAT (and its successor SPLI, see below) were discontinued before they reached the prosecution stage. In particular, during its lifespan IHAT received more than 3,600 allegations, of which 2,367 (or 65%) were ultimately closed. Of those 2,367 closed allegations, 1,667 were dismissed at the initial assessment stage, 661 were dismissed following pre-investigation case assessment, and 39 were discontinued at the investigation stage.<sup>248</sup>

169. In terms of working processes, IHAT was divided into various investigative pods, overseen by a Senior Investigating Officer and supported by specialised teams such as the Intelligence Cell<sup>249</sup> and the Major Incident Room.<sup>250</sup> Three pods were tasked

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<sup>246</sup> *Ibid.*

<sup>247</sup> Information received from the UK authorities 8 August 2018, paras. 13-14. Sir David Calvert-Smith, [Review of the Iraq Historic Allegations Team](#), 15 September 2016 at para. 5.1., describes IHAT's work as being governed by five processes or 'pillars', which in addition to the above pillar 3 (allocation of resources) and pillar 5 (post-investigation).

<sup>248</sup> Information received from the UK authorities 8 August 2018, para. 14.

<sup>249</sup> As described by IHAT, "The Intelligence Cell manages the IHAT's 'strategic and tactical tasking and coordination' process and has responsibility for the delivery of pre-investigation products. Members of the Intelligence Cell are tasked to identify, recover, analyse and then disseminate relevant material. Information has been recovered in both electronic form and in hardcopy. The material recovered was generated across the full spectrum of UK military operations in Iraq. This includes: pre-arrest planning; arrest; transportation; detention; interrogation and treatment of detainees up to the point of release. The Intelligence Cell builds the intelligence picture and, through the work of analysts, provides a strategic overview of all IHAT cases for the senior team. It also provides investigative support to SIOs on individual cases. All electronic data recovered by

with investigating allegations of unlawful killing; one pod concentrated on the death of Baha Mousa and the mistreatment of his fellow detainees, which was also pursuing enquiries relating to the battlegroup involved in this incident, '1 QLR, as part of an investigation into patterns of systemic abuse; one pod was responsible for managing the organisation of 'Operation MENSA', the process of locating witnesses/complainants and arranging for their escort to a third country to conduct a witness interview and, if appropriate, a medical examination; another pod, called the Media Review Team, had reportedly analysed around 3,000 hours of video footage taken during interrogations of Iraqis arrested by British forces during Op TELIC, and had developed a matrix for the purposes of identifying the most common tactics used by interrogators, the level of severity and the frequency different individuals are seen to use inappropriate behaviour; and a final pod, called the IHAT Review Team, was tasked to carry out the reviews directed by Provost-Marshal.<sup>251</sup>

170. What follows below provides an overview of the different filtering stages that IHAT has reported on.

#### **1. Initial Assessment ('sifting' process)**

171. This initial phase was introduced to apply as early as possible a process to 'sift' out duplicative or clearly inappropriate allegations.<sup>252</sup> This included allegations received from a third party, the vast majority of which came from relevant law firms, or which had been identified by IHAT from evidence in its possession (for example from entries in the civil litigation case register) or in the course of its own investigations.<sup>253</sup> According to information received from the SPLI, 1,667 were sifted out after initial assessment based on the following categories:

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IHAT, including 'Secret' level information, is stored in one single electronic repository, the Forensic Data Handling Capability (FDHC) computer system.”; Information received from the UK authorities, 23 June 2014, para. 39. *See also* Sir David Calvert-Smith, [Review of the Iraq Historic Allegations Team](#), 15 September 2016, para. 4.7.

<sup>250</sup> As described by IHAT, “The Major Incident Room (MIR), using HOLMES2 [Home Office Large Major Enquiry System], provides a management tool for the investigative process in line with national civilian police guidance on major and linked crime investigations. This enables SIOs to direct and control the course of the enquiry in an efficient and effective manner. The MIR maintains a record of: every action allocated to IHAT staff; the result of every inquiry; every statement taken; any exhibits seized; and a host of other material. It allows research and analysis of all material collected and provides a crucial tool for quality assurance and future review. The HOLMES2 system also facilitates the production of comprehensive reports for referral to prosecuting authorities”; IHAT Briefing Document, para. 40. *See also* Sir David Calvert-Smith, [Review of the Iraq Historic Allegations Team](#), 15 September 2016, para. 4.7.

<sup>251</sup> Information received from the UK authorities, 23 June 2014, paras. 33-38.

<sup>252</sup> Information received from the UK authorities, 5 June 2017, Annex App. 1-2.

<sup>253</sup> Information received from the UK authorities, 8 August 2018, para. 17. For more detailed discussion and flow charts explaining the initial assessment and recording process *see* Sir David Calvert-Smith, [Review of the Iraq Historic Allegations Team](#), 15 September 2016, paras. 6.1-6.6 and [Annex D, Pillar 1](#).

Reason for sifting	Allegations
Duplicate allegation or an allegation identified as one already contained within the existing IHAT caseload.	932
Proportionality: i.e. even taking the allegation of criminal offending its highest, it would not be proportionate to investigate given the length of time that has passed and the severity of the alleged offence	457
Allegation determined not to amount to a criminal offence	173
No involvement of UK Forces	26
Allegation withdrawn by PIL	25
Victim could not be identified	25
No realistic prospect of obtaining sufficient evidence to charge an identifiable individual with a service offence	21
Actions determined to be within the rules of engagement	5
Dealt with by another police force	3
<b>Total</b>	<b>1667</b>

Table 1: IHAT Initial Assessment<sup>254</sup>

## 2. Pre-Investigation ('screening' process)

172. During the pre-investigation case assessment stage, IHAT conducted a further, more detailed assessment of the allegations, leading to allegations being either screened out or allocated for investigation.<sup>255</sup> These allegations were allocated an IHAT number and went through a scoring process designed to categorise the level of offending/treatment. According to information received from IHAT:

This scoring took into account such factors as: the circumstances of the incident; the injuries sustained; any cultural issues; and the level of psychological impact. The most serious allegations such as homicide, rape, grievous bodily harm and sustained psychological abuse attracted a high score. Conversely such offending behaviour as low level physical assault, low level damage to property and complaints of irregular meal times attracted a far lower score. The IHAT then grouped the allegations into 'red' (most serious), 'amber' and green (less serious) categories. This enabled the Command Team to quickly assess the allegations which should be prioritised (red cases) and ensure that the IHAT focused investigations upon the most serious allegations.<sup>256</sup>

173. Following initial assessment, 1,698 allegations (out of the total of 3,629 received) were allocated for pre-investigation case assessment or investigation, while a further 264 allegations remained at the initial assessment stage when IHAT closed

<sup>254</sup> Information received from the UK authorities, 8 August 2018, para. 16. According to SPLI, of the 1667 allegations sifted after initial assessment, 984 of these were allegations received from third parties, the vast majority from legal firms, and 683 were identified by the IHAT from evidence in its possession (for example from entries in the civil litigation case register) or in the course of its own investigations; *Id.*, para. 17.

<sup>255</sup> *Id.*, para. 13.

<sup>256</sup> Information received from the UK authorities, 5 June 2017, Annex A, p. 2 For more detailed discussion and flow charts explaining the pre-investigation process see [Review of the Iraq Historic Allegations Team](#), paras. 7.1-8.12 and [Annex D, Pillar 2 \(unlawful killing\)](#) and [Annex D, Pillar 2 \(ill treatment\)](#). For discussion of Pillar 3, relating to the allocation of resources, see *Id.*, paras. 9.1 – 9.2 and [Annex D, Pillar 3](#).

down.<sup>257</sup> According to information received from the SPLI, IHAT screened out during the pre-investigation stage 661 allegations of ill treatment and unlawful killing based on the following categories:

<b>Reason for screening – Ill treatment</b>	<b>Allegations</b>
No credible breach of the law of armed conflict	1
No involvement of UK forces	5
Proportionality	557
Unlikely to be able to obtain sufficient evidence	5
<b>Total</b>	<b>568</b>

<b>Reasons for screening - unlawful killing</b>	<b>Allegations</b>
Evidence not sufficient to support referral	1
Unlikely to be able to obtain sufficient evidence	1
Double jeopardy case with no new and compelling evidence	3
Incident not substantiated (i.e. likely to be untrue)	2
No credible breach of the law of armed conflict	47
No involvement of UK forces	18
Allegation determined not to amount to a criminal offence	21
<b>Total</b>	<b>93</b>

Tables 2 & 3: IHAT Pre-Investigation<sup>258</sup>

174. A further 881 allegations remained at the pre-investigation case assessment stage when the SPLI inherited the IHAT caseload on 1 July 2017.<sup>259</sup>

### **3. Investigation**

175. IHAT investigations were divided into two categories: (i) full investigation, and (ii) directed or focused investigations or lines of inquiry which involved a particular avenue of investigation the result of which would decide whether the case should be discontinued or proceed to full investigation.<sup>260</sup>

176. According to information received from the SPLI, IHAT closed 39 allegations following investigation based on the following categories:

<sup>257</sup> Information received from the UK authorities, 8 August 2018, para. 15.

<sup>258</sup> Information received from the UK authorities, 8 August 2018, para. 19.

<sup>259</sup> Information received from the UK authorities, 8 August 2018, para. 18.

<sup>260</sup> [Review of the Iraq Historic Allegations Team](#), para. 7.10. For more detailed discussion and flow charts explaining the investigation process *see also* paras. 10.1-10.8 and [Annex D, Pillar 4 \(unlawful killing\)](#) and [Annex D, Pillar 4 \(ill treatment\)](#).

Reasons for closure - unlawful Killing	Allegations
Case referred to DSP	1
Proportionality	1
No realistic prospect of obtaining sufficient evidence to charge an identifiable individual with a service offence	1
Incident not substantiated (i.e. likely to be untrue)	1
Dealt with by other police force	1
No credible breach of the law of armed conflict	3
No UK forces involved	5
Allegation determined not to amount to a criminal offence	10
<b>Total</b>	<b>23</b>

Reasons for closure - ill Treatment	Allegations
Case referred to Commanding Officer	1
Case referred to DSP	1
Dealt with by other police force	1
Allegation determined not to amount to a criminal offence	1
Proportionality	2
No realistic prospect of obtaining sufficient evidence to charge an identifiable individual with a service offence	10
<b>Total</b>	<b>16</b>

Tables 4 & 5: IHAT Investigation<sup>261</sup>

177. A further 117 allegations remained at the investigation stage when SPLI inherited the IHAT caseload on 1 July 2017, with many of these allegations grouped into single investigations with a caseload consisting of a total of 43 investigations.<sup>262</sup>
178. According to its June 2017 response, IHAT interviewed 33 suspects under caution during the course of its investigations. These interviews related to allegations of offences across the full range of its caseload including: homicide offences; the war crime of outrages upon personal dignity; command responsibility; ill treatment; perverting the course of justice; and misconduct in public office.<sup>263</sup>
179. IHAT produced a table giving a short summary of completed reviews or investigations.<sup>264</sup> The bulk of allegations set out in the table were identified as “lower-level allegations of ill-treatment”, for which investigative work was discontinued because “it was not proportionate to continue to do so”.<sup>265</sup> Other completed reviews or investigations included cases discontinued after consultation with the SPA for insufficient evidence<sup>266</sup> or because there was no criminal case to

<sup>261</sup> Information received from the UK authorities, 8 August 2018, para. 21.

<sup>262</sup> Information received from the UK authorities, 8 August 2018, para. 20.

<sup>263</sup> Information received from the UK authorities, 5 June 2017, Annex A, p. 9.

<sup>264</sup> IHAT, [Table of work completed](#), updated October 2017.

<sup>265</sup> IHAT, [Table of work completed](#), updated October 2017.

<sup>266</sup> IHAT, [Table of work completed](#), updated October 2017 (IHAT 82, 88, 93, 95, 96, 102, 106, 107, 122, 141, 148, 149, 156, 280, 288, 596).

answer.<sup>267</sup> Other reviews or investigations were discontinued by IHAT because there was no realistic prospect of obtaining any new evidence;<sup>268</sup> one allegation was referred to the soldier's commanding officer, which resulted in a fine after the soldier admitted guilt at a summary disciplinary hearing;<sup>269</sup> while a small number of allegations displayed no UK involvement.<sup>270</sup> Another case of unlawful killing was presented to the Royal Air Force Police for consideration, was directed by the Provost-Marshal (Royal Air Force) for further investigation,<sup>271</sup> with the DSP later directing that no charges should be brought.<sup>272</sup> At the February 2020 meeting with the Office, the former Director of IHAT observed that the dearth of prosecutable offences was a consequence of a lack of forensic evidence and of witnesses changing their minds.<sup>273</sup>

180. In terms of IHAT numbering, it was explained to the Office that one person might be one allegation or 20 allegations. Although there were 3700 complainants, which were labelled as 'allegations', IHAT explained that there were actually many more allegations. These were grouped into clusters and made suspect-led. The Office was informed where an IHAT number involved multiple complainants, it was broken down (such as 187-A, 187-B) so that IHAT was able to apply a number to each individual complainant. This would mean that any component considered to be potentially serious offending would be investigated, but the rest might not. At the same time, for each complainant, there might be one allegation or a multiple number of allegations associated with that individual. When IHAT would publically report that an IHAT number was closed, this meant that IHAT had looked at all of the allegations within the number and they were all closed. When an IHAT number and letter (such as IHAT 187-A) was closed, this similarly referred to a complainant (since multiple complainants may have originally been put on the one number, for example, where all family members complained about one incident in one house).<sup>274</sup>

181. IHAT further explained that where there were multiple IHAT numbers in relation to a particular theme (such as Camp Stephen), they were assigned 'whiskey numbers',

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<sup>267</sup> IHAT, [Table of work completed](#), updated October 2017 (IHAT 110, 116, 120, 124, 146, 147, 176, 326, 328, 369, 586-594, 627-645). This category included allegations discontinued following the findings of the Al Sweady Inquiry.

<sup>268</sup> IHAT, [Table of work completed](#), updated October 2017 (IHAT 85, 93, 127, 128, 141, 280, 302) partially overlapping with other reasons for closing allegations.

<sup>269</sup> IHAT, [Table of work completed](#), updated October 2017 (IHAT 97): "In April 2011, the Mail on Sunday sent the Ministry of Defence's media centre video footage showing the apparent abuse of an Iraqi man by British servicemen. One of those soldiers was identified and interviewed by IHAT investigators. He admitted to being responsible. He was subsequently referred by IHAT to his Commanding Officer and was fined £3,000 after a Summary Hearing".

<sup>270</sup> IHAT, [Table of work completed](#), updated October 2017 (IHAT 83, 116, 180, 377).

<sup>271</sup> IHAT, [Table of work completed](#), updated October 2017, p. 2 (IHAT 84).

<sup>272</sup> IFI, [Progress statement into the investigation of death of Tariq Sabri Mahmud](#), 25 September 2017, p. 2.

<sup>273</sup> Information received from the UK authorities, February 2020.

<sup>274</sup> Information received from the UK authorities, February 2020.

such as Whiskey 1. When a whiskey number was discontinued after all the serious allegations within it were examined, the complainants were informed. However, where the complainant had allegations within multiple whiskey numbers, the whiskey number would stay open until all of the allegations concerning that individual had been examined. For example, if a complainant alleged that they had been raped in two locations, neither would be closed until both lots of allegations had been dealt with.<sup>275</sup>

### C. SERVICE POLICY LEGACY INVESTIGATIONS (SPLI)

182. Following criticism in the UK parliament over the work, duration and expense of IHAT,<sup>276</sup> the Secretary of State for Defence announced in February 2017 his intention to close down IHAT in advance of its scheduled December 2019 timeline,<sup>277</sup> which took effect on 30 June 2017.<sup>278</sup> The remaining investigations were reintegrated into the service police system and taken over by a new investigative unit, known as Service Police Legacy Investigations (SPLI), led by a senior Royal Navy Police (RNP) officer (Officer in Command) and made up of RNP and Royal Air Force Police (RAFP) personnel.<sup>279</sup>
183. The SPLI is thus composed of service (naval and air force) police personnel and headed by a senior Royal Navy Police Officer.<sup>280</sup> In its June 2017 submission the UK authorities informed the Office that the SPLI would consist of a mix of 40 Royal Navy Police and Royal Air Force Police supported by 25 existing current IHAT contractor staff and 12 civil servants from MoD to ensure investigative continuity and specialist support. Under the new arrangements, SPLI would be led by a senior Royal Navy Police officer who, for the purpose of investigations, would report to the Provost-Marshal (Navy), as occurred with IHAT. The SPLI was to be based in Upavon Wiltshire, utilising extant IHAT infrastructure and resources.<sup>281</sup> The continuity of

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<sup>275</sup> Information received from the UK authorities, February 2020.

<sup>276</sup> See e.g. House of Commons Defence Committee, '[Who guards the guardians? MoD support for former and serving personnel](#)', 10 February 2017, Conclusion, para. 31: "IHAT, the MoD-created vehicle for these investigations, has proved to be unfit for purpose. It has become a seemingly unstoppable self-perpetuating machine and one which has proved to be deaf to the concerns of the armed forces, blind to their needs, and profligate with its own resources. We look to the Secretary of State to set a firm and early date for the remainder of the investigations to be concluded, and for the residue of cases to be prosecuted by a replacement body which can command the confidence of the armed forces."

<sup>277</sup> UK Government, [News Story: 'IHAT to close at the end of June: Defence Secretary Sir Michael Fallon has confirmed the date that IHAT will close'](#), 5 April 2017.

<sup>278</sup> See IHAT, [Homepage](#), undated (accessed on 26 November 2020).

<sup>279</sup> See IHAT, [Homepage](#), undated (accessed on 26 November 2020); SPLI, [Homepage](#), 8 August 2017 (accessed on 26 November 2020). Regarding the contested decision to shut-down IHAT ahead of original scheduled timeframe, see above, notably paras. 86-88. IHAT criteria governing the assessment (and closing) of claims are examined in detail below, paras. 324-334.

<sup>280</sup> SPLI, [Homepage](#), (accessed on 26 November 2020).

<sup>281</sup> Information received from the UK authorities, 5 June 2017, paras. 11-12.

personnel between IHAT and SPLI would extend to the Officer in Command of SLPI, Tony Day, who served previously as Deputy Head of IHAT, and prior to that as Provost-Marshal (Navy) to whom IHAT reported.

184. The UK reported that the SPA's role would also be preserved in the same way as it functioned in relation to IHAT. The SPA would have four prosecutors co-located with SPLI, providing legal advice to the investigative teams on both the law and evidence. These would be the same lawyers who were working with the IHAT in order to guarantee continuity in corporate knowledge, procedures and processes, and expertise, with the role of the DSP and SPA remaining the same.<sup>282</sup>
185. In terms of the transition from IHAT to SPLI, Officer in Command of the SPLI informed the Office that various IHAT staff, including some IHAT senior investigating officers (SIOs), were carried on to SPLI. The IHAT SIO's and deputy senior investigating officers (DSIOs) were all replaced with uniformed service police officers, with the former SIOs moving into supporting roles. The transition was described as a 'scaling down' of contractor staff, but retaining key skillsets such as intelligence and major incident room staff who could not be replaced by uniformed service police officers. The SPLI informed the Office that 73% of IHAT's contractor staff were let go or redeployed to other organisations. The SPLI stated it had tasked an independent review team (comprised of two ex-career senior detective superintendents with significant experience in major crime). The review was overseen by a former Chief Constable and examined all key areas of SPLI business, focusing on: investigative structure; end-to-end processes; resources; capacity; capability; time scales; investigative methodology; priorities and resilience of SPLI; funding model; and governance arrangements. The Officer in Command of the SPLI reported that some recommendations had been made but overall the review team had found that the transition from IHAT to SPLI had been challenging, but had been conducted with commendable enthusiasm, professionalism and attention to detail, and that the current SPLI processes were, according to the review team, fit for purpose. The former Director of IHAT added that the transition from IHAT to SPLI had caused a delay as processes returned to full operational capacity, but he believed that the delay did not impact the quality of the investigations, since many cases were already at a mature stage.
186. The Officer in Command of SPLI explained that he sits down at least monthly with the SPLI teams in a case conference on each case and its progress. Separately, there is a joint case review panel for more mature cases, which the DSP joins to give his view. The Officer in Command had sometimes requested teams to conduct further

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<sup>282</sup> *Ibid.*

inquiries or take additional specific investigative steps: where he considered there are further areas for exploration, he sent cases back to the team for further work.

187. With respect to judicial oversight of SPLI work, the Officer in Command of the SPLI informed the Office that during his tenure, he has not had to report to Justice Leggatt's High Court replacement, but DJEP had reported to the High Court on behalf of the Secretary of State. He also confirmed that the SPLI inherited the same obligations that IHAT had in respect of the High Court.
188. In terms of focus and workload, the UK's 5 June 2017 submission to the Office stated that the investigations and cases of the SPLI would consist of those filtered and prioritised by IHAT as well as any other investigations that may arise after the establishment of the SPLI. These investigations would pursue all lines of inquiry at all levels in the chain of command, including potentially linked allegations that could be grouped together, and the SPLI would continue to consider and analyse all evidence that may show the possible existence of patterns of criminal behaviours and any systemic issues, in the same way as conducted by IHAT.<sup>283</sup>
189. The SPLI reported that it inherited 1,260 allegations from IHAT which were at different stages of the initial assessment pre-investigation or investigation stages at the time they were inherited,<sup>284</sup> and has continued to receive or identified additional allegations.<sup>285</sup> In terms of numbering, the SPLI explained that a "SPLI case number (allegation) is the same as the IHAT number. Any newly identified allegation linked to an existing SPLI allegation is allocated a numerically sequential victim number".<sup>286</sup>
190. As of its last quarterly update of 1 July 2020, SPLI reported that it had received 1287 allegations (being the 1260 inherited from IHAT and an additional 27 allegations).<sup>287</sup> There were no allegations remaining in case assessment. 74 allegations remained at the investigation stage, clustered into 8 full investigations and 2 directed lines of enquiry.<sup>288</sup> According to the same update, since SPLI had taken over IHAT it has closed or it is in the process of closing 1213 allegations.<sup>289</sup> SPLI also inherited one referral from IHAT to the SPA, which was subsequently discontinued by the SPA.<sup>290</sup> In September 2019 and April 2020, respectively, SPLI made two further referrals in relation to instances of alleged

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<sup>283</sup> Information received from the UK authorities, 5 June 2017, paras. 11-12, 14.

<sup>284</sup> Information received from the UK authorities 8 August 2018, para. 22; SPLI, [Quarterly Update](#), 31 March 2019 to 30 June 2019, fn.1.

<sup>285</sup> SPLI, [Quarterly Update](#), 1 January 2019 to 31 March 2019, p. 1.

<sup>286</sup> Information received from the UK authorities 8 August 2018, p. 7.

<sup>287</sup> SPLI, [Quarterly Update](#), 1 April 2020 to 30 June 2020, Table 1.

<sup>288</sup> SPLI, [Quarterly Update](#), 1 April 2020 to 30 June 2020, para. 2.2.

<sup>289</sup> SPLI, [Quarterly Update](#), 1 April 2020 to 30 June 2020, para. 2.1.

<sup>290</sup> SPLI, [Quarterly Update](#), 1 April 2020 to 30 June 2020, para. 3.

abuse of Iraqi detainees by UK forces. As set out below, the SPA subsequently decided that no charges should be directed in either cases.<sup>291</sup>

191. In the UK's supplemental correspondence to the Office following the February 2020 meeting, the Office was informed by that the SPLI had to date dealt with 93.5% of the caseload inherited, with 82 live allegations remaining, comprising 14 investigations. Of the 82 allegations, eight were homicide cases and the remaining 74 were cases of ill-treatment.<sup>292</sup> The ongoing investigations included Whiskey 22, which was command responsibility focused and Whiskey 54, a wider case around command responsibility linked to the death of Baha Mousa, while another ongoing investigation, Whiskey 57, concerned inter alia alleged sexual abuse.

#### **D. SERVICE PROSECUTING AUTHORITY (SPA)**

192. The role of the SPA in the UK's historical inquiries into offences by UK personnel allegedly committed in Iraq has extended to both the investigative and prosecution stages. The SPA, which is headed by the Director of Service Prosecutions (DSP), currently employs both military and civilian staff.<sup>293</sup> The SPA is independent of the military chain of command and is not answerable to the Secretary of State for Defence with regard to prosecutorial decisions. It has no hierarchical subordination to the MoD and operates under the superintendence of the Attorney-General.<sup>294</sup>

193. During IHAT and SPLI's work, SPA lawyers have been partially embedded within the investigative process to help provide direction and guidance on the evidentiary strength of cases for possible referral, applying the relevant evidentiary sufficiency test. Upon referral of cases by IHAT or the SPLI, the SPA has been responsible for determining whether such cases merited prosecution. The SPA, like the Crown Prosecution Service, applies the 'full code test', to determine what cases, and what charges, to prosecute. According to this test, (i) there must be sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge (Evidential Test), and (ii) a prosecution must be in the public interest, including the service interest in the case of the SPA (Public and Service Interest).<sup>295</sup> Factors considered to assess public and service interest include the seriousness of the offence, the level of culpability of the suspect, the harm caused to the victim, the impact on the community, whether prosecution is a proportionate response, and

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<sup>291</sup> SPLI, [Quarterly Update](#), 1 April 2020 to 30 June 2020, paras. 3.1 and 3.2.

<sup>292</sup> Information received from the UK authorities, 11 May 2020, para. 98.

<sup>293</sup> See also SPA, [Quarterly Performance Report: Second Quarter of 2016](#), July 2016, para. 2. See also Susan Kemp, *British Justice, War Crimes and Human Rights Violations: The Age of Accountability* (2019), p. 264, observing "most prosecutors are already serving members of the armed forces".

<sup>294</sup> SPA, [website](#), (accessed 26 November 2020).

<sup>295</sup> Crown Prosecution Service, ["The Code for Crown Prosecutors."](#) January 2013.; Service Prosecuting Authority, [Full Code Test \(FCT\)](#), undated.

whether there are sources of information that require protecting.<sup>296</sup> The Service Justice System Policing Review report noted with concern that the service interest test “does not explicitly consider the possibility that the interests arising from a victim in a service environment might be different from those of a civilian victim”.<sup>297</sup>

## 1. Investigations

194. The early involvement of the SPA in the investigative process was called for in 2013 by the High Court of England and Wales in *R (Ali Zaki Mousa and others)*, which expressed concerns, inter alia, that IHAT was “not structured so that decisions can be effectively and promptly taken as to whether there is a realistic prospect of prosecution”. It called for the DSP to be “involved in making a decision at the outset of each case involving death referred to IHAT as to whether prosecution was a realistic prospect and, if there was something to suggest it might be, in directing the way that the inquiry was to be conducted and in a regular review of each case to see if a prosecution remained a realistic possibility”.<sup>298</sup>
195. The High Court’s ruling resulted in the assignment of a dedicated team of lawyers to advise IHAT on cases, known as the Iraq Historic Allegations Prosecution Team (IHAPT).<sup>299</sup> In its 2014 submission to the Office, the SPA explained that as IHAPT worked with IHAT, relevant joint case management processes were set up to ensure that “cases are prioritised and dealt with appropriately”.<sup>300</sup> One such process was the Joint Case Review Panel (JCRP) which met on a regular basis to review cases and recommend whether a case should proceed to full investigation.<sup>301</sup> The basis for discussion in the JCRP was typically a Pre-Investigation Assessment produced by the IHAT intelligence cell, based on all recoverable documentation relating to the incident in question. The JCRP reportedly provided an opportunity for DSP, IHAPT, the Head of IHAT and the IHAT command team to thoroughly review and discuss each case and to identify key issues that are likely to inform prosecution decisions. The JCRP recommended investigation only when a prosecution may be viable or in order to clarify the allegation being made and the SPA, through the IHAPT, provided specific, focussed legal advice to the Head of IHAT”.<sup>302</sup> As the SPA informed the Office, “[a] substantial portion of IHAPT’s work involves providing early legal advice and investigative guidance to IHAT across its caseload of unlawful death and mistreatment cases at both pre-investigation and during

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<sup>296</sup> Crown Prosecution Service, “[The Code for Crown Prosecutors](#),” 26 October 2018 s. 4.14.

<sup>297</sup> UK Government, [Service Justice System Policing Review \(Part 1\)](#), March 2019, para. 37.

<sup>298</sup> UK EWHC, [R \(Ali Zaki Mousa and others\) v. Secretary of State for Defence No. 2](#), [2013] EWHC 1412 (Admin), 24 May 2013, para. 182.

<sup>299</sup> [Review of the Iraq Historic Allegations Team](#), paras. 4.8. 12.1.

<sup>300</sup> Information received from the UK authorities, 2014, para. 25.

<sup>301</sup> *Id.*, para. 26.

<sup>302</sup> *Id.*, para. 27.

investigation with the objective of focussing resources and avoiding delay. This includes working with IHAT (...) to identify any emerging pattern of behaviour or links between offences".<sup>303</sup>

196. A further outcome of the High Court's 2013 ruling in *R (Ali Zaki Mousa and others)* was the appointment, on 2 October 2013, of Sir George Leggatt as Designated Judge to ensure that the risks of delay and a lack of direction of national inquiries were minimised and to conduct judicial review of decisions made in the inquiries.<sup>304</sup> In the *Al-Saadoon* Judgement of 13 April 2016, Justice Leggatt confirmed that since the 2013 High Court ruling a greater role had been given to the DSP and SPA through the establishment of the JCRP, to filter out cases in which there is no credible allegation of a criminal offence.<sup>305</sup> He further concurred with the DSP's approach that IHAT had no duty to investigate an allegation where there was no realistic prospect of obtaining sufficient evidence to satisfy the evidential sufficiency test.<sup>306</sup>
197. According to the UK authorities, this system of early SPA input to investigative processes has been retained following the transition from IHAT to the SPLI. As the UK stated in June 2017, "[t]he SPA's role will continue as it presently functions in relation to the IHAT. The SPA under the current Director of Service Prosecutions (DSP), Andrew Cayley CMG QC, will have four prosecutors co-located at Upavon, where the SPLI will be based, providing legal advice to the investigative teams on both the law and evidence. These are the same lawyers who are presently working with the IHAT. Continuity in corporate knowledge, procedures and processes, and expertise will thus be guaranteed, and the role of the DSP and SPA will remain the same."<sup>307</sup>
198. The Officer in Command of SLPI stated to the Office that SPA lawyers were involved throughout the case and gave advice at various stages, but that ultimately he decided whether the evidential sufficiency test was met. The DSP also attends when there is a Joint Case Review Panel for more mature cases to give his view. In terms of the legal test for referrals, the Officer in Command clarified that if a case meets the evidential sufficiency test, he does not have the discretion not to refer it. The Officer in Command of SLPI further stated that where a case is not going to be referred, he conducts a formal consultation and writes to the DSP explaining why he thinks it does not meet the evidential sufficiency test and asks if the latter agrees with his determination. If the DSP concurs, SPLI informs the victim or victim's

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<sup>303</sup> *Id.*, para. 28.

<sup>304</sup> UK EWHC, *R (Ali Zaki Mousa and others) v. Secretary of State for Defence No. 2*, [2013] EWHC 1412 (Admin), 24 May 2013, paras. 4-6.

<sup>305</sup> *Al-Saadoon & Ors v Secretary of State for Defence (Rev 1)* [2016] EWHC 773 (Admin) (07 April 2016), para. 276.

<sup>306</sup> *Id.*, paras. 280-283. For further details *see below*, paras. 305-311.

<sup>307</sup> Information received from the UK authorities, June 2017, para. 12.

representative. A termination report will also be sent to the Director of Judicial Engagement Policy (DJEP)<sup>308</sup> to explain that the case has been dealt with and DJEP will then decide whether a case should go to the Iraq Fatality Investigations.<sup>309</sup> When a suspect has been interviewed under caution, but a decision is taken not to refer the case because the evidential sufficiency test has not been met, victims have a right to a review, which is conducted by an independent service police separate from SPLI or RNP.<sup>310</sup> The SPLI identified to the Office four cases where the right of review had been triggered, where the Royal Air Force Police (RAFP) had either upheld the decision of the Officer in Command of SPLI or, in one case, partially upheld his decision by recommending referral on a lesser charge amounting to a domestic offence.<sup>311</sup>

## 2. Prosecutions

199. The information available indicates that IHAT made four referrals to the SPA: one for homicide, one for manslaughter, and two for ill-treatment during interrogation. All four cases resulted in decisions by the SPA to not proceed with prosecution. The SPLI referred a further 5 individuals to either their Commanding Officer (who referred on to the SPA) or directly to SPA. SPA decided that no charges should be directed against the 5 individuals. Details on each of these cases is provided in Section V.A.
200. At the joint meeting of February 2020, the Office sought an explanation on why cases that had received SPA legal guidance during the investigative stage, including on decisions to make a referral for prosecution, had nonetheless failed after being referred to the SPA. The DSP stated that lawyers within IHAT advised on the evidential sufficiency test (a lower threshold test) whereas the SPA applies the 'full code test' (a higher evidential threshold), which explained why lawyers within IHAT might have considered cases were ready to proceed, whereas the SPA found they were not. He said that where a referral had been made by IHAT and a decision had to be made on charging, the case was sent to external counsel for advice on whether the test had been met.
201. During the Office's February 2020 meeting with the former and current leadership of IHAT, SPLI and SPA, the DSP described the adopted practice of the SPA, in line with the recommendation of the Calvert-Smith report, to retain independent outside counsel

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<sup>308</sup> DJEP was established in 2010 to respond to claims arising from military operations in Iraq, Afghanistan, Northern Ireland and elsewhere. Its mandate is to bring greater coherence and expertise across all legal proceedings involving the Armed Forces, improve MoD success before the courts and to 'minimise the impact that judicial challenges may have on the government's reputation and the forces' operational ability'. DJEP's purpose is to represent the interests of the MoD and to develop and implement relevant government policy.

<sup>309</sup> Information received from the UK authorities, February 2020.

<sup>310</sup> Information received from the UK authorities, February 2020.

<sup>311</sup> See below, para. 229.

(Treasury Counsel) for the review of referred cases in order to assess whether there was a realistic prospect of conviction in a given case.<sup>312</sup> Such advice was not binding on the SPA, but highly persuasive.

202. The DSP clarified that the outside counsel to whom cases were referred for review by the SPA were senior and hugely respected members of the Bar, with appropriate experience to provide legal advice in these type of cases. Outside counsel generally reviewed the evidence only once the investigation had been completed, although on some occasions senior counsel had been involved on specific issues during an investigation. The DSP stated that, in all cases sent for review, he would discuss only the nature of the case with outside counsel and that there was consultation about whether it would be possible to obtain certain evidence, but that otherwise such counsel were given free rein in their decision making and would not, and could not, be directed by the SPA to come to a certain outcome – observing that trying to do so could have resulted in the DSP being disbarred.
203. The DSP further stated the SPA could not send cases to trial in order to test the strength of evidence if that case did not meet the relevant evidential test. He nonetheless observed that even where cases were not borderline and clearly did not meet the test but were serious, they nonetheless took external advice. The DSP further stated that very few cases had fallen on the public/service interest test, and this did not include the Camp Stephen cases.<sup>313</sup>
204. There is a right of review by the SPA where it decides that the realistic prospect of conviction test or public service interest is not met; the victim or victim’s family can apply for independent review by another senior lawyer. This is conducted either by independent senior counsel or a senior lawyer within the SPA, who is not involved in the IHAT/SPLI caseload. In some cases, senior treasury counsel had looked at the cases afresh. The SPA identified to the Office examples of cases in which victims had exercised their right to review, although none of these reviews had resulted in charges proceeding.

## **E. INDIVIDUAL CASES**

205. An overview is provided below of the UK’s reported investigative and prosecutorial activity in individual cases or in thematic or grouped allegations, according to the information available. This overview is not a comprehensive catalogue of all UK activity in relation to allegations arising from Iraq, but a summary of those domestic

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<sup>312</sup> See Sir David Calvert-Smith, [Review of the Iraq Historic Allegations Team](#), 15 September 2016, recommendation 8.

<sup>313</sup> For examples of cases closed by the SPA on public/service interest, *see below*, para. 229 (W3 and W18).

proceedings that appear relevant to the Office's finding that the available information provides a reasonable basis to believe that members of UK armed forces in Iraq committed the war crimes of wilful killing/murder, ill-treatment, rape and/or other forms of sexual violence against persons in their custody.

206. The information below is necessarily constrained by the limited details and reasoning provided by the UK authorities in the public domain, but is supplemented by such publically disclosable additional information that the Office was able to obtain from IHAT/SPLI and the SPA, as well as from open sources.

**1. Death of Radhi (also Radi, Rahdi) Nama (also Niema Jabar, Nu' ma)**

IHAT 86 / SPLI 86.00 (Whiskey 1)

207. On 8 May 2003, Iraqi civilian Radhi Nama died several hours after being detained for questioning by soldiers of the First Battalion of the Black Watch, who were based at Camp Stephen in Basra.<sup>314</sup> Radhi Nama's death was originally investigated by the RMP's SIB, which reportedly concluded at some point before June 2004 that no crime could be established.<sup>315</sup> IHAT reviewed this case and found that the RMP's investigation had been inadequate and that further investigation was required.<sup>316</sup>

208. During the Ali Zaki Mousa litigation, the UK High Court had observed that it is "very unlikely that there will be a criminal prosecution" in this case due to the passage of time, closing of ranks and lack of forensic evidence.<sup>317</sup> Nonetheless, IHAT/SPA informed the Office "when making the comments, referred to in the final paragraph, about the likelihood of convictions, the High Court had neither seen nor reviewed the available evidence in each case. The issues that fell to be determined in the Ali Zaki Mousa No 2 litigation were such that it was not necessary for the court to consider the nature or strength of the evidence in each criminal case. As such, it is highly unlikely that either the DSP or indeed the judge at any subsequent criminal trial would consider themselves bound to take these comments into consideration when deciding whether prosecutions should proceed".<sup>318</sup> In this respect, the SPA further observed that the "closing of ranks" statement appeared to be a historical issue: that while it was true that one of the main reasons previously given for the lack of convictions in the more serious cases at courts

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<sup>314</sup> Guardian, [British army's investigations into Iraq deaths to be reopened](#), 30 January 2013; Guardian, [Iraq deaths in British custody could see military face legal challenges](#), 1 July 2010; UK EWHC, [R \(Ali Zaki Mousa and others\) v. Secretary of State for Defence No. 2](#), [2013] EWHC 1412 (Admin), 24 May 2013, para. 128(i).

<sup>315</sup> UK Parliament, [Hansard: Commons Debates](#), 30 June 2004. See also the statement of the Queen's Bench Division of the UK High Court that there had been "no criminal process" with respect to this incident: UK EWHC, [R \(Ali Zaki Mousa and others\) v. Secretary of State for Defence No. 2](#), [2013] EWHC 1412 (Admin), 24 May 2013, para. 166.

<sup>316</sup> UK EWHC, [R \(Ali Zaki Mousa and others\) v. Secretary of State for Defence No. 2](#), [2013] EWHC 1412 (Admin), 24 May 2013, para. 128(i).

<sup>317</sup> UK EWHC, [R \(Ali Zaki Mousa and others\) v. Secretary of State for Defence No. 2](#), [2013] EWHC 1412 (Admin), 24 May 2013, para. 167, referring to the reasons set out in para. 163.

<sup>318</sup> Information received from the UK authorities, 2 April 2015, para. 26.

martial was “a more or less obvious closing of ranks” by service personnel with the result that there was insufficient evidence to convict, the experience of IHAT was that this appeared to be less of a problem by the time it was investigating, possibly because witnesses are no longer serving in theatre with potential accused. As a result, it asserted that new evidence had come to light in some cases despite the age of the offences concerned.<sup>319</sup> The former Director of IHAT similarly told the Office that the “closing of ranks” phenomenon was in his view “exaggerated” and only one of several factors.<sup>320</sup>

209. During the Office’s February 2020 meeting with the former and current leadership of IHAT, SPLI and SPA, the Office was informed by the SPLI that the death of Rhadi Nama, together with the death of Abdul Jabbar Mossa Ali, formed part of the Whiskey 1 investigation, which examined activities in Camp Stephen. Conflicting evidence was uncovered during the course of the investigation and the evidential sufficiency test was not met in respect of the two deaths, the cause of which has not been conclusively established.
210. However, SPLI did refer other charges to the SPA in April 2019, in respect of three individuals under the UK’s International Criminal Court Act (“ICC Act”) as follows: a Commissioned Officer for failures to exercise command responsibility (s 65(2) of the ICC Act); a Senior Non-Commissioned Officer for failures in command responsibility (s 65(2) of the ICC Act) and the war crime of outrages upon personal dignity (s 51(1) of the ICC Act); and a Junior Non-Commissioned Officer for the war crime of outrages upon personal dignity (s 51(1) of the ICC Act).
211. The DSP clarified that, despite the evidential sufficiency test not being met in respect of the deaths, he had referred all of the evidence for review by senior treasury counsel, who confirmed that there was insufficient evidence to proceed in relation to both of the deaths. The DSP also referred to outside senior treasury counsel the other allegations (outrages upon personal dignity and command responsibility), who found that there was insufficient evidence under the first stage of the ‘full code test’ and, accordingly, that charges should not proceed. The DSP told the Office that he was not entirely satisfied with that advice and so referred the matter to another senior counsel for another opinion. The matter was pending with the second senior counsel and had not reached a definitive outcome at the time of the February meeting. The Office was informed in October 2020 that the second senior counsel had completed his review of the evidence and advised that under the

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<sup>319</sup> Information received from the UK authorities, 26-27 June 2014, para. 50.

<sup>320</sup> Information received from the UK authorities, 11 May 2020, para. 38.

first stage of the ‘full code test’ there was no realistic prospect of a conviction against any of the accused on the referred, or any other, charges.<sup>321</sup>

## 2. Death of Abdul Jabbar (also Abd al-Jabbar) Mossa Ali

IHAT 44 / SPLI 44.00; SPLI 113.00 (Whiskey 1)

212. Abdul Jabbar Mossa Ali died on 13 May 2003 while in the custody of the First Battalion of the Black Watch, which was based at Camp Stephen in Basra.<sup>322</sup> Abdul Jabbar Mossa Ali’s death was originally investigated by the RMP’s SIB, which did not refer the incident for prosecution.<sup>323</sup> IHAT reviewed this case and found that the RMP’s investigation had been inadequate and that further investigation was required.<sup>324</sup> As with death of Radhi Nama above, the SPA informed the Office that the evidential sufficiency test had not been met in respect Abdul Jabbar Mossa Ali’s death, a conclusion which had been confirmed by the external counsel review commissioned by the SPA. The SPLI had referred other charges concerning command responsibility and outrages upon personal dignity concerning both Radhi Nama and Mossa Ali to the SPA, namely: a company sergeant-major for failures in command responsibility (s 65(2) of the ICC Act) and the war crime of outrages upon personal dignity (s 51(1) of the ICC Act); a corporal for the war crime of outrages upon personal dignity (s 51(1) of the ICC Act); and an individual rank (full) colonel for failures to exercise command responsibility (s 65(2) of the ICC Act). The SPA subsequently found that these charges did not meet the first stage of the ‘full code test’, although the SPA had submitted the case for external counsel review.<sup>325</sup> UK officials confirmed that the family of Abdul Jabbar Mossa Ali has been informed that the case has been closed.<sup>326</sup>

## 3. Death of Baha Mousa

IHAT 153 / SPLI 153.00 (Whiskey 8)

213. Baha Mousa died between 14 and 16 September 2003 while in in the custody of 1 QLR in Basra.<sup>327</sup> A subsequent post-mortem revealed that he had received 93 separate injuries,

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<sup>321</sup> See also SPLI, [Quarterly Update](#), – 1 April 20 to 30 June 2020.

<sup>322</sup> Guardian, [British army's investigations into Iraq deaths to be reopened](#), 30 January 2013; UK EWHC, [R \(Ali Zaki Mousa and others\) v. Secretary of State for Defence No. 2](#), [2013] EWHC 1412 (Admin), 24 May 2013, para. 128(i).

<sup>323</sup> See statement of the Queen’s Bench Division of the UK High Court that there had been “no criminal process” with respect to this incident: UK EWHC, [R \(Ali Zaki Mousa and others\) v. Secretary of State for Defence No. 2](#), [2013] EWHC 1412 (Admin), 24 May 2013, para. 166.

<sup>324</sup> UK EWHC, [R \(Ali Zaki Mousa and others\) v. Secretary of State for Defence No. 2](#), [2013] EWHC 1412 (Admin), 24 May 2013, para. 128(i).

<sup>325</sup> Information received from the UK authorities, 11 May 2020, paras. 4-6; SPLI, [Quarterly Update](#), – 1 April 20 to 30 June 2020.

<sup>326</sup> Information received from the UK authorities, 11 May 2020, para. 8.

<sup>327</sup> Baha Mousa Inquiry, [Report: Volume I](#), 8 September 2011; UK Army, [The Aitken Report: An investigation into cases of deliberate abuse and unlawful killing in Iraq in 2003 and 2004](#), 25 January 2008, p.3; UK EWHC, [R \(Ali Zaki Mousa and others\) v. Secretary of State for Defence No. 2](#), [2013] EWHC 1412 (Admin), 24 May 2013, para. 128(i), 134, 166. The Baha Mousa Inquiry, [Report: Volume III](#), 8 September 2011 at para. 143, found two main causes of death: (i) “Baha Mousa had been made vulnerable by a range of factors, namely: lack of food and water, the

including a broken nose and fractured ribs.<sup>328</sup> The commanding officer referred Baha Mousa's death for investigation by the RMP's SIB, which was concluded in early April 2004 and resulted in the court martial of seven soldiers of the QLR. The court convicted Corporal Donald Payne of inhuman treatment but acquitted him of manslaughter and perverting the course of justice. He was sentenced to one year's imprisonment.<sup>329</sup> Payne appears to have been the first British soldier ever to be convicted in the UK of a war crime.<sup>330</sup> In the case of five other defendants, the Judge Advocate ruled that there was no case to answer due to lack of evidence, while two further accused were cleared by the jury of negligently performing the duty of ensuring that detainees were not ill-treated by men under their command.<sup>331</sup> Justice MacKinnon, who presided over the court martial, acknowledged that despite his finding that Baha Mousa's injuries were the result of numerous assaults over 36 hours "none of those soldiers have been charged with any offence simply because there is no evidence against them as a result of a more or less obvious closing of ranks".<sup>332</sup>

214. During the subsequent Ali Zaki Mousa litigation, the UK High Court observed: "[i]t appears on the materials before us to be highly unlikely that there will be any criminal trials of those responsible for those deaths", due to the passage of time, the closing of ranks phenomena referred to by Justice MacKinnon, and the lack of forensic evidence available to support a prosecution.<sup>333</sup> Nonetheless, as noted earlier, IHAT/SPA have questioned the accuracy and binding effect of this comment for its own inquiries.<sup>334</sup>
215. On 10 September 2013, IHAT announced that it had completed a pre-investigative assessment of the available evidence and would, with the specialist guidance of the SPA, "work to establish and pursue new lines of enquiry".<sup>335</sup> The latest version of the

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heat, rhabdomyolysis, acute renal failure, exertion, exhaustion, fear and multiple injuries. Both stress positions, which are a form of exertion, and hooding, which obviously must have increased Baha Mousa's body temperature, contributed to these factors" and (ii) "against the background of this vulnerability, the trigger for his death was a violent assault consisting of punches, being thrown across the room and possibly also of kicks. It also involved an unsafe method of restraint, in particular by being held to the ground in an attempt to re-apply plasticuffs. The combination of both causes was necessary to bring about Baha Mousa's death; neither was alone sufficient to kill him."

<sup>328</sup> ECtHR, [Al-Skeini and others v United Kingdom](#), no. 55721/07, Judgment, 7 July 2011, para. 66.

<sup>329</sup> ECtHR, [Al-Skeini and others v United Kingdom](#), no. 55721/07, Judgment, 7 July 2011, paras. 66, 68. On 30 April 2007, Payne was sentenced to a year's imprisonment and dismissal from the Army for his inhumane treatment conviction. ECtHR, [Al-Skeini and others v United Kingdom](#), no. 55721/07, Judgment, 7 July 2011, paras. 66, 68.

<sup>330</sup> Susan Kemp, British Justice, War Crimes and Human Rights Violations: The Age of Accountability (2019), p.270.

<sup>331</sup> ECtHR, [Al-Skeini and others v United Kingdom](#), no. 55721/07, Judgment, 7 July 2011, para. 68; Charge Sheet for Baha Mousa Court Martial, July 2005; Asser Institute, UK Military Court, "[Regina v. Payne](#)", 30 April 2007.

<sup>332</sup> *R v Payne*, Transcript, 13 February 2007 as reproduced in Kerr, *The Military on Trial: The British Army in Iraq*, Wolf Legal Publishers, 2008, p. 28. According to Kemp, an unnamed former senior military prosecutor at the time has reportedly noted the importance of charging decisions in this case, pointing out that the colonel acquitted of negligently performing a duty was not charged with command responsibility, and reportedly asserted that "the Army backed him completely even to the extent of not proceeding against him on a disciplinary level. So that to me spoke volumes"; pp. 212, 263.

<sup>333</sup> UK EWHC, [R \(Ali Zaki Mousa and others\) v. Secretary of State for Defence No. 2](#), [2013] EWHC 1412 (Admin), 24 May 2013, paras. 163, 167.

<sup>334</sup> Information received from the UK authorities, 2 April 2015, para. 26.

<sup>335</sup> IHAT, [Further investigation into the death of Baha Mousa](#), 10 September 2013.

Information for Complainants table [accessed in November 2020], which lists all closed cases, includes case SPLI 153.00.<sup>336</sup> The reason for closure for case 153.00 is indicated as lack of evidence.<sup>337</sup>

#### 4. Death of Tariq Sabri Mahmud

IHAT 84

216. Iraqi national Tariq Sabri Mahmud died while being detained on board an RAF helicopter in April 2003. Investigation into the death of Mr. Mahmud was triggered by an anonymous phone call received at RAF Marham on 2 June 2003, where the caller alleged that three named members of II Squadron had unlawfully killed a prisoner of war being transported by Chinook and that the incident was subsequently covered up.<sup>338</sup> An initial investigation was reportedly completed by RAF service police, who reported in June 2004,<sup>339</sup> with no information that a prosecution resulted. IHAT reviewed the RAF police investigation and presented the review (the contents or recommendations of which are unknown to the Office) to the RAF Police for consideration. The Provost-Marshal (Royal Air Force) directed further investigation<sup>340</sup> but ultimately the DSP directed that no charges should be brought on the basis that there was no realistic prospect of conviction on any charge.<sup>341</sup> On 25 May 2017, an IFI investigation into Tariq Sabri Mahmud's death was convened,<sup>342</sup> which was completed on March 2019. The IFI report was unable to identify the exact cause of death in the absence of a post-mortem or thorough medical examination,<sup>343</sup> but "concluded that it is more likely than not that death occurred while Mr. Mahmud was on the aircraft, in connection to forcible restraint applied to him by a member of RAF, and before transfer to the USAF".<sup>344</sup> Although the report could not rule out that less force could have been used, the investigation found that Mr. Mahmud, who

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<sup>336</sup> According to SPLI's response to follow-up question from the Office, in August 2018, "(...) An SPLI case number (allegation) is the same as the IHAT case number. Any newly identified allegation linked to an existing SPLI allegation is allocated a numerically sequential victim number. For example: if the original SPLI case number is '123' then this will remain the case for the original claimant; any subsequent victims identified in that case will be numbered 123.01, 123.02 and so on, as required". SPLI, Response to Follow-Up Questions from the Office of the Prosecutor of the International Criminal Court, 8 August 2018.

<sup>337</sup> SPLI, [Information for Complainants Table](#), (as at November 2020). The rationale of closing for lack of evidence is explained in the table as follows: "You made a complaint about the conduct of UK Armed Forces in Iraq. This complaint has been carefully considered by SPLI, an independent investigative unit. It has been decided to close your case, without further action, as there is a lack of sufficient, credible evidence of a criminal offence. This decision also took into the account findings against UK solicitors involved in legal proceedings concerning military operations in Iraq".

<sup>338</sup> IFI, [Consolidated Report into the death of Tariq Sabri Mahmud](#), March 2019, para. 6.95.

<sup>339</sup> IFI, [Progress statement into the investigation of death of Tariq Sabri Mahmud](#), 25 September 2017, p. 2.

<sup>340</sup> IHAT, [Table of work completed](#), updated October 2017 (*see* IHAT 84).

<sup>341</sup> IFI, [Progress statement into the investigation of death of Tariq Sabri Mahmud](#), 25 September 2017, p. 2; Information received from the UK authorities, 5 October 2020, p. 2.

<sup>342</sup> Ministry of Defence, [Confirmation of Appointment of Sir George Newman](#), 25 May 2017, p. 1.

<sup>343</sup> IFI, [Consolidated Report into the death of Tariq Sabri Mahmud](#), March 2019, para. 11.21. The only information available was based on "a limited medical perusal of the upper part of the deceased's body by a doctor" who although "he was not a pathologist and was unqualified to perform a post-mortem", nonetheless found that that the victim "had no sustained any obvious recent physical injury"; paras. 8.4, 9.6, 13.4.

<sup>344</sup> IFI, [Consolidated Report into the death of Tariq Sabri Mahmud](#), March 2019, paras. 11.1, 11.30.

strongly resisted being captured, was breaking free of his restraints and “presented a threat to the safety of the aircraft and the men”, had been forcibly restrained and placed on the floor of the aircraft, bound at the wrists in plasticuffs and hooded.<sup>345</sup>

## 5. Death of Naheem (also Nadheem) Abdullah

No IHAT number

217. Naheem Abdullah died from a blow or blows to the left side of his head inflicted by one or more soldiers of a section of the 3<sup>rd</sup> Battalion of the Parachute Regiment while in their custody in Maysan Province on 11 May 2003.<sup>346</sup> Naheem Abdullah’s death was investigated by the RMP’s SIB in 2003 and seven soldiers were charged with murder. At a court martial on 3 November 2005, the Judge Advocate found that the evidence did not permit a conclusion to be drawn on the individual responsibility of each defendant.<sup>347</sup> The Judge Advocate criticised the RMP’s SIB investigation as “inadequate” with “serious omissions” by investigators in not searching for records of hospital admissions or registers of burials.<sup>348</sup>
218. During the Ali Zaki Mousa litigation, the UK High Court noted its concern that IHAT had not taken the case forward despite the court martial finding that the death was a result of an assault by the section to which the soldiers belonged.<sup>349</sup>
219. On 27 March 2014, the Secretary of State for Defence announced that an IFI investigation into Naheem Abdullah’s death had been commissioned in order to comply with the High Court’s decision in Ali Zaki Mousa (No. 2) but that “no prosecutions will result”.<sup>350</sup> The IFI made “exhaustive inquiries about the whereabouts of the transcript of the court martial” but concluded it had probably “been destroyed or thrown away”. It further noted that the soldiers had not given oral evidence, been examined or cross-examined and found that the “need for them to give oral evidence” was a “critical aim” of the IFI inquiry.<sup>351</sup>

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<sup>345</sup> IFI, [Consolidated Report into the death of Tariq Sabri Mahmud](#), March 2019, paras. 11.20-11.26.

<sup>346</sup> IFI, [Consolidated Report into the death of Nadheem Abdullah and Hassan Abbas Said](#), March 2015, pp. 67-69.

<sup>347</sup> UK EWHC, [R \(Ali Zaki Mousa and others\) v. Secretary of State for Defence No. 2](#), [2013] EWHC 1412 (Admin), 24 May 2013, para. 155.

<sup>348</sup> Guardian, [Paratroopers cleared of murdering Iraqi after judge says there is no case to answer](#), 4 November 2005. See also Sir George Newman’s comment that the court martial had criticised the 2003 investigation and Newman urged that the RMP should be “in a position to carry out proper early investigations on future occasions”: IFI, [Consolidated Report into the death of Nadheem Abdullah and Hassan Abbas Said](#), March 2015, p. 20.

<sup>349</sup> UK EWHC, [R \(Ali Zaki Mousa and others\) v. Secretary of State for Defence No. 2](#), [2013] EWHC 1412 (Admin), 24 May 2013, para. 181.

<sup>350</sup> Secretary of State for Defence, [Defence Written Statement](#), 27 March 2014.

<sup>351</sup> IFI, [Consolidated Report into the death of Nadheem Abdullah and Hassan Abbas Said](#), March 2015, p. 20.

## 6. Death of Ahmed Jabber Kareem Ali

IHAT 85

220. Ahmed Jabber Kareem Ali, aged fifteen, died by drowning in Basra in May 2003 after he was detained on suspicion of looting.<sup>352</sup> Ahmed Jabber Kareem Ali's father brought civil proceedings against the MoD for the death, which settled out of court with the payment of £115,000 on 15 December 2008.<sup>353</sup> On 20 February 2009, Major General Cubbitt wrote to Mr Ali's father to formally apologise on behalf of the British Army for its role in his son's death.<sup>354</sup> Following an investigation by the RMP's SIB<sup>355</sup> four soldiers were subject to court martial in 2006 and all four acquitted of manslaughter when the evidence of the prosecution's main witness, another of the Iraqi men discovered looting, was found to be "inconsistent and unreliable".<sup>356</sup> A report produced on behalf of the MoD by Brigadier Robert Aitken concerning six cases of alleged deliberate abuse and killing of Iraqi citizens ("Aitken Report") noted that the court martial did not convene until 28 months after the incident. It criticised this delay in time to address the case as "unacceptable".<sup>357</sup>
221. IHAT reviewed the case but decided "to discontinue any further work on the case after the investigation identified there was no prospect of gaining new or compelling evidence to go any way to altering a previous decision made by the courts martial".<sup>358</sup> The subsequent IFI inquiry found that there were several procedural irregularities in the investigation, including that the suspects' statements were obtained before they were questioned under caution, resulting in one statement being declared inadmissible during the court martial proceedings.<sup>359</sup>

## 7. Death of Sayeed (also Sa'eed, Said) Radhi Shabram (also Shabrab) Wawi Al-Bazooni

IHAT 87 / SPLI 87.00 (Whiskey 9)

222. On 23 May 2003, 18 year old Sayeed Shabram drowned in the Shatt al-Arab river near Basra after being detained by soldiers from 26 Armoured Engineer Squadron, 32 Royal Engineer Regiment of 1 Black Watch.<sup>360</sup> The MoD agreed to pay £100,000 compensation to

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<sup>352</sup> IFI, [Report into the death of Ahmed Jabbar Kareem Ali](#), September 2016, p. 17.

<sup>353</sup> ECtHR, [Al-Skeini and others v United Kingdom](#), no. 55721/07, Judgment, 7 July 2011, para. 62.

<sup>354</sup> ECtHR, [Al-Skeini and others v United Kingdom](#), no. 55721/07, Judgment, 7 July 2011, para. 62.

<sup>355</sup> IFI, [Report into the death of Ahmed Jabbar Kareem Ali](#), September 2016, p. 19.

<sup>356</sup> ECtHR, [Al-Skeini and others v United Kingdom](#), no. 55721/07, Judgment, 7 July 2011, para. 60.

<sup>357</sup> UK Army, [The Aitken Report: An investigation into cases of deliberate abuse and unlawful killing in Iraq in 2003 and 2004](#), 25 January 2008, para. 38.

<sup>358</sup> IHAT, [Table of work completed](#), updated October 2017 (referring to IHAT 85).

<sup>359</sup> IFI, [Report into the death of Ahmed Jabbar Kareem Ali](#), September 2016, pp. 18, 63.

<sup>360</sup> IFI, Consolidated Report into the Death of Saeed Radhi Shabram Wawi Al-Bazooni, September 2020, para. 3.3.

Shabram's family. While the MoD did not admit liability, a spokesperson for the MoD said that compensation claims are "considered on the basis of whether or not there is a legal liability to pay compensation".<sup>361</sup> Following an investigation by RMP SIB, the case was formally discontinued without proceeding to court martial in July 2006.<sup>362</sup> The UK High Court noted in the Ali Zaki Mousa litigation that the case was discontinued because the "witnesses had colluded and lacked credibility"<sup>363</sup>. Shabram's family's lawyers claim the delay allowed time for the soldiers to collude on their accounts.<sup>364</sup> As with several other cases, the UK High Court also observed that it is "very unlikely that there will be a criminal prosecution" in this case due to the passage of time, closing of ranks and lack of forensic evidence.<sup>365</sup> Nonetheless, as noted earlier, IHAT/SPA have questioned the accuracy and binding effect of this comment for its own inquiries.<sup>366</sup>

223. IHAT referred the case to the DSP on 12 September 2016. The allegation was of manslaughter. A decision was taken by the DSP not to prosecute on 14 September 2017. This decision was reached on the basis that the new evidence gathered by the IHAT was insufficiently reliable to overcome the original conflict in the evidence between the 2003 Iraqi witnesses on the crucial issue as to whether Shabram was unlawfully pushed or jumped into the water. The DSP's decision was reviewed by external Queen's Counsel according to the Victim's Right to Review Scheme. He concluded that the decision was not wrong.<sup>367</sup>
224. On 15 February 2018, MoD instituted an eighth IFI investigation into the wider circumstances of the death after noting that despite police in both the Royal Military Police and the IHAT investigations considering that "the evidential sufficiency test had been met, no-one has been charged and no prosecution has been brought as the available evidence leaves unresolved the significant conflict between the accounts of the Iraqi and military witnesses as to whether Mr Al-Bazooni entered the water voluntarily".<sup>368</sup>
225. The IFI, which issued its report on 24 September 2020, concluded that there was no reliable evidence upon which it would be proper to conclude that any "British soldier pushed or forced" Shabram and his friend into the water; rather, "[i]t is most likely that

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<sup>361</sup> Guardian, [Ministry of Defence pays £100,000 to family of drowned Iraqi teenager](#), 21 July 2011; Leigh Day, [Ministry of Defence compensates family of drowned Iraqi teenager](#), 2011, p. 26.

<sup>362</sup> UK Army, [The Aitken Report: An investigation into cases of deliberate abuse and unlawful killing in Iraq in 2003 and 2004](#), 25 January 2008, para. 38; UK EWHC, [R \(Ali Zaki Mousa and others\) v. Secretary of State for Defence No. 2](#), [2013] EWHC 1412 (Admin), 24 May 2013, para. 160. See also Guardian, [Ministry of Defence pays £100,000 to family of drowned Iraqi teenager](#), 21 July 2011.

<sup>363</sup> UK EWHC, [R \(Ali Zaki Mousa and others\) v. Secretary of State for Defence No. 2](#), [2013] EWHC 1412 (Admin), 24 May 2013, para. 160.

<sup>364</sup> Leigh Day, [Ministry of Defence compensates family of drowned Iraqi teenager](#), 2011, p. 26.

<sup>365</sup> UK EWHC, [R \(Ali Zaki Mousa and others\) v. Secretary of State for Defence No. 2](#), [2013] EWHC 1412 (Admin), 24 May 2013, paras. 163, 167.

<sup>366</sup> Information received from the UK authorities, 2 April 2015, para. 26.

<sup>367</sup> See IFI, [Consolidated Report into the Death of Saeed Radhi Shabram Wawi Al-Bazooni](#), September 2020, para. 3.28.

<sup>368</sup> Ministry of Defence, [Confirmation of Appointment of Sir George Newman](#), 17 February 2018.

they jumped or fell” “in the process of trying to escape what they believed would be dire punishment for looting”.<sup>369</sup> Baroness Hallett DBE (who succeeded Sir George Newman in his role as chair of the IFI) found “clear evidence of collusion and possibly a conspiracy on the part of some Iraqi civilians to pervert the course of justice”, arising from a misguided attempt to seek justice for Shabram.<sup>370</sup> Baroness Hallett found that one “major player in the collusion/conspiracy” “organised the witnesses and escorted them to the authorities”, who in turn “lied about their presence and what they had seen”.<sup>371</sup> The principal Iraqi eyewitness, the other man who ended up in the river with Shabram, had been “fed details of the incident” and his account was both inconsistent and “significantly tainted” by the collusion and so could not be considered reliable.<sup>372</sup> Given the conclusion that UK troops were not at fault, Baroness Hallett DBE found that there was no need to further explore the training and instructions given to UK troops on dealing with looters.<sup>373</sup>

226. Baroness Hallett DBE declined to make unfavourable findings with respect to various criticisms of the conduct of UK troops during the investigations. For example, IHAT investigators had made substantial efforts to recover certain radio logs (including the logs of messages sent to or from 26 Squadron 32 Regiment RE personnel at the scene) to no avail, and Baroness Hallett drew no adverse inferences from the missing logs because “it is far from unknown for records to go missing in the aftermath of a war”.<sup>374</sup> Although her predecessor Sir George Newman was reportedly ‘appalled’ by the repeated refusal of soldiers to provide oral evidence before any investigation, instead submitting pre-prepared written statements, Baroness Hallett found that as these events had been “hanging over” the soldiers for seventeen years and they were entitled to act upon their legal advice not to speak, she did not “draw any adverse inferences from their limited cooperation over the years”.<sup>375</sup> Similarly, while a signals commander had given evidence that the main suspect in the incident had said to him something along the lines of, “If anything comes out of this will you back me up”, which the signals commander himself found odd and suggestive that the suspect “may have done something wrong”,<sup>376</sup>

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<sup>369</sup> IFI, [Consolidated Report into the Death of Saeed Radhi Shabram Wawi Al-Bazooni](#), September 2020, para. 5.52.

<sup>370</sup> IFI, [Consolidated Report into the Death of Saeed Radhi Shabram Wawi Al-Bazooni](#), September 2020, paras. 5.6-5.7.

<sup>371</sup> IFI, [Consolidated Report into the Death of Saeed Radhi Shabram Wawi Al-Bazooni](#), September 2020, para. 5.8-5.9.

<sup>372</sup> IFI, [Consolidated Report into the Death of Saeed Radhi Shabram Wawi Al-Bazooni](#), September 2020, para. 5.11-5.14, 5.20.

<sup>373</sup> IFI, [Consolidated Report into the Death of Saeed Radhi Shabram Wawi Al-Bazooni](#), September 2020, para. 5.53.

<sup>374</sup> IFI, [Consolidated Report into the Death of Saeed Radhi Shabram Wawi Al-Bazooni](#), September 2020, para. 5.39.

<sup>375</sup> IFI, [Consolidated Report into the Death of Saeed Radhi Shabram Wawi Al-Bazooni](#), September 2020, paras. 5.43-5.44.

<sup>376</sup> IFI, [Consolidated Report into the Death of Saeed Radhi Shabram Wawi Al-Bazooni](#), September 2020, para. 4.253.

Baroness Hallett found that this did not necessarily mean that the suspect wanted the signals commander to lie, but rather, “[h]e may simply have been seeking his support”.<sup>377</sup>

## 8. Cases of ill-treatment

227. As IHAT and the SPA have acknowledged to the Office, it is difficult to say with certainty how many courts martial and summary dealings may have been held arising out of mistreatment of Iraqi civilians prior to the establishment of IHAT.<sup>378</sup> Two courts martial conducted in January and February 2005 in relation to the mistreatment of detainees at Camp Breadbasket resulted in the conviction of four soldiers for service disciplinary offences who were sentenced to custodial sentences of between 4 months and 18 months.<sup>379</sup>

228. In another case concerning the alleged abuse of 8 men detained with Baha Mousa, seven soldiers, including physical perpetrators and their mid-ranking supervisors,<sup>380</sup> were tried by court martial. One pled guilty to inhumane treatment but was acquitted of manslaughter and perverting the course of justice and received a sentence of one year imprisonment and dismissal from the army. The six other soldiers were acquitted of inhumane treatment, common assault and negligently performing a duty.<sup>381</sup> As IHAT/SPA set out to the Office:

7 defendants were prosecuted during a six month court martial, with the case against all but 2 being dismissed by the judge at the conclusion of the prosecution case. The reasons for this outcome are complex but relate to the quality of the evidence given by the British soldiers who were called as witnesses by the prosecution. While the defence did not dispute that the detainees in this case had been subjected to serious mistreatment, including acts of violence, during their detention at “BG Main”, the detainees themselves were unable to identify which individual soldiers had been responsible for which aspects of their mistreatment or for which assault. This was primarily because the detainees had been hooded for most of the relevant time. Several of the soldiers who were called as witnesses by the prosecution proved reluctant to provide evidence against those with whom they still served, leading to what the Judge Advocate, a senior judge from the civilian system who had been brought in to try this case, described as a “more or less obvious closing of ranks”. The 2 defendants against whom the case was not dismissed at the conclusion of the

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<sup>377</sup> IFI, [Consolidated Report into the Death of Saeed Radhi Shabram Wawi Al-Bazooni](#), September 2020, para. 5.37.

<sup>378</sup> Annex 1 to UK response of 2015 2 April 2015, para. 9; SPA Briefing Document for the OTP visit of 26-27 June 2014, para. 45.

<sup>379</sup> UK Army, [The Aitken Report: An investigation into cases of deliberate abuse and unlawful killing in Iraq in 2003 and 2004](#), 25 January 2008, p. 3; Information received from the UK authorities, 26-27 June 2014, para. 47.

<sup>380</sup> Soldiers and officers of the Queen's Lancashire Regiment: Corporal Donald Payne; Lance Corporal Wayne Ashley Crowcroft; Private Darren Trevor Fallon; Sergeant Kelvin Lee Stacey; Major Michael Edwin Peebles; Warrant Officer Mark Lester Davies; and Colonel Jorge Mendonça.

<sup>381</sup> ECtHR, [Al-Skeini and others v United Kingdom](#), no. 55721/07, Judgment, 7 July 2011, para. 68; Charge Sheet for Baha Mousa Court Martial, July 2005.

prosecution case were subsequently acquitted by the Military Board after consideration of all of the evidence.<sup>382</sup>

229. In terms of cases of ill-treatment referred by IHAT or SPLI to the SPA, the information available shows that IHAT referred two cases for ill-treatment in interrogation and the SPLI referred a further 5 individuals, as set out below:

- (viii) **IHAT 98:** IHAT referral for ill-treatment in interrogation. SPA decided to discontinue because the conduct was not of sufficient gravity to be considered war crimes.<sup>383</sup> This case, which arose from IHAT review of video evidence of interrogation sessions (referred to as Operation Twickenham), had been referred from IHAT prior to June 2016. The DSP decided not to direct prosecution. Having sought the advice of Senior Counsel, he did not judge the allegations to be of sufficient gravity to be considered war crimes.<sup>384</sup>
- (ix) **IHAT number not known:** A separate IHAT referral for ill-treatment in interrogation. SPA decided to discontinue because conduct was not of sufficient gravity to be considered war crimes.<sup>385</sup> As with the preceding case, this case arose from IHAT review of the footage of interrogations in Iraq (referred to as Operation Twickenham) and was referred from IHAT prior to June 2016. After having sought the advice on Senior Counsel, the DSP decided not to direct prosecution in either case, as he did not judge the allegations to be of sufficient gravity to be considered war crimes.<sup>386</sup>
- (x) **IHAT/SPLI number not known:** SPLI referred 2 individuals to a nominated Commanding Officer in relation to offences linked to alleged assaults and abuse of Iraqis held by UK armed forces in April 2004. In October 2019, the Commanding Officer referred the individuals to the SPA, which decided no charges should be directed.<sup>387</sup>
- (xi) **IHAT 8 (Whiskey 3):** The case of W3 (IHAT 8: alleged abuse of Iraqi youths in Al Almarah Riot in April 2004) was referred on 30 September 2019. In the case of W3 a decision was made that it was not in the public and service interest to direct charges. This case was referred for a crime of minor violence under UK law, it was not referred for a war crime. There was no evidence of injury and

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<sup>382</sup> Information received from the UK authorities, 2 April 2015, para. 12.

<sup>383</sup> IHAT, [Quarterly update](#), April to June 2017, pp. 2-3; IHAT, [Table of work completed](#), updated October 2017; Information received from the UK authorities, 5 June 2017, p. 7; SPLI, [Quarterly Update](#), 1 April 2020 to 30 June 2020.

<sup>384</sup> Information received from the UK authorities, 5 June 2017, p. 7.

<sup>385</sup> IHAT, [Quarterly update](#), April to June 2017, pp. 2-3; IHAT, [Table of work completed](#), updated October 2017; Information received from the UK authorities, 5 June 2017, p. 7; SPLI, [Quarterly Update](#), 1 April 2020 to 30 June 2020.

Information received from the UK authorities, 5 June 2017, p. 7.

<sup>387</sup> SPLI, [Quarterly Update](#), 1 April 2020 to 30 June 2020.

the victims in the case gave contradictory and unreliable evidence. There were significant evidentiary problems with the case. The SPA sought external counsel's opinion. The DSP decided it was not in the public and service interest to direct charges on such a minor case that was so old. The victim had exercised the right of review which was being done internally at the SPA.<sup>388</sup>

- (xii) **IHAT 167 (Whiskey 18):** In the case of W18 or IHAT 167, the SPLI initially took the decision not to refer the case to the SPA on any charge since the Evidential Sufficiency Test had not been met for the war crime of outrage upon personal dignity. The victim exercised their right of review. The case was then sent to the RAF Police (RAFP) who agreed that there was no evidence of a war crime, but decided that an offence under the Protection of Children Act (possession of indecent images of children) should be referred to the SPA, because a soldier had in his possession an indecent image of a child which he produced during an interrogation. The DSP decided not to proceed with the case following the RAFP referral on the basis of public and service interest given the passage of time and the non-custodial sentence that would have applied.<sup>389</sup>

## F. SYSTEMIC ISSUES

230. Beyond the individual allegations received by IHAT and SPLI, a key focus of the preliminary examination has been whether investigations and/or prosecutions have also encompassed the allegations concerning the responsibility of commanders and other superiors, and if so, whether these were genuine.

231. In particular, a key allegation made by PIL/ECCHR in their article 15 communications to the Office is that the violence inflicted on victims in Iraq by members of UK armed forces was not the result of random and chaotic circumstances, but derived from systemic failings which trigger individual criminal responsibility at the highest levels of the military and the government. As PIL/ECCHR observed:

Between them, these victims make thousands of allegations of mistreatment amounting to war crimes of torture, or cruel, inhuman or degrading treatment, as well as wilfully causing great suffering, or serious injury .... Clear patterns emerge of the same techniques being used for the same purposes in a variety of different UK facilities, over the whole period that UK Services Personnel were in Iraq, from 2003 to 2008. Available evidence suggests that failures to follow-up on or ensure accountability for ending such practices became a cause of further abuse. The

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<sup>388</sup> Information received from the UK authorities, 7 May 2020.

<sup>389</sup> Information received from the UK authorities, 7 May 2020.

obvious conclusion is that such mistreatment was systematic and had a systemic cause, which further suggests that there are hundreds more such victims. There are considerable reasons to allege that those who bear the greatest responsibility for the crimes are situated at the highest levels, including all the way up the chain of command of the UK Army, and implicating former Secretaries of State for Defence and Ministers for the Armed Forces Personnel.<sup>390</sup>

232. As noted in Section IV.C (Internment and Interrogation Policies), the question of individual as opposed to corporate responsibility was a key theme of the Baha Mousa Inquiry. Part of the Inquiry's mandate was to determine "where responsibility lay for approving the practice of conditioning detainees".<sup>391</sup> In its submissions to the Baha Mousa Inquiry, the MoD "accept[ed] its corporate responsibility for the gap in doctrine" with respect to use of the five techniques during interrogation had been expressly prohibited in Part I of the 1972 Directive with respect to internal security operations.<sup>392</sup> Sir William Gage, the Chairman of the Baha Mousa Inquiry, similarly emphasised the MoD's corporate responsibility, observing:

... it can be seen that at the time of Op Telic there was no proper MoD endorsed doctrine on interrogation of prisoners of war that was generally available. Knowledge of Part I of the 1972 Directive on internal security operations as a policy document containing the prohibition on the five techniques had largely been lost, and the prohibition was not contained in JWP 1-10. Despite JWP 1-10 status as the lead publication on the handling of prisoners of war, it also made no mention of sight deprivation. / This position had developed over decades and was the product not only of failings but also of missed opportunities. In those circumstances, although I make comments about the role played by some individuals at certain times, it is fair and appropriate to conclude that the position outlined above was as a result of a corporate failure by the MoD.<sup>393</sup>

233. With respect to theatre-specific orders on prisoner handling and the attendant directive for Op TELIC 1, the report of the Baha Mousa Inquiry similarly found, in apparent reflection of the specific, and non-criminal, scope of the public inquiry:

... on the ground, the guidance given to soldiers and junior commanders was inadequate. / However, having reached this conclusion, I do not think it proper or appropriate to blame individual Division and Brigade level staff officers for this shortcoming. Commanders issuing orders addressing amongst many other things prisoners of war handling were entitled to rely on JWP 1-10. The MoD is corporately responsible for the fact that the guidance in JWP 1-10 was itself inadequate. I am satisfied that the historic failures to maintain adequate prisoner of war handling and

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<sup>390</sup> ECCHR and PIL, [First article 15 communication](#), 10 January 2014, p. 6.

<sup>391</sup> Baha Mousa Inquiry, [Report: Volume I](#), 8 September 2011, para. 1.4.

<sup>392</sup> Closing Submissions on modules 1-3 on behalf of the Ministry of Defence, 25 June 2010, SUB000947, at pp. 112-113 (SUB001058-9); Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, para. 5.27.

<sup>393</sup> Baha Mousa Inquiry, [Report: Volume III](#), 8 September 2011, paras. 292-293.

interrogation doctrine led directly to inadequate prisoner of war handling guidance being issued in the lead-up to the warfighting phase of Op Telic.<sup>394</sup>

234. Subsequent proceedings before the ECtHR in *Al Skeini and others v United Kingdom*, confirmed that the UK Government had a duty under the Convention to carry out an adequate and effective investigation into allegations involving British service personnel in Iraq as well as into wider systemic issues. As the ECtHR observed, “[t]he investigation should also be broad enough to permit the investigating authorities to take into consideration not only the actions of the State agents who directly used lethal force but also all the surrounding circumstances, including such matters as the planning and control of the operations in question”, adding that an independent examination must also consider “broader issues of State responsibility, for the death, including the instructions, training and supervision given to soldiers undertaking tasks such as this in the aftermath of the invasion”.<sup>395</sup>

235. As set out earlier, IHAT was created in direct response to calls, following Baha Mousa and the Al Sweady public inquiries, for a further public inquiry that would also encompass arguable systemic issues arising out of the individual allegations.<sup>396</sup> Nonetheless, in May 2013, the High Court expressed concerns, inter alia, with IHAT’s work in terms of the poor prospects for prosecutions as well as the lack of adequate investigations into issues of systemic abuse and training:

There is no evidence that the IHAT inquiry has considered or will consider with the appropriate level of detail ‘the instructions, training and supervision given to soldiers undertaking tasks such as this in the aftermath of the invasion’. This would entail obtaining evidence given from the soldiers and from those responsible for devising and organising the training. It would also be necessary for there to be effective testing of the evidence so as to check its reliability. / IHAT is neither structured nor staffed to perform these functions.<sup>397</sup>

236. Following this ruling, IHAT reportedly adjusted its working methodology by grouping the assessment of allegations displaying ‘Problem Profiles’, in order to cluster together allegations which appeared prima facie linked by the personnel identified, the time period or detention facilities involved, or by the commanding officer(s).<sup>398</sup>

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<sup>394</sup> Baha Mousa Inquiry, [Report: Volume III](#), 8 September 2011, paras. 350-351.

<sup>395</sup> ECtHR, [Al-Skeini and others v United Kingdom](#), no. 55721/07, Judgment, 7 July 2011, paras. 163, 174.

<sup>396</sup> See above, paras. 161-162.

<sup>397</sup> UK EWHC, [R \(Ali Zaki Mousa and others\) v. Secretary of State for Defence No. 2](#), [2013] EWHC 1412 (Admin), 24 May 2013, paras. 192-193; see generally paras. 126-194.

<sup>398</sup> [Review of the Iraq Historic Allegations Team](#), para. 13.14.

237. In its April 2015 response to the Office, the UK Government observed (in relation to allegations of command responsibility in the 2014 PIL/ECCHR Communication):

There is no 'strict liability' under international criminal law for those in command positions being responsible for the actions of alleged perpetrators solely on account of occupying a command position, whether military or civilian. As the IHAT has indicated (and explained to the OTP in the briefing session and its briefing documents) its investigations are 'evidence-led', focusing on all alleged incidents, and encompassing all possible persons who could be responsible irrespective of their position and depending on the evidence that becomes available as a result of the investigations.

...

Following this approach means that the IHAT is considering whether the evidence that is gathered from its investigations into specific incidents reveals patterns, connections, and systemic issues. There is simply no basis to conclude that, if there were any evidence that any person – irrespective of their rank or position – had committed any offence, the IHAT would fail to investigate it fully and thoroughly.

...

IHAT has put in place mechanisms for identifying patterns and connections in the evidence as it is gathered and analysed, and features that could be indicative of systemic abuses or failings that may have consequences up the chain of command, depending on the evidence. The investigations are centred on gathering evidence about the alleged crimes and following the trail of that evidence wherever it may lead in order to hold responsible those who are involved irrespective of their position in the hierarchy based on the available evidence.<sup>399</sup>

238. The response further noted that IHAT/SPA had identified certain errors in the approach taken to the issue of command responsibility in the PIL/ECCHR communication. In particular, the IHAT/SPA response stated that the PIL/ECCHR communication failed to make a distinction between criminal culpability arising out of command responsibility as defined in article 28 of the Rome Statute and other forms of criminal and non-criminal responsibility. The response noted, for example, that the alleged responsibility of those who oversaw the training of interrogators, who may have then committed offences in theatre, and those responsible for the delivery of such training, would not meet the requirements of article 28. In the same way, it noted that individuals who did not have effective control of those who may have been responsible for war crimes cannot be criminally culpable via article 28 of the Statute. IHAT/SPA also noted that no differentiation was made between an Officer Commanding of a sub-unit (for example a company) and a Commanding Officer of a unit (for example a battalion), which may be relevant given the legal

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<sup>399</sup> Information received from the UK authorities, 2 April 2015, paras. 26, 28, 55.

and statutory obligations of a Commanding Officer in relation to discipline and investigation.<sup>400</sup>

239. As for the legal standard applied, during the February 2020 meeting, the DSP confirmed that section 65(2) of the ICC Act covers the same ground as the ICC's doctrine of command responsibility,<sup>401</sup> adding that command responsibility only applies to crimes within the ICC Act and not to the relevant domestic offences examined by IHAT. He further observed that command responsibility was constantly discussed at IHAT and that personnel were regularly briefed by the SPA (by the DSP, the Deputy DSP, and the Managing Prosecutor within the Operational Offending Team) on the elements of command responsibility and what to look for. The Officer in Command of SPLI similarly stated that the SPLI had referred multiple individuals to the SPA for failures of command responsibility, even though none of those cases had progressed to prosecution (see 'individual cases' above).
240. As for the potential criminal liability of the interrogators in question, IHAT responded that the fact that members of UK armed forces may have been trained to use certain techniques would not constitute a defence in law and would not by itself be a reason not to prosecute.<sup>402</sup>
241. IHAT/SPA further observed that although IHAT investigations had initially concentrated on low level perpetrators, this was solely because this was where the available evidence lay, and in no way precluded evidence led investigations following evidence up the command chain in due course, which it asserted in fact happened in some of the more mature IHAT investigations.<sup>403</sup>
242. In December 2016, IHAT indicated to the Defence subcommittee inquiry that "high-level perpetrators have not been ruled out from the investigation that can come out from" the 60 allegations left by mid-summer.<sup>404</sup>
243. In its meeting with the Office in February 2017, IHAT indicated that it had assessed 1,400 claims of ill-treatment across 24 'Problem Profiles' with the aim of identifying crime patterns as well as alleged perpetrators. Allegations displaying a 'Problem Profile' reportedly sought "to bring together under one umbrella allegations which are on the face of it linked to each other by e.g. the same personnel identified as

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<sup>400</sup> Information received from the UK authorities, 2 April 2015, paras. 15-16.

<sup>401</sup> Section 65(2) of the [International Criminal Court Act](#), 2001, incorporates article 28(a) of the Rome Statute.

<sup>402</sup> Information received from the UK authorities, 2 April 2015, paras. 66-67.

<sup>403</sup> Information received from the UK authorities, 2 April 2015, para. 72.

<sup>404</sup> UK Parliament, Defence Sub-Committee, Oral Evidence: MoD Support for former and serving personnel subject to judicial processes, 24 December 2016, p. 9.

being involved in a number of different and independent allegations of ill-treatment perhaps at the same facility over a particular period and under the supervision of the same commanding officer(s)".<sup>405</sup> IHAT stated that these 'Problem Profiles' included particular units, locations, detention facilities, with most 'Problem Profiles' identified based on the material disclosed by PIL. IHAT further informed the Office that its investigations to date had not revealed the involvement of any high commanding officers in the commission of the alleged abuses. Instead, the evidence suggested that responsibilities for detainee abuse lay with junior officers deployed on the ground, and not at the battlegroup level.

244. In March 2017, the Office sent a series of follow-up questions, requesting additional information with respect to systemic and command issues, including: what type of patterns of behaviour that IHAT had identified and on the basis of what type of evidence and/or analysis; whether IHAT had considered using claims as leads to potential evidence relevant for determining the existence of possible patterns of criminal behaviours; whether IHAT had identified any alleged perpetrators - specific battlegroups or individuals involved in alleged detainee abuse; to what extent IHAT had investigated allegations brought by Lieutenant Colonel Nicholas Mercer, the senior legal advisor to 1 (UK) Division in 2003 during the war in Iraq, before the Defence Sub-Committee on 28 June 2016 that the UK servicemen were trained to apply interrogation techniques that contravened Geneva Conventions prior to their deployment in Iraq and that the instructions to use such techniques emanated from the MoD, and any IHAT findings in that regard.

245. In its written response of 5 June 2017, IHAT informed the Office that the focus of its investigations included broader 'Problem Profiles', with a series of potentially linked allegations of serious offending, including sexual violence, which lent themselves to a grouped assessment, with the aim of identifying crime patterns as well as alleged perpetrators.<sup>406</sup> Nonetheless, IHAT also stated that "[t]o date the instances of serious criminal allegations we have investigated show no discernable pattern across formations or units of the British Army. As such, the IHAT has so far found no evidence of systematic or systemic criminal behaviour, although this will be kept under review as work continues."<sup>407</sup> In addition, the June 2017 response noted:

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<sup>405</sup> [Review of the Iraq Historic Allegations Team](#), para. 13.14.

<sup>406</sup> "(...) where there appears to be the possibility of consistent behaviour in given periods of time or relating to specific units of the British Army, in order to subsequently determine whether any such behaviour, if patterns do exist, is systemic (...). See Information received from the UK authorities, 5 June 2017, Annex A, pp. 2, 6, 9.

<sup>407</sup> Information received from the UK authorities, 5 June 2017, Annex A, p. 6.

By June 2016 the IHAT had already thoroughly investigated allegations of ill treatment during interrogation, particularly in relation to the techniques revealed in video evidence of interrogation sessions. Two interrogation cases had already been referred to the DSP, one of which related to the most serious offending identified by the IHAT in the video evidence. The DSP decided not to direct prosecution in either case. Having sought the advice of Senior Counsel in both cases, he did not judge the allegations to be of sufficient gravity to be considered war crimes.

The interrogation training received by the suspects in these cases was considered by both IHAT investigators and by the DSP. The Report of Baha Mousa Public Inquiry, which was accepted virtually in full by the UK Government, had also set out in detail the inadequacies of the training provided for interrogators in the field. Taking these factors into account, it would not now be proportionate to investigate this issue further on the basis of the allegations made by Mr Mercer to the Defence Sub-Committee.<sup>408</sup>

246. During the Office's February 2017 meeting with IHAT and SPA officials, IHAT similarly explained that its teams had reviewed more than 3,500 hours of video recordings of interrogation sessions, revealing a 'prolific offender' – an interrogator who appeared responsible for protracted abuse against a particular individual over a period of time – who IHAT had referred to the SPA.<sup>409</sup> IHAT further indicated that it had considered all civil claims submitted to the MoD to identify whether any amounted to criminal behaviour.

247. As noted above, the SPLI has informed the Office that of the remaining 82 live allegations before it, its ongoing investigations include two command responsibility cases focussed on different clusters of allegations, while a third investigation groups several claims related to sexual abuse.<sup>410</sup>

## G. NON-CRIMINAL MECHANISMS

248. The Office recalls that, in principle, only national investigations that are designed to result in criminal prosecutions can trigger the application of article 17(a)-(c).<sup>411</sup> As such, the Office has examined the findings of other mechanisms only in so far as they may be relevant to possible criminal proceedings. As noted above, IHAT also observed that they have considered all civil claims submitted to the MoD to ascertain whether they might warrant criminal inquiry.<sup>412</sup>

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<sup>408</sup> *Id.*, p. 7.

<sup>409</sup> IHAT's review of the footage of interrogation in Iraq is known as Operation Twickenham. *See* MoD, Systemic Issues Identified from Investigations into Military Operations Overseas: July 2014, p. 3.

<sup>410</sup> *See above*, para. 191.

<sup>411</sup> [Burundi Article 15 Decision](#), para. 154.

<sup>412</sup> *See above* para. 246.

## 1. Public inquiries

249. As noted earlier, in 2008 and 2009, two public inquiries were launched in relation to allegations of ill-treatment and unlawful killing by UK armed forces in Iraq, namely the death in British custody of an Iraqi civilian, Baha Mousa in September 2003 ('Baha Mousa Inquiry') and allegations of unlawful killings and ill treatment arising from the so-called "Battle of Danny Boy" in May 2004 ('Al Sweady Inquiry'). These public inquiries had the power to compel witnesses to attend hearings and provide evidence and to make recommendations with respect to the need for criminal proceedings, although they had no power to rule on or determine any person's civil or criminal liability.<sup>413</sup>
250. The Baha Mousa Inquiry report, published on 8 September 2011, made findings on the death of Baha Mousa in British custody in Basra after several days of abuse in September 2003. Five years prior to the report, seven suspects had been subject to the pre-IHAT procedure described above, which resulted in six acquittals at a court martial and one conviction for the war crime of inhuman treatment (following a guilty plea). The report found that British soldiers had subjected detainees to serious, gratuitous violence and that although doctrinal shortcomings may have contributed to the use of a process of unlawful conditioning, it could not "excuse or mitigate the kicking, punching and beating of Baha Mousa which was a direct and proximate cause of his death, or the treatment meted out to his fellow Detainees".<sup>414</sup> The findings did not inspire new prosecutions. On 8 June 2017, during a hearing to review the progress of IHAT investigations, Justice Leggatt noted that it was "difficult to understand why almost six years after a major public inquiry was finished in 2011 there has been no resolution of the question whether to prosecute anybody in relation to Baha Mousa."<sup>415</sup>
251. The Al Sweady Inquiry report, which examined accusations of mistreatment of prisoners following the 2004 Battle of Danny Boy, was published on 17 December 2014. The report concluded that allegations of torture and murder were "wholly without foundation and entirely the product of deliberate lies, reckless speculation and ingrained hostility".<sup>416</sup> It found that some aspects of prisoner handling and of tactical questioning did nonetheless amount to ill-treatment.<sup>417</sup>

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<sup>413</sup> See [Inquiries Act \(2005\)](#), s. 1, 2, 21.

<sup>414</sup> Baha Mousa Inquiry, [Report: Volume III](#), 8 September 2011, para. 294.

<sup>415</sup> *The Queen on the Application of Al-Saadoon and Ors v. Secretary of State for Defence and Ors*, Transcript of Hearing, 8 June 2017, para. 46.

<sup>416</sup> Al Sweady Inquiry, [Report: Volume II](#), December 2014, para. 5.201.

<sup>417</sup> See above, para. 99 and accompanying footnotes.

## 2. Iraq Fatality Investigations (IFI)

252. In January 2014, the Secretary of State for Defence appointed barrister and former judge Sir George Newman as chair of the Iraq Fatality Investigations (IFI), a form of judicial inquiry tasked with investigating the circumstances surrounding Iraqi deaths involving British forces.<sup>418</sup> IFI investigations into eight deaths have been instituted, including into four<sup>419</sup> of the illustrative cases that have formed the focus of the Office's report.<sup>420</sup>
253. In response to a request from Sir George Newman, the Office issued non-use undertakings in relation to evidence given in the IFI investigations by soldiers alleged to have participated in the immediate circumstances leading to the deaths under investigation.<sup>421</sup> The Prosecutor concluded that such an undertaking, in the particular circumstances of the Iraq Fatality Investigations ("IFI"), would be in accordance with the object and purpose of the Rules of Procedure and Evidence of the International Criminal Court ("ICC"), in particular Rule 74. In this context, the Prosecutor emphasised that the Office was unable to provide an assurance of non-prosecution in relation to the particular incident under investigation, nor not to prosecute particular individuals, as this would not be consistent with her statutory obligations, particularly at the preliminary examination stage, where there are as yet no individual suspects and the contours of potential cases are only defined in very general terms. Nonetheless, recalling that the Office's prosecutorial policy, as a general rule, is to investigate and prosecute individuals who bear the greatest responsibility for the most serious crimes, the Prosecutor also noted that as a matter of prosecutorial discretion, the Office would normally select for prosecution those situated at the highest rather than the lowest echelons of responsibility.<sup>422</sup>
254. According to Sir George Newman, there is "no 'relationship'" between the IFI and the SPA or IHAT/SPLI and it is independent of the MoD, although the MoD assists with operational tasks such as locating witnesses, sourcing documents and general administrative matters. The IFI is not concerned with criminal or civil liability (and has no power to recommend that a criminal investigation be (re)opened) but with

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<sup>418</sup> Secretary of State's [letter of appointment](#) of Sir George Newman dated 27 January 2014, with terms of reference attached.

<sup>419</sup> Ahmed Jabber Kareem Ali, Nadheem Abdullah, Tariq Sabri Mahmud and Saeed Radhi Shabram Wawi Al-Bazooni.

<sup>420</sup> IFI, [Iraq Fatality Investigations Website](#), (accessed on 26 November 2020).

<sup>421</sup> As set out in the Prosecutor's response, the scope of the undertaking concerned an assurance that any self-incriminating evidence provided to the IFI by any of the soldiers alleged to have participated in the immediate circumstances leading to the deaths in question would not be used by the Office either directly or indirectly as incriminating evidence in any possible subsequent prosecution before the ICC of any soldier that provided that evidence.

<sup>422</sup> See e.g. Prosecutor's Response to Sir George Newman's request of 2 December 2014, reproduced at Appendix 7, IFI, [Consolidated Report into the death of Nadheem Abdullah and Hassan Abbas Said](#), March 2015, p. 115.

bringing to light all facts relating to the immediate and surrounding circumstances in which the deaths occurred.<sup>423</sup>

255. The forms of conduct on which the IFI entered finding were: hooding,<sup>424</sup> forcible restraint,<sup>425</sup> hand-cuffing,<sup>426</sup> beatings and assault,<sup>427</sup> forcing alleged looters into the water and failing to come to rescue after it became clear that the victim was floundering,<sup>428</sup> and use of lethal force on unarmed civilians or otherwise not justified in the circumstances.<sup>429</sup>

### 3. Systemic Issues Working Group (SIWG)

256. As several public bodies in the UK found, the abuse detainees experienced arose from systemic failings in doctrine, training and overall command climate.

257. Among other non-criminal mechanisms, the MoD established a Systemic Issues Working Group ('SIWG') for the purpose of "identifying, reviewing, and correcting areas where its doctrine, policy and training have been insufficient to prevent practices or individual conduct that breach its obligations under international humanitarian law".<sup>430</sup> SIWG was tasked with reviewing all court and inquiry findings and evidence of wrongdoing by UK forces, irrespective of the theatre of operations, for potential systemic issues.<sup>431</sup> SIWG operates under a definition of 'systemic issues' that does not encompass deliberate acts:

The term "systemic issues" primarily envisages shortcomings of doctrine, policy, training, or supervision that result in unintentional breaches. It encompasses inter alia situations where an individual has complied with policy and training, but these have been flawed; where policies issued at different levels have been contradictory, leaving individuals unable to determine whether their actions are correct; and where supervision has been insufficient to identify and address such confusion, or failure to understand and apply training correctly. Deliberate acts by individuals in knowing contravention of the law and of doctrine, policy or training are not systemic issues, and are punishable through the Service Justice system.<sup>432</sup>

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<sup>423</sup> See [Iraq Fatality Investigations](#) webpage, published 8 June 2018, last updated 24 September 2020.

<sup>424</sup> IFI, [Consolidated Report into the death of Tariq Sabri Mahmud](#), March 2019, pp. 68-72.

<sup>425</sup> IFI, [Consolidated Report into the death of Tariq Sabri Mahmud](#), March 2019, pp. 68-72.

<sup>426</sup> IFI, [Consolidated Report into the death of Tariq Sabri Mahmud](#), March 2019, pp. 68-72.

<sup>427</sup> IFI, [Consolidated Report into the death of Nadheem Abdullah and Hassan Abbas Said](#), March 2015, p. 20.

<sup>428</sup> IFI, [Report into the death of Ahmed Jabbar Kareem Ali](#), September 2016, pp. 38-48.

<sup>429</sup> IFI, [Report into the death of Muhammad Abdul Ridha Salim](#), March 2016, pp. 94-96; IFI, Report into the death of Captain Abdul Hussan Taleb Hassan, March 2017, pp. 46-49; IFI, [Report into the death of Muhammad Alim Salam Naser](#), March 2017, pp. 55-59.

<sup>430</sup> SIWG, [First Report](#), July 2014, p. 1. The SIWG is chaired by the MoD's Director, Judicial Engagement Policy, and comprises the Head of Claims, Judicial Reviews and Public Inquiries; the Head of MoD Central Legal Services' Operational and International Humanitarian Law division; the Head of the Operations Directorate's Legal Policy team; the Deputy Army Inspector; and a small secretariat; *Id*, p. 2.

<sup>431</sup> SIWG, [First Report](#), July 2014, p. 1.

<sup>432</sup> SIWG, [Fourth Report](#), August 2018, fn. 1.

258. As made clear above, the definition appears designed to enable the MoD to identify those areas of doctrine, policy and practice that might lead to unintentional breaches, and might therefore be capable of being remedied by institutional measures. Nonetheless, the exclusion of deliberate conduct, while made for reasons apparent to the scope of SIWG's work, could create confusion in a different context as to whether certain alleged criminal conduct might be defined as having occurred systemically.<sup>433</sup>
259. In relation to the interaction between SIWG and IHAT, if there was no prosecution then IHAT's investigative report was released to the MoD for consideration of systemic issues, such as related to training or policy. Where there was a prosecution, the report was to be released once the prosecution was complete.<sup>434</sup> This process changed with respect to less serious ill-treatment allegations during the 2016-2017 reporting period, when SIWG stopped considering "every case" to confirm whether the evidence from the investigation disclosed systemic issues, and focused on "problem profiles".<sup>435</sup>
260. In making its assessment, the SIWG reviewed actions taken to address the issues identified and determined whether they were appropriate and sufficient or further action was necessary. The findings of the SIWG were referred to senior military and civilian staff across the MoD to put in place any changes to doctrine, policy or guidance.<sup>436</sup> The SIWG does not possess its own investigative capabilities and is largely reliant on the Service Police or judicial proceedings to obtain the evidence necessary to determine what happened and why, although it is empowered to make or commission appropriate enquiries.<sup>437</sup>
261. In this context and with respect to incidents involving captured persons, the forms of conduct the SIWG found evidence for were: improper use of blindfolding,<sup>438</sup> delay or denial of food or water,<sup>439</sup> assault during interrogation,<sup>440</sup> threatening behavior during interrogation,<sup>441</sup> sleep deprivation,<sup>442</sup> subjecting detainees to loud noise,<sup>443</sup> assault in detention,<sup>444</sup> delay or denial of medical attention,<sup>445</sup> delay in

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<sup>433</sup> For criticism of this approach see e.g. ECCHR, [Follow-up communication](#), 31 July 2019, p. 42.

<sup>434</sup> SIWG, [First Report](#), July 2014, pp. 1-2.

<sup>435</sup> SIWG, [Fourth Report](#), August 2018, paras. 3.2-3.4.

<sup>436</sup> *Ibid.* See also SIWG, [Fourth Report](#), August 2018, paras. 3.1-3.5 on the progression of SIWG's working methodology.

<sup>437</sup> SIWG, [Second Report](#), July 2015, p. 1.

<sup>438</sup> SIWG, [First Report](#), July 2014, pp. 5-6; SIWG, [Second Report](#), July 2015, p. 4.

<sup>439</sup> SIWG, [First Report](#), July 2014, pp. 6-7; SIWG, [Second Report](#), July 2015, pp. 4, 15.

<sup>440</sup> SIWG, [First Report](#), July 2014, pp. 6-7; SIWG, [Second Report](#), July 2015, p. 17.

<sup>441</sup> SIWG, [First Report](#), July 2014, pp. 6-7; SIWG, [Second Report](#), July 2015, p. 17; SIWG, [Fourth Report](#), August 2018, pp. 19-20.

<sup>442</sup> SIWG, [First Report](#), July 2014, p. 7; SIWG, [Second Report](#), July 2015, p. 17; SIWG, [Fourth Report](#), August 2018, pp. 15-17.

<sup>443</sup> SIWG, [First Report](#), July 2014, p. 8; SIWG, [Second Report](#), July 2015, p. 17.

reporting deaths to the Service Police,<sup>446</sup> hooding,<sup>447</sup> failure to ensure that the treatment of captured persons complies with recognized norms,<sup>448</sup> use of unauthorized techniques during tactical questioning,<sup>449</sup> use of stress positions,<sup>450</sup> limited access to toilet facilities,<sup>451</sup> incorrect use of plasticuffs or other physical restraints.<sup>452</sup>

262. In its fourth report of August 2018, under the case cluster topic of assault in detention, the SIWG considered that “there was sufficient evidence to conclude that assaults in detention had occurred, and may have been systemic”, within the meaning of the definition above, but noted that “given the enhancements to doctrine, policy and training, and the evidence of disciplinary action in appropriate cases, the SIWG was satisfied that there is not currently a systemic issue around assaults in detention”.<sup>453</sup>

#### 4. Civil proceedings

263. Although they are not directly relevant for the complementarity assessment, the Office notes that a number of civil actions have been brought in the UK concerning incidents involving individuals in UK-controlled detention facilities or while in the custody of UK armed forces in Iraq. Public information on these claims is limited, as many claims have been settled out of court. IHAT has also informed the Office that all civil claims were submitted by the MoD to IHAT to identify whether any amounted to criminal behaviour.<sup>454</sup>

264. The Office has furthermore reviewed annual reports of MoD claims. The report for the year 2012-2013 indicates that MoD was dealing with “375 claims of abuse by Iraqi nationals arising from the years between 2003 and 2009. 204 further such claims have been settled, at a total value of £10.575m”.<sup>455</sup> Subsequently, Iraqi civilians brought to the MoD 617 liability claims in the years 2013-14,<sup>456</sup> 189 in 2014-

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<sup>444</sup> SIWG, [First Report](#), July 2014, p. 8; SIWG, [Second Report](#), July 2015, p. 17; SIWG, [Fourth Report](#), August 2018, pp. 22-24.

<sup>445</sup> SIWG, [First Report](#), July 2014, p. 7; SIWG, [Second Report](#), July 2015, p. 15.

<sup>446</sup> SIWG, [First Report](#), July 2014, p. 7; SIWG, [Second Report](#), July 2015, p. 17.

<sup>447</sup> SIWG, [First Report](#), July 2014, p. 7; SIWG, [Second Report](#), July 2015, p. 11.

<sup>448</sup> SIWG, [Second Report](#), July 2015, p. 5.

<sup>449</sup> SIWG, [Second Report](#), July 2015, p. 6.

<sup>450</sup> SIWG, [Second Report](#), July 2015, p. 6.

<sup>451</sup> SIWG, [Second Report](#), July 2015, p. 7.

<sup>452</sup> SIWG, [Second Report](#), July 2015p. 8; SIWG, [Fourth Report](#), August 2018, pp. 17-18.

<sup>453</sup> SIWG, [Fourth Report](#), August 2018, para. 7.1.7. For criticism of the opaqueness of SIWG findings, see Dr Carla Ferstman, Dr Thomas Obel Hensen and Dr Noora Arajärvi, [The UK Military in Iraq: Efforts and Prospect for Accountability for International Crimes Allegations?](#), 1 October 2018, pp. 9-10.

<sup>454</sup> Information received from the UK authorities, 5 June 2017, Annex A, p. 6.

<sup>455</sup> MoD, [Claims Annual Report](#), 2012/2013, p. 6.

<sup>456</sup> MoD, [Claims Annual Report](#), 2012/2013, p. 6.

15,<sup>457</sup> and 12 in 2015-16.<sup>458</sup> Prior to that, claims were handled by Public Liability Team (PLT) which reportedly paid compensation of £5.4m to Iraqi civilians in the year 2008-2009.<sup>459</sup>

265. According to information disclosed in 2015 by the MoD following a Freedom of Information (FOI) request, “there are a number of claims from Iraq and Afghanistan nationals arising from allegations of unlawful detention and personal injury that are being handled by the MoD (...) and the numbers of those from Iraq nationals number some 1,200 and of these, the number settled totals some 323 at a total value of £19.6m”.<sup>460</sup> The MoD further indicated it was unable to provide “details in relation to individual case settlements” as they are subject to a confidentiality agreement with the solicitors representing the claimants.<sup>461</sup>

266. Information obtained by the Press Association through a further FOI request in 2017 indicates that the MoD settled 1,471 claims from Iraqi nationals between 2003 to 2017 for a total amount of £21,949,879.<sup>462</sup> The MoD’s FOI response reportedly stated that “[t]he reason for the settlement of the overwhelming majority of claims received is not, as has been reported, that the MoD accepts that the claimants were maltreated”.<sup>463</sup> In August 2020, news outlet Middle East Eye reported that the number of payments to Iraqi former detainees has significantly increased since 2017, citing figures released from the MoD in response to a FOI request. According to Middle East Eye, the MoD indicated in its response that payments have been made in around 1200 cases brought in the UK in addition to further 3,200 claims made in Iraq. However, MoD indicated that it was not able to disclose the exact amount paid to settle the claims from Iraqi nationals, arguing that it would take weeks for civil servants to collate the figures.<sup>464</sup>

267. In its 2017 response to the Office, the UK Government stated that all cases have been compensated by MoD on the basis of the length of detention, irrespective of any allegation of ill-treatment.<sup>465</sup> UK forces believed that “their UN mandate entitled

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<sup>457</sup> MoD, [Compensation Claims Financial Year 2014/15](#), 9 June 2016.

<sup>458</sup> MoD, [Compensation Claims Financial Year 2015/16](#), 13 October 2016.

<sup>459</sup> MoD, [Claims Annual Report](#), 2008/2009, pp. 7-8.

<sup>460</sup> MoD, [Freedom of Information Letter](#), 9 November 2015.

<sup>461</sup> MoD, [Response to Freedom of Information request on ‘Compensation payments made to civilian nationals, UK service personnel and the families of UK service personnel as a result of the conflicts in Afghanistan and Iraq’](#), 9 November 2015, p. 2. Regarding civil claims issued by Leigh Day on behalf of Iraqi citizens, see Leigh Day, [Claims by Iraqi civilians litigation](#), undated.

<sup>462</sup> Belfast Telegraph, [MoD paid out almost £22m in Iraq war compensation claims](#), 13 June 2017.

<sup>463</sup> Forces Network, [MoD Paid Over £20m In Iraq War Compensation Claims](#), 13 June 2017; the FOI itself appears to be unavailable on the MoD’s [FOI release](#) webpages.

<sup>464</sup> Middle East Eye, [UK government says payouts for Iraq abuse claims ‘too many to count’](#), 26 August 2020.

<sup>465</sup> Information received from the UK authorities, 5 June 2017, Annex A, p. 1.

them to detain Iraqi nationals where this was required for security purposes, but subsequent decisions of the ECtHR”, notably *Al Jedda v. UK*, “established this was not necessarily the case and that such detainees may be entitled to compensation”.<sup>466</sup> In such cases, the sum to be paid is determined primarily by the length of detention, “ranging from £1.500 for a few hours to £115.000 for three years of more”.<sup>467</sup>

268. Nevertheless, the MoD acknowledged, in relation to claims dealt with in the year 2012-2013, that “many such claims further allege that the claimant suffered ill-treatment while being detained (...)” and that “where these claims are proven or at least credible, the claimant will be paid additional compensation”.<sup>468</sup> The annual report 2008-2009 explicitly states that PLT paid compensation to Iraqi civilians “who were the victims of torture and abuse whilst held in detention by British Forces during Operation TELIC”.<sup>469</sup>

269. In the Office’s February 2020 meeting with the former Director and Deputy Director of IHAT, the Officer in Command at SPLI and the Head of the Service Prosecution Agency, the DSP observed that the different standards applied would explain why a higher number of civil claims advanced than criminal complaints. The former Director and Deputy Head of IHAT added that claimants who were able to prove detention received monetary awards without needing to prove abuse beyond detention, adding that the monetary amount was determined by factors such as the amount of time in detention.

270. In relation to those cases that have gone to court, in *Alseran & Others v Ministry of Defence*, in the first trial of the first group of claims (concerning four claimants), the High Court entered findings of inhuman and/or degrading treatment with respect to assaults;<sup>470</sup> hooding with sandbags;<sup>471</sup> deprivation of sight and hearing;<sup>472</sup> use of

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<sup>466</sup> MoD, [Claims Annual Report](#), 2012/2013, p. 6.

<sup>467</sup> MoD, [Claims Annual Report](#), 2012/2013, p. 6.

<sup>468</sup> MoD, [Claims Annual Report](#), 2012/2013, p. 6.

<sup>469</sup> MoD, [Claims Annual Report](#), 2008/2009, p. 8.

<sup>470</sup> UK EWHC, [Alseran & Others v Ministry of Defence](#) [2017] EWHC 3289 (QB), 14 December 2017, para. 233: “the incident at Al-Seeba in which soldiers deliberately ran over the backs of prisoners clearly crossed the threshold level of severity to amount to a breach of article 3. Those assaults involved the gratuitous infliction of pain and humiliation for the amusement of those who perpetrated them. They have caused Mr Alseran deep and long-lasting feelings of anger and mental anguish and were an affront to his dignity as a human being. I find that they constituted both inhuman and degrading treatment. They also constituted a clear breach of the Geneva Conventions, which require prisoners at all times to be humanely treated: *see* article 13 of Geneva III and article 27 of Geneva IV”; and at paras. 482-485 and 500 (“MRE was hit on the head with what must have been a rifle butt, an assault which has caused him some permanent disability”); para. 657 and 719 (claimant Mr Al-Waheed) “While he was being transported to the Basra Airport base following his arrest, he was repeatedly beaten on the upper back and arms by British soldiers (probably with rifle butts). He was also punched in the face and sustained a painful finger injury”.

<sup>471</sup> *Id.*, para. 499 (claimants MRE and KSU). Claimants MRE and KSU were also found to have been victims of excessive force used at the time of their capture and forced nudity and sexual humiliation, but it was not proven that the soldiers responsible were members of the UK as opposed to US armed forces; *Id.*, paras. 482-483.

harshing techniques;<sup>473</sup> and the use of sleep deprivation for the purpose of interrogations.<sup>474</sup>

271. The four claims that were the subject of the Alseran judgment (of the more than 600 remaining claims at the time) were tried as “lead cases” by which the High Court was able to reach conclusions on certain central issues affecting all cases, with the hope that thereby to “enable the parties to make a realistic assessment of the likely outcome of most of the remaining claims”.<sup>475</sup> Among these central conclusions was whether certain practices to which the claimants were subjected amounted to inhuman or degrading treatment.<sup>476</sup>

272. As to the number of claims settled, as summarised by Justice Leggatt in the December 2017 High Court judgment in *Alseran & Others v Ministry of Defence*: “In total, 967 claims have been issued by Leigh Day on behalf of Iraqi citizens against the MOD in matters other than those relating to their employment and/or engagement by the defendant in Iraq. Of these, 331 claims have been settled, four have been discontinued or struck out and 632 claims – including the four which are the subject of this judgment – remain unresolved”.<sup>477</sup>

273. On 7 July 2020, Minister for Defence People and Veterans Johnny Mercer reported to the UK parliament that 213 pending claims had been either withdrawn or struck out and that “discussions regarding the resolution of the remaining 414 claims remain ongoing”.<sup>478</sup> On 24 July 2020, Defence Secretary Johnny Mercer further confirmed to the UK parliament that discussions between the claimants’ solicitors and departmental officials with regard to the resolution of the outstanding remaining claims had continued since early 2018, although the terms of these discussions and any outcomes remained the subject of a confidentiality agreement; he stated that he “hoped that we will be in a position to provide further information in relation to the remaining outstanding claims in the ICL [Iraqi Civilian Litigation] in the near future”.<sup>479</sup>

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<sup>472</sup> *Id.*, para. 719 (claimant Mr Al-Waheed).

<sup>473</sup> *Id.*, para. 719 (claimant Mr Al-Waheed) “At the Basra Airport base he was subjected to tactical questioning using the “harsh” interrogation approach which involved a deliberate attempt to humiliate the detainee by shouting insults and personal abuse at him”.

<sup>474</sup> *Id.*, para. 719 (claimant Mr Al-Waheed).

<sup>475</sup> *Id.*, para. 983. The other central conclusions reached were on issues “such as whether it was lawful to detain the claimants, whether the conditions in which they were held [...] amounted to inhuman or degrading treatment, whether their claims are time-barred and how any damages should be assessed”; *Ibid.*

<sup>476</sup> *Id.*, paras. 3, 26, 983.

<sup>477</sup> UK EWHC, *Alseran & Others v Ministry of Defence* [2017] EWHC 3289 (QB), 14 December 2017. 25.

<sup>478</sup> UK Parliament, [Iraq: Detainees: Answer to written question – 70307](#), 13 July 2020.

<sup>479</sup> UK Parliament, [Questions for Ministry of Defence: UIN 75193](#), tabled on 16 July 2020.

274. The Office has treated information arising out of civil claims with some caution. Clearly, the level of information necessary to support a civil claim as well as any resultant findings of mistreatment cannot be equated with the outcome of a criminal inquiry, nor do they indicate whether the mistreatment amounted to war crimes, nor the gravity that might attach to any related criminal cases. Nonetheless, the underlying factual findings entered in the cases that have gone to court, on their face, appear to corroborate information provided from other sources. Moreover, for those claims settled out of court, although claimants reportedly did not have to prove abuse beyond detention, it appears that in number of settlements the claimants received from the MoD a compensation amount exceeding the minimum amount of compensation due for the duration of detention and included additional compensation arising from ill-treatment.<sup>480</sup>

## H. CONCLUSION ON INACTION

275. The information available indicates that the UK authorities have not been inactive in relation to the allegations brought to the attention of the Office, but have initiated a number of criminal proceedings (involving pre-investigative assessment of claims, investigations, and a more limited number of prosecutions) in relation to the conduct of UK armed forces in Iraq over a period of fifteen years. This appears to include the most notorious incidents which would likely arise from an investigation of the situation by the Office. A number of other non-criminal proceedings have also brought to light facts that appear to have fed into relevant criminal inquiries.

276. In this context, the Office has considered whether it would be correct to characterise as 'inaction' decisions taken by IHAT/SPLI or the SPA to not proceed with certain allegations, and has concluded that it would not. This includes allegations that were filtered out based on criteria that had been developed and/or had been approved by the High Court.<sup>481</sup> Although the initial assessment of a claim might not lead to a fully-fledged investigation being undertaken (based on the screening criteria), or an investigation or prosecution might be abandoned after a subsequent assessment, the Office considers that it is difficult to argue that the State had remained inactive in relation to such a claim, since such assessments form part of the investigative and prosecutorial process. Such decisions also correspond to the sequence of actions foreseen in article 17(1)(a)-(b). As such, the Office proceeded to examine the genuineness of the various actions taken by IHAT/SPLI and SPA, to determine

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<sup>480</sup> See MoD, [Claims Annual Report](#), 2012/2013, p. 6, and MoD, [Claims Annual Report](#), 2008/2009, p. 8.

<sup>481</sup> See above, paras. 194, 196. See also below, paras. 305-311.

whether this was vitiated by unwillingness genuinely to carry out the investigation or prosecution, or if a decision not to prosecute had resulted from unwillingness genuinely to prosecute.

277. With respect to broader allegations involving military command or civilian superior responsibility, the Office recalls its policy paper which identifies among relevant factors for assessing inactivity whether there is a “deliberate focus of proceedings on low-level or marginal perpetrators despite evidence on those more responsible; or other, more general issues related to the lack of political will or judicial capacity”.<sup>482</sup>

278. Although much of the focus of IHAT and SPLI appears to have centred on the role of physical perpetrators and their immediate supervisors, IHAT and SPLI do appear to have also examined issues of pattern that might be evidence of systematic or systemic criminal behaviour and might give rise to responsibility at the command/superior level.<sup>483</sup> As set out earlier, systemic issues appear to have formed a specific focus of IHAT/SPLI’s work.<sup>484</sup> A focus on systemic issues was one of the principal aspects of IHAT’s mandate, its inadequacies in respect of which resulted in High Court criticism in 2013 and led to adjustments of its working methodology to group allegations displaying certain ‘Problem Profiles’.<sup>485</sup> Some of these inquiries, including the use of certain interrogation techniques revealed by videotape evidence, appear to have formed the focus of specific lines of inquiry. In these circumstances, IHAT/SPLI appear to have examined the same body of incidents and categories of perpetrators that would likely form the focus of an investigation by the Office. Accordingly, it could not be said that the UK authorities have remained inactive in relation to the potential cases that the Office would likely focus on, in the sense of failing to take “steps directed at ascertaining whether those suspects are responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses” and undertaking “tangible, concrete and progressive investigative steps”.<sup>486</sup> In this regard, the more pertinent question appears to be the genuineness of these efforts.

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<sup>482</sup> ICC OTP, [Policy Paper on Preliminary Examinations](#), November 2013, para. 48.

<sup>483</sup> See Information received from the UK authorities, 5 June 2017, Annex A, p. 6: “IHAT’s focus has been on the identification and investigation of all potentially criminal behaviour. This has led us to investigate individual serious allegations, and groups of allegations, where there appears to be the possibility of consistent behaviour in given periods of time or relating to specific units of the British Army, in order to subsequently determine whether any such behaviour, if patterns do exist, is systemic. IHAT continues to do this.”

<sup>484</sup> See above paras. 236-247.

<sup>485</sup> *Ibid.*

<sup>486</sup> [Simone Gbagbo Admissibility Decision](#), para. 65. See also [Simone Gbagbo Admissibility AJ](#), para. 122; [Ruto Admissibility AJ](#), para. 41, [Muthaura Admissibility AJ](#), para. 40; [Saif Al-Islam Gaddafi Admissibility AJ](#), para. 116.

279. Accordingly, the Office has assessed the nature and scope of IHAT/SPLI and SPA's work under the second step of the complementarity assessment, in terms of genuineness, namely: whether the State is unwilling genuinely to carry out the proceedings (article 17(1)(a)) or has taken a decision not to prosecute which resulted from the unwillingness of the State genuinely to prosecute (article 17(1)(b)).

## X. UNWILLINGNESS GENUINELY TO PROCEED

280. Given the overall findings under the first step of the complementarity assessment above, the Office's analysis has focussed on whether the proceedings might have been vitiated by an unwillingness to carry them out genuinely, based on the criteria in the subparagraphs of article 17(2).<sup>487</sup>

281. The drafting history of the negotiation of the Statute indicates that the term 'genuine' was chosen among other qualifiers in an effort to identify the most objective and least disagreeable term,<sup>488</sup> although the Statute does not further clarify its meaning.<sup>489</sup> Its insertion may be said to emphasise the need for an objective assessment as is possible of the State's unwillingness or inability to carry out the proceedings (article 17(1)(a)) or to prosecute (article 17(1)(b)). The exceptions to the *ne bis in idem* principle under article 17(1)(c) and article 20(3), although they do not employ the terms 'genuine', reflect the same considerations, as do the underlying factors set out in article 17(2)(a)-(c) and 20(3)(a)-(b). A similar function is served by the inclusion in the chapeau of article 17(2) of the phrase "having regard to the principles of due process recognized by international law", which was likewise introduced during the drafting of the Statute in order to enhance the objectivity of the assessment.<sup>490</sup>

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<sup>487</sup> The Office has not deemed considerations under article 17(3) relevant to its analysis given the cumulative requirement in the provision that the relevant challenges preventing the State concerned from carrying out genuine proceedings must have resulted from the "total or substantial collapse or unavailability of *its* national judicial system" (emphasis added). In this regard, any inability that might attach to the Iraqi national judicial system, even if factually relevant for explaining in part the challenges faced by the UK, would not in principle alter the focus of the assessment as to whether the British authorities were unable genuinely to investigate and prosecute relevant allegations against UK service members within the meaning of article 17(3).

<sup>488</sup> As John Holmes recalls, in his capacity as coordinator on issues of complementarity, he referred negotiators to the Oxford dictionary definition of the term 'genuine' as "Having the supposed character, not sham or feigned"; John Holmes, "The Principle of Complementarity" in Roy Lee (ed), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, 1999, p. 50.

<sup>489</sup> *Ibid*, p. 43 and p. 49, recalling the initial term 'ineffective' used by the ILC in the 1994 draft, and rejection of other terms during the PrepComs such as 'effective', 'ineffective', 'good faith' and 'diligently'. See also William Schabas and Mohamed El Zeidy, "Article 17, Issues of admissibility" in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court, A Commentary*, 3rd edition, 2016, p. 805, noting, but in a different context, the interchangeable use of 'genuineness' and 'good faith' by the European Court of Justice.

<sup>490</sup> William Schabas and Mohamed El Zeidy, "Article 17, Issues of admissibility" in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court, A Commentary*, 3rd edition, 2016, pp. 791-192.

282. Compared to the first step of the complementarity assessment, to date the Court has had more limited occasion to address in concrete terms the content of the terms 'unwillingness', 'inability' and 'genuineness'. The Appeals Chamber in the *Al-Senussi* case has made a number of overarching observations relevant to a finding of a State's unwillingness to genuinely investigate or prosecute. For example, the Appeals Chamber noted that in relation to article 17(2):

The purpose of this exception is to ensure that the principle of complementarity - which enables States to retain jurisdiction over cases and promotes the exercise of criminal jurisdiction domestically- is not abused, so that it would be contrary to the overall purpose of the Statute, which is to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole.<sup>491</sup>

The concept of being "unwilling" genuinely to investigate or prosecute is therefore primarily concerned with a situation in which proceedings are conducted in a manner which would lead to a suspect evading justice as a result of a State not being willing genuinely to investigate or prosecute.<sup>492</sup>

283. More generally, the Appeals Chamber has described the finding by the Court that a State is unwilling genuinely to investigate or prosecute as having to meet a "high threshold".<sup>493</sup>

284. As to how the Court should practically assess the factors set out in of article 17(2), the Appeals Chamber observed in the context of article 17(2)(c), but of apparent relevance for all the subparagraphs of article 17(2)):

It is clear that regard has to be had to "principles of due process recognized by international law" for all three limbs of article 17 (2), and it is also noted that whether proceedings were or are "conducted independently or impartially" is one of the considerations under article 17(2)(c). The concept of independence and impartiality is one familiar in the area of human rights law. Rule 51 of the Rules of Procedure and Evidence specifically permits States to bring to the attention of the Court, in considering article 17(2), information "showing that its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct". As such, human rights standards may assist the Court in its assessment of whether the proceedings are or were conducted "independently or impartially" within the meaning of article 17(2)(c).

285. Thus, while the Appeals Chamber has stressed that "in the context of admissibility proceedings, the Court is not primarily called upon to decide whether in domestic proceedings certain requirements of human rights law or domestic law are being

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<sup>491</sup> [Al-Senussi Admissibility AJ](#), para. 217.

<sup>492</sup> *Id.*, para. 218.

<sup>493</sup> *Id.*, para. 191.

violated”,<sup>494</sup> it has also confirmed that the case law of human rights bodies may assist in defining the contours of certain terms set out in article 17 insofar as subparagraph 2 of the provision calls upon the Court to interpret those criteria by “having regard to the principles of due process recognized by international law” set out in the chapeau of article 17(2).<sup>495</sup>

286. The Office’s Policy Paper on Preliminary Examinations similarly observes that, “[r]espect for principles of due process may be assessed in light of the provision of article 67 of the Statute as well as of the principles of due process recognised by international law as elaborated in relevant international instruments and customary international law.”<sup>496</sup> The paper goes on to set out a number of factors that may guide the Office’s admissibility assessment, drawn from principles and standards set out in various international instruments, guidelines and basic principles and relevant case law of international and regional human rights courts and supervisory bodies.<sup>497</sup>

287. Accordingly, the assessment below has cited human rights jurisprudence to the extent it may assist in the interpretation of relevant terms in article 17(2), adjusted to context. The Office emphasises in this respect, as the Appeals Chamber has done, that in doing so the ICC is not acting as a human rights court nor directly applying human rights standards. For example, the ICC is not being asked to assess whether the State has complied with its procedural obligations under those standards. Instead, the approach is one of examining the relevance and utility of human rights standards and accompanying jurisprudence as an aid to interpreting the various terms used in article 17, given the chapeau requirement in article 17(2) that the Court when applying the criteria for unwillingness have “regard to the principles of due process recognized by international law”.<sup>498</sup>

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<sup>494</sup> *Id.*, para. 190; further observing, at para.219: “the Court was not established to be an international court of human rights, sitting in judgment over domestic legal systems to ensure that they are compliant with international standards of human rights” and at para.229: “As set out above, the Appeals Chamber considers that article 17 was not designed to make principles of human rights *per se* determinative of admissibility.”

<sup>495</sup> *Id.*, paras. 220, 229. The Appeals Chamber has also repeatedly held that the Statute as a whole is underpinned by the requirement in article 21 (3) that the application and interpretation of law under the Statute “must be consistent with internationally recognized human rights”; [Lubanga Admissibility AJ](#), paras. 36 – 39. *See similarly* the approach of Pre-Trial Chamber I in [Gaddafi Admissibility Decision](#), 5 April 2019, para. 45.

<sup>496</sup> ICC OTP, [Policy Paper on Preliminary Examinations](#), November 2013, para. 55.

<sup>497</sup> ICC OTP, [Policy Paper on Preliminary Examinations](#), November 2013, paras. 50-58; *see similarly* *Informal expert paper: The principle of complementarity in practice* (ICC-OTP 2003), Annexes 4, 6-7 listing a number of such sources.

<sup>498</sup> A number of commentators have endorsed a similar approach; *see e.g.* *Informal expert paper: The principle of complementarity in practice* (ICC-OTP 2003); Mohamed El Zeidy, *The Principle of Complementarity in International Criminal Law Origin, Development and Practice* (2008); Harmen van der Wilt and Sandra Lyngdorf, ‘Procedural Obligations Under the European Convention on Human Rights: Useful Guidelines for the Assessment of ‘Unwillingness’ and ‘Inability’ in the Context of the Complementarity Principle’, 9 *ICLR* (2009), 39-75.

288. The Office observes that in the current context, this approach has the additional benefit of also broadly mirroring how domestic courts in the UK have examined the extent of the UK authorities' duty to investigate and prosecute allegations arising from Iraq under the European Convention on Human Rights (ECHR), which has focussed in particular on the case law of the European Court of Human Rights (ECtHR) on the procedural obligations of States under article 2 (right to life) and article 3 (prohibition of torture and inhuman or degrading treatment and punishment) of the ECHR.<sup>499</sup>
289. As to the scope of the assessment undertaken by the Office under article 17(2), the term 'proceedings' has been understood to embrace both the investigative and judicial phases, given the reference in article 17(1) to both 'investigation' and 'prosecution'.
290. As set out in article 17(2), the Court's assessment must be made in the light of the 'particular case' before it and considering the 'circumstances' of that case, and accordingly cannot be carried out in the abstract.<sup>500</sup> Nonetheless, "in the context of the circumstances of the case, the Court may consider, inter alia, information that the State referred to in article 17, paragraph 1, may choose to bring to the attention of the Court showing that its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct".<sup>501</sup>
291. Evidence relevant to substantiate the first step of the complementary assessment as to the existence of relevant ongoing proceedings may also be relevant to assess their genuineness under the second step.<sup>502</sup>
292. Finally, it should be observed that while article 17 directs the Court's analysis to the unwillingness or inability of the 'State', different national institutions may demonstrate varying and inconsistent degrees of willingness/unwillingness.<sup>503</sup> As such, when analysing the response of a given domestic body in a specific case, the

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<sup>499</sup> See e.g. UK EWHC, [R \(Ali Zaki Mousa and others\) v. Secretary of State for Defence No. 2](#), [2013] EWHC 1412 (Admin), 24 May 2013; [Al-Saadoon & Ors v Secretary of State for Defence \(Rev 1\)](#) [2016] EWHC 773 (Admin) (07 April 2016).

<sup>500</sup> The chapeau of article 17(2) calls for the assessment to be made in the context of "a particular case". Although only subparagraphs (b) and (c) of article 17(2) use the phrase "in the circumstances", this requirement would appear to be axiomatic also for the factual assessment under subparagraph (a).

<sup>501</sup> Rule 51, ICC RPE.

<sup>502</sup> [Al-Senussi Admissibility Decision](#), para. 210.

<sup>503</sup> E.g. certain State organs, such as those connected to the security services, might be opposed to or obstructive of the investigative or prosecutorial efforts of other components of the national system; see e.g. IACtHR, [Moiwana Community v. Suriname](#), Judgment, 15 June 2005, paras. 86(27) and 162; [García Prieto et al. v. El Salvador](#), Judgment, 20 November 2007, paras. 112-116; [Gudiel Álvarez et al. \(Diario Militar\) v. Guatemala](#), Judgment, 20 November 2012, paras. 248-252.

Court will need to also consider the activities of any other component or components of the national system that have a bearing on the proceedings at hand.

293. The analysis that follows begins with an overview of the criteria that have guided the Office's assessment. Since this is the first time that the Office has set out its findings on genuineness as the primary focus of its complementarity assessment, relevant case law and standards are cited in some detail in order to contextualise the rationale of the Office's factual determinations. This assessment is conducted against the full range of scenarios described in article 17(1)(a)-(c), namely ongoing proceedings, investigations that have resulted in a decision not to prosecute, and cases to which the principle of *ne bis in idem* applies.

## A. INTENT TO SHIELD

### 1. Admissibility criteria

294. In accordance with article 17(2)(a), the determination of unwillingness requires, "having regard to the principles of due process recognized by international law", that "[t]he proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5".<sup>504</sup>

295. As set out in its policy paper in preliminary examination, for this purpose the Office may have regard to such factors as:

Intent to shield a person from criminal responsibility may be assessed in light of such indicators as, manifestly insufficient steps in the investigation or prosecution; deviations from established practices and procedures; ignoring evidence or giving it insufficient weight; intimidation of victims, witnesses or judicial personnel; irreconcilability of findings with evidence tendered; manifest inadequacies in charging and modes of liability in relation to the gravity of the alleged conduct and the purported role of the accused; mistaken judicial findings arising from mistaken identification, flawed forensic examination, failures of disclosure, fabricated evidence, manipulated or coerced statements, and/or undue admission or non-admission of evidence; lack of resources allocated to the proceedings at hand as

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<sup>504</sup> As Schabas and El Zeidy, observe: "Article 17(2)(a) is a test for discerning the bad faith of a State by way of checking the effectiveness of national proceedings. Thus any intentional deficiency or serious negligence in conducting national proceedings that lead to negative results, through certain acts or omissions, might reflect a State's intention to 'shield [the] person from criminal responsibility'" in William Schabas and Mohamed El Zeidy, "Article 17, Issues of admissibility" in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court, A Commentary*, 3rd edition, 2016, p. 819.

compared with overall capacities; and refusal to provide information or to cooperate with the ICC.<sup>505</sup>

296. As noted earlier, the initial formulation of these factors by the Office drew from principles of due process set out in various international standard-setting instruments and human rights jurisprudence, in line with the chapeau requirement of article 17(2).<sup>506</sup> The development of such principles under other sources of international law cannot be mechanically imported into the Rome Statute given their different context and sphere of application. Nonetheless, appropriate regard for how such principles have been interpreted and applied can, as mandated by article 17(2), help inform how the terms set out in article 17 should be understood within the particular context of ICC admissibility rulings.

297. The ECtHR and the Inter-American Court of Human Rights (IACtHR) have required a criminal investigation to be serious and effective.<sup>507</sup> The ECtHR has relied on certain conditions to determine whether domestic investigations were effective; failure to meet these conditions without adequate justification creates a presumption that the State is shielding the person from criminal responsibility.<sup>508</sup> In particular, an ‘effective’ investigation must be ‘adequate’,<sup>509</sup> meaning that, it must be capable of leading to a determination of relevant facts and circumstances and to the identification and punishment of those responsible.<sup>510</sup> This is not an obligation of result, but of means.<sup>511</sup> The authorities must take “the reasonable steps available to them” to secure the evidence concerning the incident.<sup>512</sup> The investigation’s conclusions must be based on a “thorough, impartial and careful” analysis of all relevant elements.<sup>513</sup> Failing to follow an obvious line of inquiry undermines to a

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<sup>505</sup> ICC OTP, [Policy Paper on Preliminary Examinations](#), November 2013, para. 51.

<sup>506</sup> See e.g. IACtHR, [Genie-Lacayo v. Nicaragua](#), Judgment, 29 January 1997, para. 68; [Villagrán Morales et al.](#), Judgment, 19 November 1999, paras. 231-233; IACHR, [Ignacio Ellacuría](#), Report No. 136/99, Case 10.488, paras 81-142; UN, [Updated Set of principles for the protection and promotion of human rights through action to combat impunity](#), E/CN.4/2005/102/Add.1, 8 February 2005.

<sup>507</sup> William Schabas and Mohamed El Zeidy, “Article 17, Issues of admissibility” in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court, A Commentary*, 3rd edition, 2016, p. 819.

<sup>508</sup> *Ibid.*

<sup>509</sup> ECtHR, [Ramsahai and Others v. the Netherlands](#), no.52391/99, Judgment, 15 May 2007, para. 324.

<sup>510</sup> ECtHR, [Armani Da Silva v. the United Kingdom](#), no. 5878/08, Judgment, 30 March 2016, para. 233; ECtHR, [Al-Skeini and Others v. the United Kingdom](#), no. 55721/07, Judgment, 7 July 2011, para. 166.

<sup>511</sup> ECtHR, [Tahsin Acar v. Turkey](#), no. 26307/95, Judgment, 8 April 2004, para. 223; [Jaloud v. The Netherlands](#), no. 47708/08, Judgment, 20 November 2014, para. 186; [Al-Skeini and Others v. the United Kingdom](#), no. 55721/07, Judgment, 7 July 2011, para. 166; [S.Z. v. Bulgaria](#), no. 29263/12, Judgment, 3 March 2015, paras. 29-40.

<sup>512</sup> See e.g. ECtHR, [Al-Skeini and Others v. the United Kingdom](#), no. 55721/07, Judgment, 7 July 2011, para. 166, holding in the case of alleged violations of the right to life, for example, this might include eyewitness testimony, forensic evidence and where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of the clinical findings, including the cause of death; while noting any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk failing foul of this standard. See also, ECtHR, [Armani Da Silva v. the United Kingdom](#), no. 5878/08, Judgment, 30 March 2016, para. 233; [Ahmet Özkan and Others v. Turkey](#), no. 21689/93, Judgment, 6 April 2004, para. 312; [Isayeva v. Russia](#), no. 57950/00, Judgment, 24 February 2005, para. 212.

<sup>513</sup> ECtHR, [McCann and Others v. the United Kingdom](#), no. 18984/91, Judgment, 27 September 1995, paras. 161-163. See similarly (on the requirements of a “thorough and effective investigation”) [Çakıcı v. Turkey](#), no. 23657/94, Judgment, 8 July 1999, para.113; [Gäfgen v. Germany](#), no. 22978/05, Judgment, 1 June 2010, paras. 116, 121.

decisive extent the investigation's ability to establish the circumstances of the case and the identity of those responsible.<sup>514</sup>

298. Further, the ECtHR and the IACtHR have examined factors such as the purposeful covering-up of crimes or concealing bodies of victims; placing the burden on the victim's relatives to provide conclusive proof;<sup>515</sup> the failure to carry out indispensable and obvious investigative steps and ignoring highly relevant facts; altering or hiding police reports;<sup>516</sup> manipulating evidence submitted to court;<sup>517</sup> or murdering, harassing and threatening law enforcement personnel, witnesses and the victim's relatives.<sup>518</sup>

299. Other cases have examined the effectiveness of national criminal investigations and prosecutions more generally in the light of both the right to an effective remedy as well as procedural obligation to give effect to a State's general duty to secure certain convention rights and freedoms.<sup>519</sup> In this regard, several ECtHR cases have set out general principles governing alleged breaches of a State's investigative duty. The ECtHR has acknowledged that the nature and degree of scrutiny which satisfies the minimum threshold of the investigation's effectiveness depends on the circumstances of the particular case. This, it stated, must be assessed on the basis of all relevant facts and with regard to the practical realities of investigation work. Thus in *Al-Skeini v UK*, arising out of the allegations concerning the conduct of British forces in Iraq, the ECtHR recognised:

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<sup>514</sup> ECtHR, *Mustafa Tunç and Fecire Tunç v. Turkey*, no. 24014/05, Judgment, 14 April 2015, para. 175. See also *Jeronovičs v. Latvia*, no. 44898/10, Judgment, 5 July 2016, para. 107, holding that the principles regarding the procedural obligation to investigate under Article 2 apply similarly to the procedural obligation to investigate under Article 3 (citing ECtHR, *Tuna v. Turkey* (Fr), no. 22339/03, Judgment, 19 January 2010, paras. 58-63).

<sup>515</sup> IACtHR, *Velasquez Rodriguez v. Honduras*, Judgment, 29 July 1988, paras. 180; *Godinez-Cruz v. Honduras*, Judgment, 20 January 1989, para. 190.

<sup>516</sup> IACtHR; *Myrna Mack Chang v. Guatemala*, Judgment, 25 November 2003, paras. 166 – 172; ECtHR; *Nachova and others v. Bulgaria*, nos. 43577/98 and 43579/98, Judgment, 6 July 2005, para. 116; *Velikova v. Bulgaria*, no. 41488/98, Judgment, 18 May 2000, paras. 82-83.

<sup>517</sup> IACtHR, *Myrna Mack Chang v. Guatemala*, paras. 173-199.

<sup>518</sup> *Id.*, paras. 183- 199; IACtHR, *Kawas Fernández v. Honduras*, Judgment, 3 April 2009, para. 114.

<sup>519</sup> The procedural obligations of the State under the ECHR was first formulated in the context of the use of lethal force by State agents. As the ECtHR held in *McCann and Others v. the United Kingdom*, Application no. 18984/91, Judgment, 27 September 2005, para. 161: "a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision (art. 2), read in conjunction with the State's general duty under Article 1 (art. 2+1) of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State". The purpose of such an investigation is to secure the effective implementation of the domestic laws safeguarding the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility (*Hugh Jordan v. the United Kingdom*, § 105; *Nachova and Others v. Bulgaria* [GC], § 110; *Al-Skeini and Others v. the United Kingdom* [GC], § 163). The notion of procedural obligations has been applied to in a variety of situations where an individual has sustained life-threatening injuries, died or has disappeared in violent or suspicious circumstances, and without a requirement that the unlawful conduct be attributable to State agents. The IACtHR has adopted a similar standard in *Velasquez Rodriguez v. Honduras*, Judgment, 29 July 1988, paras. 166, 174, 176.

The Court is conscious that the deaths in the present case occurred in Basrah City in South East Iraq in the aftermath of the invasion, during a period when crime and violence were endemic. Although major combat operations had ceased on 1 May 2003, the Coalition forces in South East Iraq, including British soldiers and military police, were the target of over a thousand violent attacks in the subsequent 13 months. In tandem with the security problems, there were serious breakdowns in the civilian infrastructure, including the law enforcement and criminal justice systems

... The Court takes as its starting point the practical problems caused to the investigatory authorities by the fact that the United Kingdom was an Occupying Power in a foreign and hostile region in the immediate aftermath of invasion and war. These practical problems included the breakdown in the civil infrastructure, leading inter alia to shortages of local pathologists and facilities for autopsies; the scope for linguistic and cultural misunderstandings between the occupiers and the local population; and the danger inherent in any activity in Iraq at that time. As stated above, the Court considers that in circumstances such as these the procedural duty under Article 2 must be applied realistically, to take account of specific problems faced by investigators.<sup>520</sup>

300. At the same time, the ECtHR has stressed that, while remaining fully aware of this context, its approach must be guided by the object and purpose of the Convention that requires its provisions to be interpreted and applied so as to make its safeguards practical and effective, noting that certain fundamental provisions, such as the right to life or the prohibition of torture and other forms of ill-treatment, are non-derogable and that a State's investigative duty continues to apply in difficult security conditions, including in a context of armed conflict or in the event of a public emergency.<sup>521</sup> And while acknowledging that investigations occurring "in circumstances of generalised violence, armed conflict or insurgency, obstacles may be placed in the way of investigators and [...] concrete constraints may compel the use of less effective measures of investigation or may cause an investigation to be delayed", nonetheless, the relevant duty "entails that, even in difficult security conditions, all reasonable steps must be taken to ensure that an effective, independent investigation is conducted".<sup>522</sup>

301. As stated earlier, although these decisions offer useful guidance for assessing what may constitute 'shielding', the ICC will need to examine the concept of shielding within the context of article 17 of the Rome Statute. In particular, it should be

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<sup>520</sup> ECtHR, *Al-Skeini and others v United Kingdom*, no. 55721/07, Judgment, 7 July 2011, paras. 161, 168. See similarly *Ergi v. Turkey*, no. 23818/94, Judgment, 28 July 1998, para. 85.

<sup>521</sup> ECtHR, *Al-Skeini and others v United Kingdom*, no. 55721/07, Judgment, 7 July 2011, para. 164, citing *Güleç v. Turkey*, no. 21593/93, Judgment, 27 July 1998, para. 81; *Ergi v. Turkey*, no. 23818/94, Judgment, 28 July 1998, paras. 79 and 82; *Ahmet Özkan and Others v. Turkey*, no. 21689/93, Judgment, 6 April 2004, paras. 85-90, 309-320, 326-330; *Isayeva v. Russia*, no. 57950/00, Judgment, 24 February 2005, paras. 180, 210. See also ECtHR, *Gäfgen v. Germany*, no. 22978/05, Judgment, 1 June 2010 paras. 87, 123.

<sup>522</sup> ECtHR, *Al-Skeini and others v United Kingdom*, no. 55721/07, Judgment, 7 July 2011, paras. 164 (in the context of the right to life); citing further, *inter alia*, *Kaya v. Turkey*, 158/1996/777/978, Judgment, 19 February 1998, paras. 86-92; *Ergi v. Turkey*, no. 23818/94, Judgment, 28 July 1998, p paras.82-85; *Isayeva v. Russia*, no. 57950/00, Judgment, 24 February 2005, paras. 215-224.

recalled that the ICC, unlike human rights bodies, is not being tasked with determining whether a State complied with its duties to provide an effective remedy or fulfilled the procedural obligation to give effect to a fundamental human right, but whether the proceedings were undertaken or the national decision was made “for the purpose of shielding the person concerned from criminal responsibility”.

## 2. Determination

302. Applying the factors set out above to the preliminary examination in Iraq/UK has proven particularly complex given the numerous proceedings that have been undertaken at the national level, whether in the form of out-of-court compensation settlements, military court-martial trials, or subsequent inquiries and evidentiary assessments by IHAT/SPLI or SPA, much of which is not publicly accessible, as well as related litigation before the UK High Court and the ECtHR. The Office has also considered the impact of the findings of the Solicitors Disciplinary Tribunal against PIL and its principal, Phil Shiner, from whom the largest bulk of article 15 communications were received, as well as another ruling by a separate Solicitors Disciplinary Tribunal which cleared the firm Leigh Day and three of its solicitors (who had acted with PIL in bringing many of the domestic claims) of all wrongdoing.<sup>523</sup> The fact-heavy and legally novel issues arising from the admissibility assessment necessitated several rounds of internal review and further inquiry, including as a result of more recent allegations of cover-up emerging from former staff of IHAT, as well as developments related to the introduction of the new legislation on the proposed imposition of statutory time limits.
303. The sub-sections that follow set out the Office’s findings with respect to a number of different clusters of issues. Some issues discussed under this sub-section could equally have been set out under article 17(2)(b) and (c), in so far as they may be relevant to factors applicable under those provisions.
304. Since the very high volume of allegations submitted to the domestic authorities (over 3,000 claims) resulted in a significantly smaller number of cases being submitted to full investigation and still fewer to prosecution, the Office has focussed below on three sets of filtering criteria that appear to have had a significant impact on the way IHAT and the SPA processed the numerous Iraq related claims. These are: (i) filtering criteria set out by Justice Leggatt of the High Court; (ii) filtering criteria applied after the Solicitors Disciplinary Tribunal (‘SDT’) findings against Phil Shiner/PIL; and (iii) filtering criteria based on an assessment the severity of the offence. Then the focus turns to the extent to which IHAT/SPLI

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<sup>523</sup> See below, paras. 313-350.

also examine systemic issues and related questions of command and supervisory responsibility relevant to an assessment of shielding. Finally, the Office assesses the allegations made by a number of former staff members of IHAT, publicised by the BBC Panorama documentary programme and the Sunday Times newspaper, that during the course of IHAT's work there was intentional disregarding, falsification, and/or destruction of evidence as well as the impeding or prevention of certain investigative inquiries and the premature termination of cases.

**a) Filtering criteria set out by the High Court**

305. According to IHAT, around 70 percent of the allegations were sifted out and never reached full investigation as a result,<sup>524</sup> while of cases submitted to full investigation only a handful were referred for prosecution to the SPA. Accordingly, the Office has paid particular attention to the manner in which claims were 'sifted' or filtered and the sufficiency of evidence test applied during the during the initial assessment, as part of the pre-investigation case assessment, or upon full investigation in order to determine whether the proceedings or the decisions made with respect to particular allegations were made for the purpose of shielding persons from criminal responsibility.
306. In May 2013, the High Court of England and Wales in *R (Ali Zaki Mousa and others)* ruled that the IHAT was sufficiently independent, as a formal matter (see article 17(1)(c) assessment below).<sup>525</sup> It nonetheless expressed concerns, inter alia, that IHAT was "not structured so that decisions can be effectively and promptly taken as to whether there is a realistic prospect of prosecution". It called for the DSP to be "involved in making a decision at the outset of each case involving death referred to IHAT as to whether prosecution was a realistic prospect and, if there was something to suggest it might be, in directing the way that the inquiry was to be conducted and in a regular review of each case to see if a prosecution remained a realistic possibility".
307. Pursuant to this ruling, inter alia, on 2 October 2013, Sir George Leggatt was appointed as Designated Judge to ensure that the risks of delay and a lack of direction of national inquiries were minimised and to conduct judicial review of decisions made in the inquiries.<sup>526</sup>

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<sup>524</sup> IHAT, '[Work Completed](#)', undated.

<sup>525</sup> UK EWHC, *R (Ali Zaki Mousa and others) v. Secretary of State for Defence No. 2*, [2013] EWHC 1412 (Admin), 24 May 2013.

<sup>526</sup> UK EWHC, *R (Ali Zaki Mousa and others) v. Secretary of State for Defence No. 2*, [2013] EWHC 1412 (Admin), 24 May 2013, paras. 4-6.

308. In his Judgement of 13 April 2016, Justice Leggatt observed that since the High Court in *R (Ali Zaki Mousa and others)*, a greater role had been given to the DSP and SPA through the establishment of the Joint Case Review Panel which reviewed cases and made recommendations about whether a case should proceed to a full investigation after IHAT had conducted a pre-investigation assessment. A case screening process had also been introduced, in which lawyers from the SPA were involved, to filter out cases in which there is no credible allegation of a criminal offence, although the DSP was not yet involved in making a decision at the outset of each case referred to IHAT as to whether prosecution is a realistic prospect.<sup>527</sup> In response to the DSP's proposal on the correct approach to be adopted for this purpose, Justice Leggatt observed as follows:

As noted by the DSP, the evidential part of the Full Code Test has a statutory basis. Section 116 of the Act applies where a service police force has investigated an allegation which indicates, or circumstances which indicate, that a service offence has or may have been committed. Pursuant to section 116(2), a service policeman must refer the case to the DSP if he considers that there is sufficient evidence to charge a person with a service offence. Section 116(5) provides that, for this purpose:

'there is sufficient evidence to charge a person with an offence if, were the evidence suggesting that the person committed the offence to be adduced in proceedings for the offence, the person could properly be convicted.'

It seems to me that the DSP is clearly right to regard this test (the "evidential sufficiency test") as providing a benchmark which determines whether and how far it is necessary for IHAT to investigate an allegation that a person has or may have committed an offence, and that where a judgment is reasonably made that there is no realistic prospect of obtaining sufficient evidence to satisfy the evidential sufficiency test, there is no duty on IHAT under the Act or at common law to conduct any further investigation.

I think it equally clear that the DSP's proposed approach is compliant with articles 2 and 3. As discussed in section C of this judgment, the duty under those provisions to investigate historic allegations is only to take such steps as it is reasonable in the circumstances to take. Moreover, it is specifically recognised that, in assessing what investigative steps it is reasonable to take, the authorities are entitled to take into account the prospects of success of any prosecution.

I therefore agree with the DSP that it is appropriate to ask at an early stage whether there is a realistic prospect of obtaining sufficient evidence to charge an identifiable individual with a service offence. If it is clear that the answer to this question is 'no', there can be no obligation on IHAT to make any further enquiries. In some cases where the answer is not immediately clear, it may well be possible to identify one or more limited investigative steps which, depending on their outcome, may lead to the conclusion that there is no realistic prospect of meeting the evidential sufficiency

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<sup>527</sup> UK EWHC, [Al-Saadoon & Ors v Secretary of State for Defence \(Rev 1\)](#) [2016] EWHC 773 (Admin) 07 April 2016, para. 276.

test. Examples of such steps might be carrying out a documentary search or interviewing the complainant or a key witness. It goes without saying that it will be a matter for the judgment of the Director of IHAT in any particular case how the test formulated by the DSP is applied.<sup>528</sup>

309. The Judgment also dealt with a set of practical problems that had impacted the efficiency and effectiveness of IHAT's working processes arising from the level of information provided in cases referred by PIL from August 2014 onwards. In particular, the Director of IHAT had observed that whereas the early claims forwarded to IHAT by PIL usually included letters of claim sent under the judicial review pre-action protocol and a first witness statement from the claimant, since August 2014 the information accompanying the claims was generally in summary form with much less information. The Director of IHAT stated that this had led to a corresponding increase in IHAT's work at the outset of the process, caused delay and significantly increased its workload, while in some cases the complainant when interviewed by IHAT provided information that was 'starkly different' to the summary of claim.<sup>529</sup>

310. Justice Leggatt held that "IHAT can properly take the view that it will not investigate an allegation of killing or ill-treatment by British forces in Iraq first brought to the attention of the MoD many years after the incident allegedly occurred solely on the basis of assertions made in a claim summary filed in these proceedings".<sup>530</sup> Specifically, Justice Leggatt observed that IHAT can, as a general rule, properly decline to investigate an allegation unless it is supported by a signed witness statement giving the claimant's own recollection, identifies any other relevant witness known to the claimant and the gist of the claimant's evidence, and explains any past steps or attempts to bring the allegation to the attention of the British authorities.<sup>531</sup>

311. Setting out the reasons given for these conditions, Justice Leggatt observed:

i) Communication through intermediaries in Iraq and solicitors in England gives ample scope for mistranslation and misunderstanding. It is reasonable to require confirmation in the form of a signature that the allegation made on the claimant's behalf does indeed reflect the claimant's own evidence.

ii) Before an allegation made many years after the relevant events can be accepted as credible and such as would indicate to a reasonable person that a criminal offence may have been committed, it is reasonable to require a greater level of detail and

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<sup>528</sup> *Id.*, paras. 280-283.

<sup>529</sup> *Id.*, paras. 284-286. Counsel for PIL had pointed out that this had arisen due to funding limitations, since the standard legal aid funding for claims had covered a maximum of four hours' work for each claimant, resulting in only the preparation of a claim summary following completion of a questionnaire by the client and a telephone conference; *Id.*, at para. 287.

<sup>530</sup> *Id.*, para. 288.

<sup>531</sup> *Id.*, para. 289.

explanation than might be required if the allegation had been made promptly. That detail and explanation, in my view, may properly include the information described above.

iii) It is also reasonable to require this information to be provided before a decision can be taken that there is a realistic prospect of obtaining sufficient evidence to charge a person with a criminal offence. I have endorsed this test as one which it is appropriate for IHAT and the SPA to apply in deciding and advising on whether it is necessary to investigate a particular allegation.

iv) As discussed, in order to manage its workload and deal with the vast influx of allegations in a proportionate way, IHAT needs to set priorities and target its resources. In doing so I consider that IHAT can reasonably take the view that it should only devote its investigative resources to allegations which meet defined minimum standards of evidential support.<sup>532</sup>

312. Having assessed the filtering criteria set out by the High Court, the Office considers that these appear reasonable in the circumstances and do not, in and of themselves, support a finding of a lack of willingness on the part of the competent national authorities to genuinely carry out relevant criminal inquiries, in the sense of proceedings being undertaken or national decisions made for the purpose of shielding persons from criminal responsibility.

#### **b) Impact of Solicitors Disciplinary Tribunal findings**

313. This part considers the impact of the findings of the Solicitors Disciplinary Tribunal (SDT) against PIL and its principal, Phil Shiner, from whom the largest bulk of article 15 communications were received, as well as a ruling by a separate SDT which cleared the firm Leigh Day and three of its solicitors (who had acted with PIL in bringing many of the domestic claims) of all wrongdoing.

314. As noted earlier, the Al Sweady Inquiry found that the six core Iraqi complainants (all represented by PIL) had engaged in “deliberate lies, reckless speculation and ingrained hostility”.<sup>533</sup> The inquiry also expressed concerns over how PIL and Leigh Day had handled the allegations.

315. As a result of these findings, the MoD took the unprecedented step of lodging a submission concerning the two firms to the Solicitors Regulation Authority for professional misconduct: in particular, for allegations of deliberate delay in withdrawing the claims of torture and murder, making unsolicited approaches to potential clients, as well as late disclosure of a document revealing that victims

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<sup>532</sup> *Ibid*; see also paras. 140-141 (not precluding IHAT from proceeding in the absence of such a witness statement, e.g. because of the nature of the claim or the existence of corroborating information already in the possession of the MoD; while further holding that, in general, claimants should also be required to provide any document in their possession that is relevant to the allegation).

<sup>533</sup> Al Sweady Inquiry, [Report: Volume II](#), December 2014, para. 5.201.

were armed insurgents and not Iraqi civilians.<sup>534</sup> The Solicitors Regulation Authority referred the matter for disciplinary action before the Solicitors Disciplinary Tribunal (SDT) as a result of the findings of the Al Sweady Inquiry.<sup>535</sup>

316. The SDT panel found Phil Shiner (of PIL) guilty of 12 allegations of professional misconduct, including of having acted dishonestly in five charges.<sup>536</sup> These findings, which were largely uncontested, were conducted over a two-day summary hearing, with unrepresented respondents. Phil Shiner had himself made a number of admissions, in full or in part, to a significant number of the charges brought by the SRA, i.e. 18 out of 24, including that he acted without integrity (in 9 charges) or recklessly, but denied all allegations of dishonesty.<sup>537</sup>
317. The proven charges, all specific to the Al Sweady case, included allegations of: unsolicited approaches to clients; improper agreements to influence evidence provided to the Solicitors Regulation Authority; improper referral fees and fee-sharing arrangements with PIL intermediary Mazin Younis; inadequate system for document management; failure to comply with duty of candour and to disclose important evidence in relation to the judicial review; improperly making personally endorsed allegations at the 22 February 2008 Al Sweady press conference; and failure to keep Al Sweady clients properly informed as to the progress of the inquiry.<sup>538</sup>
318. In considering sanction, the SDT found Phil Shiner's "culpability to be very high" and that "(...) the misconduct was at the highest level". The Tribunal notably considered that: (1) the misconduct "was deliberate, calculated, repeated and (...) continued over several years"; (2) Phil Shiner had direct "control and responsibility for the circumstances giving rise to"; and (3) he was driven by the goal to "(...) secure clients and high profile cases, which brought with it reputational and financial reward". The Tribunal also unequivocally established that Phil Shiner "(...)

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<sup>534</sup> See Information received from the UK authorities, 27 August 2015, Annex 4. Specifically, the allegations against PIL and Leigh Day made in the submission related to the following: failure to inform the court as soon as they became aware that the evidence of some of their clients was untrue and that they missed four opportunities to do so; failure to cease to act for their clients in the public inquiry; failure to alert the Inquiry Chairman to the possibility that clients' evidence was untrue and to seek to prevent these clients from being called to give oral evidence; late disclosure of a document revealing that victims were armed insurgents and not Iraqi civilians and, making unsolicited approaches to potential clients. The UK file also includes several allegations relating to the additional cost of the Inquiry to the taxpayer and inconvenience caused to military witnesses.

<sup>535</sup> SRA, [Al Sweady Inquiry Statement](#), 7 April 2016.

<sup>536</sup> Solicitors Disciplinary Tribunal, [Solicitors Regulation Authority and Philip Joseph Shiner](#), Judgement, 29 March 2017.

<sup>537</sup> *Ibid.*

<sup>538</sup> *Ibid.*

had sought to conceal his wrongdoing through the construction of elaborate strategies to mislead the SRA (...).<sup>539</sup>

319. The Solicitors Regulation Authority also brought the case to the UK Legal Aid Agency. Based on the information that the Solicitors Regulation Authority disclosed, the Legal Aid Agency, independently from the SDT proceedings, announced on 2<sup>nd</sup> August 2016 that it had terminated its contract with and funding of PIL due to proven contractual breaches by the latter.<sup>540</sup>
320. In the parallel proceedings brought against the law firm Leigh Day and its solicitors Martyn Day, Sapna Malik and Anna Crowther, a different SDT reached opposite findings. In contrast to the summary, uncontested proceedings above, this second SDT heard evidence over a six-week period in contested proceedings and ultimately found the allegations against Leigh Day and its solicitors not proven.<sup>541</sup> Given the close interlinkage of the subject-matter of the two disciplinary proceedings and the tripartite relationship between PIL, Leigh Day and their intermediaries which formed the focus of both cases, the SDT entered the following observation on the different outcomes reached:

Many of the matter that were covered in the allegations were also covered in the disciplinary proceedings against Phil Shiner (“PS”) and Public Interest Lawyers (“PIL”). This Tribunal made its decision in relation to the allegations based only on the evidence put before it. It assumed that the Applicant and Respondents had brought to this Tribunal’s attention any evidence from the PS proceedings that they considered relevant. This Tribunal took note of the findings of the PS Tribunal when making its decisions. However this Tribunal was mindful that the PS Tribunal did not have the benefit of evidence from these Respondents nor the advantage of hearing some of the arguments put forward on behalf of these Respondents. This Tribunal also took into account that the obligation was on the Applicant to prove the allegations in this hearing beyond all reasonable doubt, and that the findings in the PS Tribunal had not reversed that burden of proof.<sup>542</sup>

321. The SDT’s findings with respect to Leigh Day and its solicitors were later upheld on appeal.<sup>543</sup> Notably, the High Court examined a number of events and practices central to the judgment and concluded that they were not improper, comported with permitted practice at the time, and appeared justified. The High Court upheld,

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<sup>539</sup> *Id.*, p. 76, para. 102.

<sup>540</sup> *Civil news: contract termination for Public Interest Lawyers, Legal Aid Agency finds Public interest Lawyers in breach of contract*, 2 August 2016. The LAA [statement](#) announced that it has taken action “after a thorough review of information provided by PIL, following the investigation by the Solicitors Regulation Authority (SRA) into the firm”. It clarified that while the LAA “has no role in judging the issues of professional conduct” alleged before the SDT, “contractual breaches with LAA’s contract are proven and warrant investigation by the relevant authorities”.

<sup>541</sup> Solicitors Disciplinary Tribunal, *Solicitors Regulation Authority and Day & Ors*, Judgment, 22 September 2017.

<sup>542</sup> *Id.*, para. 33; *see also* paras. 146.63 and 147.44.

<sup>543</sup> Solicitors Disciplinary Tribunal, [Solicitors Regulation Authority v Day & Ors](#) [2018] EWHC 2726, 19 October 2018.

inter alia, the SDT's dismissal of the allegations that Phil Shiner and Martyn Day had improperly made personally endorsed allegations at the 22 February 2008 Al Sweady press conference;<sup>544</sup> that there has been improper the fee sharing arrangements with Mazin Younis (between Leigh Day and Mazin Younis, and a tripartite agreement between Leigh Day, PIL and Mazin Younis);<sup>545</sup> or that there was payment of a prohibited referral fee to Mazin Younis.<sup>546</sup> With respect to payment to witnesses, for example, the High Court observed:

... for our part, we have difficulty in seeing how it could credibly be argued that there was anything improper by the standards of the law of England and Wales in making a payment to secure the availability of a potential witness for interview. If MD [first respondent, Martyn Day] and SM [second respondent, Sapna Malik] were to find what they genuinely thought was the truth about what occurred at CAN [Camp Abu Naji], they needed to facilitate the taking of witness statements from those who, so they were told by those in Iraq "on the ground", had something of relevance to say. If it was impossible to do so without making the payments said by MY [Mazin Younis] to be required in order to secure their attendance, we can see nothing improper in doing so. There does not appear to have been anything in the size of each individual payment or otherwise to suggest that the evidence of a witness was being "bought" even if, as may be the case, the making of any such payment was "unusual" in the experience of MD and SM. If the test is how "ordinary decent people" would consider the propriety of the making of such payments (see below), in our judgment, possessed of all the relevant information, they would not regard the making of such payments as dishonest or otherwise improper.<sup>547</sup>

322. Notwithstanding this differential outcome in the two sets of disciplinary proceedings concerning substantially the same factual allegations, the SDT's findings against Phil Shiner/PIL appears to have had a significant impact on the course of subsequent criminal investigations and prosecutions in the UK with respect to the conduct of British forces in Iraq. Firstly, the SDT judgment against Phil Shiner/PIL gave rise to wider concerns of contamination concerning the role of PIL's intermediaries that went beyond the immediate findings related to the 6 core witnesses. Second, the SDT judgment led to new, elevated thresholds being applied by IHAT in relation to any claims originating from PIL, which resulted in the dismissal of a significant number of claims. Thirdly, the SDT judgment reinforced a perception, shared by the UK authorities, some Members of Parliament and some segments of the media, that all underlying claims concerning the conduct of British

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<sup>544</sup> *Id.*, paras. 88-110.

<sup>545</sup> *Id.*, paras. 197-207.

<sup>546</sup> *Id.*, paras. 235-236.

<sup>547</sup> *Id.*, para. 250. The citation begins with the observation: "It follows that in this court the actual propriety or otherwise of the payments made is not in issue: the evidence before the Tribunal did not establish that there was anything illegal or otherwise improper about the purpose for which the payments were made. Accordingly, this court must proceed on the basis that there was, in fact, nothing improper about them, whether in the form of a bribe or in some other manner. Indeed, ..."

forces in Iraq were vexatious and amounted to harassment of current and former service personnel.<sup>548</sup> This in turn precipitated both the early closure of IHAT as well as the introduction of draft legislation aimed at creating a presumption against prosecution to combat the perceived problem of ‘vexatious litigation’.<sup>549</sup>

323. Firstly, with respect to the issue of a wider contamination that went beyond the immediate scope of the findings related to the six core witnesses in Al Sweady, the Office notes that the SDT judgment raised concerns whether contamination had also affected (i) all other claimants identified through the same intermediary that identified these six claimants (intermediary Mazin Younis); and/or (ii) all other claimants identified through the other main PIL intermediary (intermediary Abu Jamal).

324. In relation to intermediary Mazin Younis, a key piece of evidence supporting the possible contamination of all claimants identified by Younis comes from a manuscript note provided to the SDT by Paul McNab, then PIL chief executive officer. The note recorded his conversation with Younis. In the conversation, Younis recounts to McNab that both the practice of door-knocking and even payments to witnesses to encourage them to come forward related not just to all Al Sweady clients but to “nearly all of the cases” he handled and that Phil Shiner knew and approved of these arrangements.<sup>550</sup> The SDT judgment also highlighted concerns with respect to the personal integrity of Younis, suggesting that he tried to effectively force PIL to pay him excessive fees (contrary to permissible practice) by going on strike until his demands were met.<sup>551</sup>

325. A related concern is that other claimants identified through the second main PIL intermediary Abu Jamal may also be tainted. This is based on the fact that Abu Jamal (who is locally based in Basra), assisted and accompanied Younis (who grew up in the UK) when Younis was identifying complainants.

326. The Office met with PIL intermediary Jamal in 2015 in order to understand the nature of his working processes. Jamal had facilitated access to most of the clients, acting as a conduit to meet individuals, but was not involved in actively taking

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<sup>548</sup> See e.g. House of Commons Defence Committee, [Drawing a line: Protecting veterans by a Statute of Limitations, Seventeenth Report of Session 2017–19](#), together with formal minutes relating to the report Ordered by the House of Commons to be printed 16 July 2019, paras. 11-39. Compare House of Commons/House of Lords Joint Committee on Human Rights, [Legislative Scrutiny: The Overseas Operations \(Service Personnel and Veterans\) Bill, Ninth Report of Session 2019–21](#), 21 October 2020, paras. 118-125.

<sup>549</sup> On the second reading of the Overseas Operations (Service Personnel and Veterans) Bill, e.g., the term ‘vexatious’ was used 53 times in parliament; UK Parliament, [House of Commons Hansard: Overseas Operations \(Service Personnel And Veterans\) Bill](#), 23 September 2020. For further discussion see below, paras. 464-479.

<sup>550</sup> Information received from the UK authorities, 5 June 2017.

<sup>551</sup> Solicitors Disciplinary Tribunal, [Solicitors Regulation Authority and Philip Joseph Shiner](#), Judgement, 29 March 2017, paras. 83.9; 84.3; 85.2.

statements. He remained as a liaison person supporting Younis's work, such as sending him supporting documents.

327. Later on, Abu Jamal became the main PIL intermediary for a second batch of claims. These were collected without any involvement of Mazin Younis. Abu Jamal stated that he did not knock on doors or make unsolicited advances: that since he was locally well-known, he did not need to and instead local people came to his house as news spread by word of mouth. From 2010 until October 2012, Abu Jamal collected between 1500-2000 statements, and since the work on collecting allegations became more voluminous decided to open an office in 2013. In his meeting with the Office, Abu Jamal stated that he used a standardised questionnaire to write down the complaints given to him orally and did not evaluate the reliability of any of the claims.<sup>552</sup>

328. Abu Jamal does not appear to have been implicated in any of the SDT findings. There is one reference in the manuscript note from Paul McNab, in relation to the complainants identified by Mazin Younis. The note reads: "Mazin then said they (Mazin and Abu) were aware of at least two witnesses that Khuder<sup>553</sup> had brought forward to the Al Sweady Inquiry who were not involved in the incident (Danny Boy) or did not have any family involved in the incident".<sup>554</sup> There may be a more generalised concern that complainants might have been incentivised to come forward with claims by the prospect that they may get compensation before domestic courts in the UK, although this does not go to the potential merits of the complaints.<sup>555</sup>

329. There are no other allegations concerning the role of Abu Jamal in his support role to Younis in relation to the Younis complainants (first batch of claims), nor in his later role as intermediary in relation to the second batch of complainants (second batch of complaints). Abu Jamal was later employed by IHAT to help with logistics and facilitate IHAT's access to interviewees by accompanying them to a third country.

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<sup>552</sup> In his meeting with the OTP, Abu Jamal recalled he would fill in the questionnaires writing down by hand people's oral response to questions. In some cases, he would help in this process by typing down responses on the computer. He stated he would not evaluate the reliability of claimants and credibility of allegations, but would simply transmit the questionnaires as received because he has no professional background to do so.

<sup>553</sup> Khuder Karim Ashour Al Sweady (witness 1), an Iraqi national, alleged that his nephew Hamid Mez'el Kareem A'shour Al Sweady (deceased 3) was one of a number of Iraqi nationals said to have been unlawfully killed while in the custody of British troops at Camp Abu Naji between 14 and 15 May 2004.

<sup>554</sup> Typed version of Paul McNab's manuscript note; Information received from the UK authorities, 5 June 2017.

<sup>555</sup> In his meeting with the OTP, Abu Jamal observed that people were also encouraged to come forward and give their statements when some victims started to received compensations from the UK forces or based on cases won before the UK courts.

330. With respect to the second impact of the SDT judgment, in terms of IHAT filtering processes, IHAT explained to the Office in June 2017 that it had heightened its threshold for considering any claim originating from PIL as follows:

In light of this new evidence, the Director of IHAT felt that it was necessary to seek further advice specifically as to whether the findings against Mr Shiner by the SDT, and the evidence of what was said by Mazin Younis to Paul McNab, meant that there was no longer a realistic prospect of obtaining sufficient evidence to charge an identifiable individual with a service offence in any IHAT case where PIL was involved.<sup>556</sup>

331. As a result, IHAT adopted a new policy:

The Director of IHAT has now adopted a general policy that: (i) ill treatment allegations originating from PIL, and in which none of the exceptions apply, should be discontinued; and (ii) allegations of serious sexual offending and unlawful killings should be subject to a preliminary screening process to establish whether these allegations require further investigation, taking into account the revelations against Mr Shiner.

He has also directed that ill treatment allegations of very serious harm (i.e. allegations which would amount to offences of wounding or inflicting grievous bodily harm) should also be subject to an additional screening process, due to the inherent seriousness of these allegations, prior to any of these allegations being discontinued.<sup>557</sup>

332. The exceptions referred to above are listed as including:

- The allegation concerned had been made to the UK authorities before or independently of PIL's involvement, whether contemporaneously or after the alleged incident;
- The IHAT has already identified contemporaneous video or photographic evidence of ill-treatment;
- The IHAT has already identified compelling evidence of the alleged incident independent of the claimant or other PIL identified witnesses;
- There was a prior direction by Provost-Marshal (Army) or Ministers that the incident or allegation should be investigated.<sup>558</sup>

333. IHAT went on to report that: "The result of the screening process is that 36 investigations remain subject to ongoing full investigation or directed lines of enquiry (14 of these relate to unlawful killing allegations, 18 to ill treatment

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<sup>556</sup> Information received from the UK authorities, 5 June 2017, Annex A, p. 4.

<sup>557</sup> *Id.*, p. 6.

<sup>558</sup> *Id.*, p. 5.

allegations, and 4 relate to circumstances which involve allegations of both unlawful killing and ill treatment.)”<sup>559</sup>

334. This decision was adopted after seeking advice from the DSP, who advised IHAT as follows:

The DSP responded to the Director of IHAT’s request for advice on 8 February 2017 stating that it seems entirely reasonable for IHAT to take into account the behaviour of Mr Shiner and his agents, as revealed by the SDT, when deciding whether to take any or any further investigatory steps in response to allegations that have originated from PIL. The DSP considered that it would be perfectly reasonable to take account of the fact that all allegations that have come via PIL will be substantially undermined by the conduct of Mr Shiner and his organisation.<sup>560</sup>

335. The DSP had similarly advised in relation to allegations of ill treatment not amounting to homicide or rape that “it would be reasonable to adopt a general policy not to investigate such allegations where they originate from PIL and none of the exceptions suggested by the Director of IHAT (as set out in the bullet points above) apply.”<sup>561</sup> In relation to serious sexual offences and unlawful killings, the DSP stated that “these most serious of offences should be subject to a preliminary screening (or ‘triage’) process to establish whether these allegations require further investigation”, as well as applying the same set of exceptions set out above.<sup>562</sup>

336. The SPLI appears to have continued the same practice of taking into account the disciplinary proceedings against Phil Shiner/PIL as part of its assessment to close cases.<sup>563</sup>

337. In reviewing the above, the Office considered the impact of the SDT findings against Phil Shiner/PIL on the course of subsequent criminal investigations and prosecutions in the UK and their relevance for a potential finding of unwillingness, in view of an intent to shield, under article 17(2). The Office appreciates the circumstances that led IHAT and the SPA to reconsider how they dealt with claims originating from PIL after the findings in the Al Sweady Inquiry and the disciplinary findings against Phil Shiner/PIL. However, the OTP has had difficulty understanding both the reasons for suspecting contamination of all actions associated with the two intermediaries as well as the reasons for subjecting the entire bulk of claims originating from PIL to such an elevated threshold.

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<sup>559</sup> *Id.*, p. 6.

<sup>560</sup> *Id.*, p. 5.

<sup>561</sup> *Id.*, p. 5.

<sup>562</sup> *Id.*, p. 5.

<sup>563</sup> See SPLI, [Information for Complainants Table](#), as at November 2020, stating as among standard reasons for closing a complaint for “lack of sufficient, credible evidence of a criminal offence” that “[t]his decision also took into the account findings against UK solicitors involved in legal proceedings concerning military operations in Iraq”.

338. In the Office's analysis, while suspicion might attach to whether intermediary Younis comported himself in a similar manner as those set out in the SDT's findings concerning the six core claimants in Al Sweady, as IHAT/SPA also note, this does not mean that the substantive allegations submitted on behalf of other claimants identified through Younis were baseless. As set out elsewhere in this report, the underlying allegations of a number of claimants originating from PIL were relied upon and held as proven, such as in the Al-Skeini cases (before UK domestic courts and the ECtHR) and the Baha Mousa Inquiry or in Iraq Fatality Investigations, or have formed the basis of compensation claims settled out of court.<sup>564</sup> Indeed, as appears to have been acknowledged by the DSP and IHAT, the credibility of the underlying allegations of claimants originating from PIL had not been affected per se by the findings of the SDT, even if it introduced a heightened threshold for acting on such claims.<sup>565</sup> As such, it would appear that the origin of complainants brought to PIL via intermediary Mazin Younis would not per se render their substantive allegations baseless.
339. Moreover, in relation to intermediary Abu Jamal, it is unclear why claimants originating from his activities, arising independently from and following working methodology untainted by those attaching to Younis, should also have been subjected to such an elevated threshold. The Office's own prior meetings with Abu Jamal and Mazin Younis also brought out the distinction in their roles and working modalities.
340. The Office recognises that the outcome of the disciplinary findings against Phil Shiner/PIL invited doubt as to the credibility and reliability of any allegations that might be pursued at trial in domestic criminal proceedings where the claimants were identified through PIL and its intermediaries, and that this therefore impacted on the assessment of what might constitute a realistic prospect of conviction. In its June 2017 submission, the UK Government stated:

... the findings against Mr. Shiner by the SDT have cast substantial doubt over the reliability and credibility of all of the allegations that he and his firm have put forward as being true to the IHAT and to the OTP ... The reliability and credibility of these allegations, and the underlying materials, as put forward by PIL must now be

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<sup>564</sup> See e.g. ECtHR, [Al-Skeini and others v United Kingdom](#), no. 55721/07, Judgment, 7 July 2011, paras. 55-71; Baha Mousa Inquiry, [Report: Volume I](#), 8 September 2011, para. 1.31, referring to the domestic *Al-Skeini* litigation which gave rise to the inquiry into the death in custody of Baha Mousa; IFI, [Report into the death of Ahmed Jabbar Kareem Ali](#), September 2016; out-of-court settlements to victims of Camp Breadbasket and Al Amarah Riot incidents (*see above* paras. 36-43). Other actions brought by claimants acting through from PIL include court martial proceedings regarding the case of Camp Breadbasket, the death of Baha Mousa and the ill-treatment of his co-detainees, and the death of Ahmed Jabbar Kareem Ali.

<sup>565</sup> See *above* paras. 331-336.

in serious doubt, and they cannot reasonably be relied on to make any findings about the nature of these allegations, their scale and gravity.<sup>566</sup>

341. In view of prosecution prospects arising from such allegations, moreover, the UK Government stated:

It has to be recognised that there is a substantial risk that it would be fatal to any potential prosecution to seek to rely on allegations and materials provided by PIL given (i) the evidence before the SDT and the findings that have been made by the SDT about the manner in which these materials were obtained, and (ii) the fact that certain of the allegations have been found to be untrue.<sup>567</sup>

342. In the UK Government's submission, support for this conclusion was drawn from the note by Paul McNab described earlier, the admissions made by Phil Shiner to the SDT, and a number of specific findings of the SDT concerning Phil Shiner's conduct in obtaining clients and materials.<sup>568</sup>

343. IHAT's reporting shows that a large number of cases were subjected to the above mentioned case assessment and screening process following the SDT judgment.<sup>569</sup>

344. While the Office recognises this general proposition, it is concerned that IHAT and the SPA appear to have been overly restrictive in not seeking to distinguish those claims that could have been affected by the findings in the Al Sweady Inquiry and by the SDT and those that were not. Moreover, this assessment might have been revisited in the light of the separate SDT disciplinary proceedings against Leigh Day and its solicitors, which cleared the respondents with respect to many of the same issues.<sup>570</sup> The case for doing so should have been even clearer after the High Court found no fault with the various witness handling practices involving Mazin Younis and Abu Jamal or in the different fee sharing arrangement or referral fee arrangement involving Mazin Younis, PIL and Leigh Day.<sup>571</sup> The Office accepts that the High Court was seized of the SDT's judgment concerning Leigh Day and its solicitors and not the separate judgment rendered against Phil Shiner and PIL. Nonetheless, clear regard could have been had for the considerable factual convergence of the issues before the High Court and those separately examined in the disciplinary proceedings against Phil Shiner/PIL.

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<sup>566</sup> Information received from the UK authorities, 5 June 2017, para. 18.

<sup>567</sup> *Id.*, paras. 20-21.

<sup>568</sup> *Id.*, paras. 18, 20-21. *See also* Solicitors Disciplinary Tribunal, [Solicitors Regulation Authority and Philip Joseph Shiner](#), Judgment, 29 March 2017, paras. 99, 101 and 102.

<sup>569</sup> Information received from the UK authorities, 5 June 2017, Annex A, p. 1.

<sup>570</sup> Solicitors Disciplinary Tribunal, [Solicitors Regulation Authority and Day & Ors](#), Judgment, 22 September 2017, paras. 33, 146.63 and 147.44.

<sup>571</sup> [Solicitors Regulation Authority v Day & Ors](#) [2018] EWHC 2726, 19 October 2018, paras. 58, 168-300.

345. In the Office's assessment, IHAT and the SPA appear to have placed over-reliance on the SDT's disciplinary findings against Phil Shiner and PIL to terminate lines of criminal inquiry that may have otherwise progressed.
346. In their meeting with the Office, the former Director of IHAT and the Director of Service Prosecutions observed that the favourable SDT findings made in respect of Leigh Day did not alter the negative SDT findings against Phil Shiner. The Director of Service Prosecutions observed that Phil Shiner's credibility implications still had to be considered, and that he could not argue in court that Leigh Day's 'acquittal' altered the findings against Phil Shiner. The DSP said that if the only piece of evidence they had was from PIL and it was a low-level offence, they would not pursue the investigation further. However, where there was independent evidence, they would pursue it, giving priority to the most serious allegations, in accordance with the policy that the SPA and SPLI had agreed in 2017 in response to the SDT findings against Phil Shiner. The Officer in Command of SPLI further recalled that, irrespective of the findings against PIL, the allegations nonetheless went through a screening process and were independently assessed (i.e. they were not filtered out en masse due to originating from PIL). He observed that of the live SPLI investigations, 71 of 82 allegations were in fact PIL-related.
347. The above considerations raise questions over how the Office (and Chambers of this Court) should proceed with the complementarity assessment as a result. As recalled earlier, bearing in mind the purpose of article 17(2), the Office considers that the relevant test is not whether the Prosecutor or a Chamber of this Court would have come to a different conclusion on the evidence and have proceeded differently, but whether the facts, on their face, demonstrate an intent to shield persons from criminal responsibility. To do otherwise would be to substitute the Prosecutor's own assessment of what might constitute a realistic prospect of obtaining sufficient evidence to satisfy the evidence sufficiency test or a realistic prospect of conviction to support a prosecution before UK courts in place of the assessment of the competent national prosecuting service - and to interpret that difference as a lack of genuine intent to bring the person concerned to justice. And since the 'proceedings' referred to in article 17 occur in the context of the domestic legal framework and domestic investigative and prosecutorial practice, it is against the domestic backdrop that the assessment must be made, rather than an abstract assessment of how the Prosecutor might have proceeded under the Rome Statute.
348. Acknowledging some scope for how a domestic authority appreciates what may constitute a realistic prospect of a conviction domestically does not mean that the ICC must accept at face value propositions made by domestic authorities. The Office has had to conduct its own examination of the underlying claims, which it received

simultaneously, as a means of bias control/verification in order to assess whether the application by UK authorities of those tests to the actual claims resulted in outcomes that appear manifestly inconsistent with the material available to the Office.

349. Having regard to the factors relevant to an assessment of unwillingness as set out in the Office's policy paper on preliminary examination, and with regard to the principles of due process recognised by international law, the Office considers that the methodology adopted by IHAT and the SPA to filter cases was certainly more conservative than may have been warranted. This did not prevent allegations originating from PIL from continuing to be considered; rather it subjected them to an elevated threshold that may have unduly filtered out and therefore terminated lines of inquiry that would not otherwise have been discontinued. Even accounting for the need for prioritisation in light of IHAT's heavy workload and the challenge for the SPA of having to anticipate possible legal challenges in court to allegations originating from PIL, the Office considers that the approach ultimately adopted by IHAT/SPLI and the SPA was not the only reasonable course of action in the circumstances.

350. Nonetheless, it appears that IHAT and SPLI continued to consider the most serious and well supported claims originating from PIL, albeit under the new threshold, including most of the remaining lines of inquiry before SPLI. In this respect, even if the Office disagrees with approach adopted, it was not so unreasonable or deficient as to constitute evidence of unwillingness to carry out relevant investigations or prosecutions genuinely, in the sense of showing an intent to shield perpetrators from criminal justice.

**c) Proportionality criteria**

351. The Office has also examined IHAT and SPLI's closure of allegations of ill-treatment (without full investigation) on the basis of 'proportionality'. While it is difficult to gauge the exact number of cases which were closed on proportionality grounds, it appears to be significant: for example, in August 2018, SPLI informed the Office that 457 of the 1667 allegations it had closed were on the basis of proportionality.<sup>572</sup>

352. It has been both IHAT and SPLI's practice to issue periodic public reports on the status of allegations processed, typically presented in the form of tables with standardised entries. SPLI explains its reasons for dismissal in its public reporting as follows:

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<sup>572</sup> Information received from the UK authorities, 8 August 2018, para. 16.

### Information for Complainants Table

Please use your unique number to find your case. If it is listed below, it has been closed.

CLOSED (proportionality): You made a complaint about the conduct of UK Armed Forces in Iraq. This complaint has been carefully considered by SPLI, an independent investigative unit. It has been decided to close your case, without further action, as there is a lack of evidence of a serious criminal offence. It is also not considered proportionate to investigate further given the length of time that has passed.

CLOSED (Lack of evidence): You made a complaint about the conduct of UK Armed Forces in Iraq. This complaint has been carefully considered by SPLI, an independent investigative unit. It has been decided to close your case, without further action, as there is a lack of sufficient, credible evidence of a criminal offence. This decision also took into the account findings against UK solicitors involved in legal proceedings concerning military operations in Iraq.

Source: SPLI Information for Complainants Table <sup>573</sup>

353. SPLI similarly explained to the Office its definition of ‘proportionality’ as meaning that “even taking the allegation of criminal offending its highest, it would not be proportionate to investigate given the length of time that has passed and the severity of the alleged offence”.<sup>574</sup> IHAT and SPLI applied the same working definition of and approach to proportionality.<sup>575</sup>

354. With regard to the ‘severity’ criterion referred to in the above definition, in its June 2017 response to the OTP, IHAT further clarified that:

(...) For those allegations which were not sifted out and were allocated to the IHAT caseload, these immediately went through a scoring process designed to categorise the level of offending/treatment against any one complainant. This scoring took into account such factors as: the circumstances of the incident; the injuries sustained; any cultural issues; and the level of psychological impact. The most serious allegations such as homicide, rape, grievous bodily harm and sustained psychological abuse attracted a high score. Conversely such offending behaviour as low level physical assault, low level damage to property and complaints of irregular meal times attracted a far lower score. The IHAT then grouped the allegations into ‘red’ (most serious), ‘amber’ and green (less serious) categories. This enabled the Command Team to quickly assess the allegations which should be prioritised (red cases) and ensure that the IHAT focused investigations upon the most serious allegations.

One example of dismissal prior to further investigative action was the identification of 48 ‘green’ cases which were not linked to any allegations of more serious offending, and are therefore not part of a ‘problem profile’ (the term used to describe a grouped assessment of a series of potentially linked allegations).<sup>576</sup>

<sup>573</sup> SPLI, [Information for Complainants Table](#), as at November 2020.

<sup>574</sup> Information received from the UK authorities, 8 August 2018, para. 16.

<sup>575</sup> IHAT, [Information for Complainants Table](#), 2017.

<sup>576</sup> Information received from the UK authorities, 5 June 2017, Annex A, p. 2. The UK’s response goes on to note that these cases were therefore terminated on the basis of proportionality.

355. In supplemental correspondence, the UK Government provided the following clarifications on the categorisation of allegations for the purpose of the SPLI investigative threshold:

**Tier 1**

Tier 1 allegations are those that meet the investigative threshold of the SPLI. These cases are at the highest level of serious ill-treatment and are generally categorized by offence type and the level of inquiry sustained. However, the Tier allocation will also be affected by wider considerations and factors; thus an offence which may not necessarily meet the Tier 1 threshold. (i.e. life changing injuries or significant psychological harm) when taken in isolation may do so as a result of accumulative lower level ill-treatment that results in life changing physical injuries or significant psychological damage. In addition to serious ill-treatment, Tier 1 will also be applied to serious sexual offences and allegations of violence where the threshold of Grievous Bodily Harm (GBH) is met.

**Tier 2**

Tier 2 allegations are those that may meet the investigative threshold of the SPLI but are dependent upon a further review. They are cases of moderate severity ill-treatment where no life changing injuries or significant psychological harm has been sustained. Examples of Tier 2 cases could include, but are not limited to, GBH type offences that are not of a life changing nature; e.g. broken bones and / or fractures. Tier 2 allegations could also include lower level sexual allegations e.g. intimate searches, and other treatment of a serious nature i.e. mock execution, nonfatal shootings and electrocution.

**Tier 3**

Tier 3: Tier 3 allegations are those which based on the information available; do not meet the investigative threshold of the SPLI in terms of severity, proportionality or offence type. These types of allegation could include offences of common assault, actual bodily harm or low-level ill-treatment

**Juvenile Cases**

Any case which involves the alleged mistreatment of juveniles, regardless of injury, will attract a minimum Tier 2 status.

356. In view of the above, it appears that allegations categorised as either 'amber' or 'green' (for IHAT) or 'Tier-2' or 'Tier-3' (for SPLI) could be terminated on the basis of proportionality, after further review as appropriate. The Office notes that SPLI expressly lists under Tier-2 types of abuse that, on their face, could amount to the war crimes of torture or cruel and inhuman treatment under the Rome Statute, such as non-fatal shootings, electrocution and mock execution (although allegations relating to an accumulative lower level ill-treatment that results in life changing physical injuries or significant psychological damage would meet the Tier 1 threshold).

357. ECCHR, in its follow-up article 15 communication, as well as a group of 74 NGOs in a report in March 2019 to the UN Committee on Torture, have submitted that there are conceptual problems with IHAT/SPLI's approach insofar as it excludes from investigation cases that would otherwise attract a right to an effective remedy under human rights law or trigger the responsibility of the UK authorities to undertake an effective investigation under international humanitarian law.<sup>577</sup> In particular, it has been argued that allegations excluded on this basis include cases of torture involving severe mental pain or suffering, and many cases of inhuman treatment, cruel treatment and outrages upon personal dignity, particularly humiliating and degrading treatment, including sexually degrading treatment.<sup>578</sup> It is argued that this approach also excludes cases that fail to reach the threshold of grievous bodily harm.<sup>579</sup> On the basis of the joint NGO submission, the UN Committee on Torture subsequently expressed concerns "about reports indicating that cases transferred to SPLI might have been closed 'based on an arbitrary and conceptually under inclusive ranking of their severity'".<sup>580</sup>
358. It has proven difficult for the Office to analyse whether the allegations dismissed by IHAT and SPLI on proportionality grounds would amount to war crimes under the Rome Statute due to the limited information available. The Office has largely relied on the publicly available reasoning of IHAT/SPLI, which is limited.<sup>581</sup> The Office notes that the limited nature of IHAT and SPLI's public reporting does not indicate the underlying rationale for discontinued allegations and dismissals.<sup>582</sup>

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<sup>577</sup> ECCHR, [Follow-up communication: War crimes by UK forces in Iraq](#), 31 July 2019, p. 26; United Nations Committee against Torture, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, Adopted by the Committee at its sixty-sixth session, [CAT/C/GBR/CO/6](#), 7 June 2019.

<sup>578</sup> ECCHR, [Follow-up communication: War crimes by UK forces in Iraq](#), 31 July 2019, p. 26, fn. 112, citing to Elizabeth Stubbins Bates, 'Distorted Terminology: The UK's Closure of Investigations into Alleged Torture and Inhumane Treatment in Iraq', (2019), 68 [ICLO](#) 719.

<sup>579</sup> *Id.*, p. 27.

<sup>580</sup> United Nations Committee against Torture, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, Adopted by the Committee at its sixty-sixth session, [CAT/C/GBR/CO/6](#), 7 June 2019, at para. 32

<sup>581</sup> For example, SPLI publishes a table of work completed, which consists of a numbered list of discontinued investigations, each labelled for whether the investigation was discontinued for "lack of evidence" or "proportionality", without further elaboration. The table does not contain information on the facts of any case which would permit an understanding of the conduct investigated in each case: SPLI, [Work Completed Table](#). Similarly, SPLI's quarterly reports are brief (generally 1.5 page) summaries of the overall numbers of allegations which have been discontinued versus those which are still live. SPLI does not provide details of any particular case or what the allegations related to. Accordingly, it is difficult for the Office to understand from the public reporting the specific conduct alleged in the cases which have been closed for proportionality, or to appreciate why these cases failed on proportionality.

<sup>582</sup> As Bates noted, this means that it remains unclear whether cases failed due to "past failures in relation to forensic examinations in Iraq, operational and practical difficulties in conducting these examinations, MOD failures to retain records relating to earlier investigations; or if evidence is lacking because witnesses have not been interviewed" or whether "[the] absence of funding for legal representation is a plausible cause of gaps in the evidential records, as is the closure of Public Interest Lawyers", recalling that "The IFI Inspector discovered that court-martial records had been destroyed, and confirmed to other researchers that there was a pattern of such document destruction. The Judge Advocate in the court-martial concerning the death of Iraqi civilian Baha Mousa complained of a more or less complete 'closing of ranks' with soldier witnesses being unwilling to share their testimony. The initial Inspector in

359. In order to close these information gaps the Office sought from the UK authorities in 2018 “detailed information” on allegations dismissed by IHAT and “the grounds on which each one was dismissed, including individual data on each allegation”. The UK authorities objected to the Office requiring information on “each allegation that has not been investigated further by IHAT and the SPLI”, asserting its view that, under the complementarity test, it was “clearly inappropriate for the Prosecutor to second-guess each and every one of the specific allegations being investigated” as part of its assessment of unwillingness/inability.<sup>583</sup> The UK authorities went on to respond to the Office’s requests for clarification with information that pertained largely to overall figures and not to the specifics of individual cases that had been closed. In the Office’s meeting of February 2020, the former Director and Deputy Head of IHAT nonetheless informed the Office that examples of ‘lower-level offences’ included common assault, hooding and minor assault occasioning bodily harm; while more serious offences include grievous bodily harm, sexual offences and offences involving a juvenile. The Office was told that although low-level offences were dropped, they were still examined as potentially relevant for understanding the overall conduct in a particular incident, such as at Camp Stephen, and that low-level offences were also retained for intelligence purposes.

360. The Office has related concerns with regard to IHAT/SPLI’s classification of alleged ill-treatment as lower level and the use of the proportionality criterion to dismiss such allegations without further investigation. For example, the use of the ‘passage of time’ criterion in the proportionality test by both IHAT and SPLI appears problematic given the historical allegations context in which IHAT and SPLI operate. Generally, no further reasons are provided by either body which would allow for appreciation of the weight accorded to this (or any other) criterion as compared with the severity of the alleged treatment. Accordingly, it is difficult to identify or understand the specific reasons behind conclusions that further investigation would be disproportionate on the basis of the passage of time.<sup>584</sup> This appears particularly problematic given that this factor is within the control of the

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the Saeed Shabram IFI was appalled at the recurrent, durable ‘no comment’ responses from soldier witnesses”; Elizabeth Stubbins Bates, ‘Impossible or Disproportionate Burden’: The UK’s Approach to the Investigatory Obligation under Article 2 and 3 ECHR’ [2020] European Human Rights Law Review (forthcoming).

<sup>583</sup> Information received from the UK authorities, 21 August 2018, paras. 3-4. In this respect, the Office recalls that even if the duty of States Parties to “cooperate fully” as set out in article 86 might be relative to the Court’s “investigation and prosecution” of crimes, at the preliminary examination stage it will generally be in the mutual interest of the Office and the State concerned to enable the Court to come to as informed a view as possible on the status and progress of relevant domestic proceeding in view of possible proceedings under articles 17-19 of the Statute.

<sup>584</sup> The Office notes that while Justice Leggatt found that IHAT could properly take the view that it will not investigate an allegation brought to the attention of the MoD many years after the incident allegedly occurred, this was only in circumstances where the allegation was ‘solely’ made ‘on the basis of assertions made in a claim summary filed in these proceedings’. Justice Leggatt did not find that the passage of time, of itself, would be a reason not to proceed with an allegation.

UK authorities and has typically resulted from their own past failings. As UK domestic courts have repeatedly acknowledged, many of the initial criminal investigations into allegations of detainee abuse during Op TELIC suffered a number of critical failings, largely concerning internal shortcomings (as opposed to operational difficulties), including lack of resources and access to suitably qualified and experienced investigators, poor record keeping due to negligence or even deliberate destruction of records, and other serious deficiencies in evidence collection and analyses.<sup>585</sup> It was due to these failings that further investigations, by IHAT and later SPLI, were deemed necessary. Accordingly, there is an obvious cause for concern in the reliance on the 'passage of time' criterion by IHAT/SPLI given proven past deficiencies of UK authorities in investigating allegations of detainees abuse.

361. The Office accepts that it was necessary for IHAT/SPLI to apply criteria to identify the most serious cases that warranted further investigation in order to enable prioritisation. The Office does the same in its own work. In this context, the criteria developed by IHAT and SPLI do not appear unreasonable at face value. Nonetheless, the Office has struggled with the lack of clarity on how the proportionality test has been applied in specific cases to terminate specific allegations prior to further investigation.
362. As with the previous part, this issue raises the question of how the Office should treat assessments made by domestic investigative and prosecutorial bodies, in this case with respect to their discretion in prioritising the most serious criminal allegations. Again, the question before the Office is not whether it might have proceeded differently, but whether the response of IHAT/SPLI to the allegations in the circumstances evidences intent to shield persons from criminal responsibility. The Office accepts that under the admissibility test a domestic authority is not required to provide detailed reasoning for every negative decision it arrives at; but at the same time, in order to conduct the article 17(1)(b) assessment, the Office must be provided with examples and indicators sufficient to demonstrate how relevant criteria were actually applied in practice. The Office accepts that States are entitled to a certain degree of discretion in view of how they seek to manage their workload and prioritise the most serious allegations. The Office also observes that the concerns it has noted largely stem from the overall paucity of the information available and the different possible inferences that might be drawn therefrom.

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<sup>585</sup> See below, paras. 425-432. See also Susan Kemp, *British Justice, War Crimes and Human Rights Violations: The Age of Accountability* (2019), pp. 321.

363. Nonetheless, although the Office does not have detailed reasoning for IHAT's filtering decisions with respect to each allegation, on the basis of the explanations conveyed to it on how the proportionality criteria were applied by IHAT in practice - although the Office would have expected victims to have been provided with a fuller reasoning - the approach ultimately adopted and the explanations provided do not appear so unreasonable and deficient as to constitute evidence of unwillingness to carry out relevant investigations or prosecutions genuinely, in the sense of showing an intent to shield perpetrators from criminal justice.

**d) Systemic issues and command/superior responsibility**

364. The last cluster of issues the Office has examined under article 17(2)(a) relate to the genuineness of IHAT/SPLI and the SPA's response to allegations of broader systemic issues for failings in military doctrine, training and in-theatre treatment of detainees set out in this report. In particular, the Office has sought to ascertain if the UK authorities genuinely subjected the evidence available to inquiries that went beyond the immediate circumstances related to the treatment of Iraqi detainees by the direct physical perpetrators involved and instead looked at evidence of patterns as well as questions of military command and/or civilian superior responsibility.

365. As set out earlier, one of the key issues which triggered the Prosecutor's decision to re-open the preliminary examination of the situation in Iraq was "new information received by the Office [which] alleges the responsibility of officials of the United Kingdom for war crimes involving systematic detainee abuse in Iraq from 2003 until 2008".<sup>586</sup> Accordingly, a key focus of the preliminary examination has been the genuineness of investigations and/or prosecutions relating to the alleged responsibility of commanders and other superiors.

366. The Office recalls the Baha Mousa Inquiry's identification of "corporate responsibility" on the part of the MoD and the UK Government for allowing knowledge of certain prohibited practices to be lost within the armed forces, including at the level of training, command and operational rules for the treatment and handling of detainees.<sup>587</sup> However, the question before the Office is not whether there is institutional responsibility on the part of MoD or the UK Government, nonetheless, but whether individual criminal responsibility appears to attach, on the reasonable basis to believe standard, to persons situated at command/supervisory levels within the MoD and the UK Government on the basis of either article 25 or article 28 of the Statute.

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<sup>586</sup> Prosecutor's statement: "[Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq](#)", 13 May 2014.

<sup>587</sup> Baha Mousa Inquiry, [Report: Volume II](#), 8 September 2011, paras. 5.27, 5.76, 5.142, 5.151.

367. Under article 25(3), the Office would need to establish, even in the case of accessory liability, that the requisite mental element was proven to the article 30 standard.<sup>588</sup> In particular, the Court has held that article 30 specifically excludes from its scope of application the notion of '*dolus eventualis*' or 'advertent recklessness', as known in some domestic jurisdictions.<sup>589</sup> Furthermore, in the case of command/superior responsibility under article 28(a), the information available would need to provide a reasonable basis to believe that a military commander (or a person effectively acting as a military commander) with effective command and control (or effective authority and control) over the forces that committed the crimes, either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and that the military commander or person failed to take all necessary and reasonable measures within their power to prevent or repress the commission of such crimes or to submit the matter to the competent authorities for investigation and prosecution.<sup>590</sup> In the case of superior responsibility under article 28(b), the information available would need to provide a reasonable basis to believe that a superior who had effective authority and control over the subordinates that committed the crimes knew, or consciously disregarded information which clearly indicated, that the forces were committing or about to commit such crimes; the crimes must have concerned activities that were within the effective responsibility and control of the superior; and the superior must have failed to take all necessary and reasonable measures within their power to prevent or repress the commission of such crimes or to submit the matter to the competent authorities for investigation and prosecution.<sup>591</sup>

368. In this respect, the Office acknowledges that the fact that mistreatment of detainees occurred in theatre, even in multiple incidents across a number of different units at different times, does not necessarily mean that one or more cases capable of sustaining an article 25(3) or article 28 criminal conviction before the ICC is possible. Moreover, there is some evidence that when apprised of the practice of certain prohibited conduct, the supervisory command structure took measures to prevent their reoccurrence, albeit executed in somewhat confused, haphazard and chaotic manner, and lost operationally in subsequent roll-over of troops.<sup>592</sup>

369. Moreover, for the purpose of a case before the ICC, the underlying conduct in question must constitute a crime within a jurisdiction of the Court. As noted earlier, although domestic public inquiries have found that certain techniques applied by members of UK

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<sup>588</sup> Article 30(2) requires that a person has intent where: "(a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events".

<sup>589</sup> [Lubanga TJ](#), paras. 449, 1011; [Katanga TJ](#), para. 775.

<sup>590</sup> Rome Statute, article 28(a). See also [Bemba TJ](#), paras. 170-174.

<sup>591</sup> Rome Statute, article 28(b).

<sup>592</sup> See e.g. Baha Mousa Inquiry, [Report: Volume I](#), 8 September 2011, paras. 14.144-14.167.

armed forces, such as the prohibited five techniques, were prevalent at the time across different units and tours of duty, such techniques would not per se constitute a war crime within the jurisdiction of the Court unless carried out at the requisite level of severity.<sup>593</sup> Thus, a command responsibility case at the ICC could not base itself on the widespread practice of the use of hooding or other prohibited techniques, but would need to concentrate on a smaller sub-set of incidents where such conduct was carried out in a manner that resulted in cruel or inhuman treatment, and draw relevant inferences from a pattern of such incidents with respect to supervisory failures.

370. The Office recalls that IHAT/SPLI have referred a small number of cases involving command responsibility to the SPA, involving the immediate supervisory levels within the units where the alleged crimes occurred, although these cases were reported as not having survived the scrutiny of the 'full code test', including following outside review.<sup>594</sup> The Office is also aware that the SPLI's inquiries into the most serious incidents involving pattern evidence with respect to specific conduct of British troops in particular locations as well as issues of command responsibility remain ongoing. These reportedly include two command responsibility-focused cases, and another case which grouped several claims around alleged sexual abuse.<sup>595</sup>
371. At the same time, the Office has examined whether the outcome of IHAT/SPLI inquiries to date is irreconcilable with the information available, or has resulted from mistaken factual or legal findings or manifestly insufficient steps. The Office recalls that the information available has not provided, at this stage, a basis for the Office to identify an affirmative plan or policy on the part of the MoD or UK Government to subject detainees to the forms of conduct set out in this report.<sup>596</sup> Nonetheless, the Office has found several levels of institutional civilian supervisory and military command failures contributed to the commission of crimes against detainees by UK soldiers in Iraq. As noted earlier, the MoD and the UK Government appear to have failed to guard against the gradual erosion of doctrine and practice with respect to the treatment of detainees over the course of several decades. This conclusion of collective failure is of extreme gravity in terms of its consequences for the treatment of civilians in conflict and should continue to trigger deep institutional reflection. However, the paucity of cases concerning command responsibility that have resulted in referrals for prosecution, and the subsequent fate of those cases cannot,

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<sup>593</sup> See above paras. 82-83.

<sup>594</sup> See above, Section IX.E (Individual Cases).

<sup>595</sup> See above, para. 191.

<sup>596</sup> Compare the Office's findings in the [Afghanistan Article 15 Request](#), paras. 222-245.

in and of itself, provide a basis for the Office to argue that the UK authorities have sought to shield persons in military command or civilian superior or ministerial roles from criminal responsibility.

**e) Allegations of cover-up**

372. Among the most serious allegations of shielding that the Office has examined have been allegations of cover-up within IHAT/SPLI itself and/or the SPA to intentionally shield members of UK armed forces and members of the MoD from genuine criminal inquiry. The Office has paid particular attention to the findings published in November 2019 by the BBC's Panorama programme and the Sunday Times ('BBC/Times') which alleged efforts to shield the conduct of British troops in Iraq and Afghanistan from criminal accountability. In particular, the reports allege that this has involved the intentional disregarding, falsification, and/or destruction of evidence as well as the impeding or prevention of certain investigative inquiries and the premature termination of cases.<sup>597</sup>
373. The BBC/Times reportedly interviewed a range of individuals, including: ten former Iraq Historic Allegations Team ('IHAT') investigators; several Iraqi witnesses, including family members of alleged victims; former British military interrogator Frank Ledwidge;<sup>598</sup> and other unnamed army personnel, including soldiers of the Black Watch Battalion. Only one of the ten IHAT investigators was named publicly, with the rest either assigned pseudonyms or described as former IHAT investigators. The BBC/Times also accessed documentation from both the RMP's and IHAT's investigations, including photographic evidence and investigative reports. The BBC/Times concluded that UK authorities had attempted to cover up killings in Iraq, including through the obstruction of investigative steps, political pressure and the premature termination of cases.<sup>599</sup> The principal reported allegations are set out below.
374. In relation to the events at Camp Stephen, corresponding to the two deaths in custody and mistreatment set out in section V.A above, the BBC/Times allege that IHAT investigators had found overwhelming evidence that the deaths of two Iraqi civilians, Rhadi Nama and Abdul Jabbar Mossa Ali, were caused by their treatment

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<sup>597</sup> Sunday Times, [War crimes scandal: Army 'covered up torture and child murder' in the Middle East](#), 17 November 2019; BBC, [Panorama: War Crimes Scandal Exposed](#), 18 November 2019. *See also* earlier report in Guardian, [Why we may never know if British troops committed war crimes in Iraq](#), 7 June 2018; ECCHR, [Follow-up communication: War crimes by UK forces in Iraq](#), 31 July 2019, pp. 16-17.

<sup>598</sup> Ledwidge, who worked as a military investigator in Iraq, spoke about ill-treatment in detention and said that army personnel were instructed to use aggressive questioning techniques. The documentary does not suggest that Ledwidge has information on subsequent criminal investigations or proceedings.

<sup>599</sup> Sunday Times, [War crimes scandal: Army 'covered up torture and child murder' in the Middle East](#), 17 November 2019; BBC, [Panorama: War Crimes Scandal Exposed](#), 18 November 2019.

by British soldiers at Camp Stephen in May 2003.<sup>600</sup> Former IHAT investigators reportedly told the BBC/Times that there were irregularities in the original RMP investigations and that the RMP had failed to link the two deaths, despite their occurrence within five days of each other at the same location.<sup>601</sup> The BBC/Times further allege that IHAT investigators uncovered evidence that detainees at Camp Stephen had been subjected to “widespread abuse”, which witnesses said occurred daily.<sup>602</sup> Reportedly, more than ten army personnel gave evidence to IHAT that detainees had been subjected to physical abuse.<sup>603</sup>

375. With respect to alleged failures in investigating command responsibility, former IHAT investigators reported to the BBC/Times that they had found evidence that the Black Watch’s (then) commanding officer, Lieutenant-Colonel Michael Riddell-Webster, had been warned about mistreatment of detainees by the regiment’s chaplain before the deaths of Rhadi Nama and Abdul Jabbar Mossa Ali at Camp Stephen.<sup>604</sup> Reportedly, IHAT investigators had recommended that senior officers and soldiers at Camp Stephen should be prosecuted, but no charges ever eventuated.<sup>605</sup> One former IHAT investigator asserted that the officers running the camp must have known about the abuse given the confined nature of the space.<sup>606</sup>

376. In terms of the alleged political pressure to close IHAT cases, ten former IHAT investigators reportedly told the BBC/Times that credible evidence of war crimes was swept aside for political reasons and that there was pressure from the MoD to close cases as quickly as possible.<sup>607</sup> According to one former IHAT investigator, a senior civil servant was appointed as an IHAT official by the government in order to exert pressure on investigators to ensure that they did not look further up the chain of command beyond low-level perpetrators.<sup>608</sup> According to another former IHAT investigator, cases were closed against the wishes of senior investigating officers and key decisions were taken out of their hands.<sup>609</sup>

377. More generally, a number of former IHAT investigators reported to the BBC/Times that they believed UK authorities were attempting to cover up alleged crimes. For

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<sup>600</sup> BBC, [Panorama: War Crimes Scandal Exposed](#), 18 November 2019, 24.50-33.00.

<sup>601</sup> BBC, [Panorama: War Crimes Scandal Exposed](#), 18 November 2019, 24.50-33.00.

<sup>602</sup> BBC, [Panorama: War Crimes Scandal Exposed](#), 18 November 2019, 19.00-23.00; Sunday Times, [War crimes scandal: Army ‘covered up torture and child murder’ in the Middle East](#), 17 November 2019.

<sup>603</sup> Sunday Times, [War crimes scandal: Army ‘covered up torture and child murder’ in the Middle East](#), 17 November 2019.

<sup>604</sup> BBC, [Panorama: War Crimes Scandal Exposed](#), 18 November 2019, 34.20-34.55; Sunday Times, [War crimes scandal: Army ‘covered up torture and child murder’ in the Middle East](#), 17 November 2019.

<sup>605</sup> BBC, [Panorama: War Crimes Scandal Exposed](#), 18 November 2019, 34.50-35.00.

<sup>606</sup> BBC, [Panorama: War Crimes Scandal Exposed](#), 18 November 2019, 17.24-19.01, 36.55-37.45; Sunday Times, [War crimes scandal: Army ‘covered up torture and child murder’ in the Middle East](#), 17 November 2019.

<sup>607</sup> BBC, [Panorama: War Crimes Scandal Exposed](#), 18 November 2019, 33.35-34.26.

<sup>608</sup> ECCHR, [Follow-up communication: War crimes by UK forces in Iraq](#), 31 July 2019, p. 16.

<sup>609</sup> BBC, [Panorama: War Crimes Scandal Exposed](#), 18 November 2019, 17.24-19.01, 36.55-37.45; Sunday Times, [War crimes scandal: Army ‘covered up torture and child murder’ in the Middle East](#), 17 November 2019.

example, IHAT investigators who sought permission to interview senior officers at Camp Stephen were blocked from doing so by the Ministry of Defence.<sup>610</sup> One IHAT investigator who had requested permission to interview a senior army officer in relation to a killing was refused and repeatedly blocked by IHAT's leadership and the MoD from pursuing this line of inquiry. According to the same investigator, other IHAT colleagues were told by either a MoD lawyer or IHAT senior leadership to drop a case that had sufficient evidence for prosecution.<sup>611</sup> Former IHAT investigators further alleged that Major Chris Suss-Francksen used falsified witness testimony to exonerate a soldier for shooting Iraqi policeman, Raid al-Mosawi. Suss-Francksen had found that the soldier acted in self-defence, as another soldier witnessed al-Mosawi fire first. However, the supposed witness to the death told IHAT that he did not witness the shooting and he could not say the soldier had acted in self-defence. The soldier also told IHAT that he only heard one gunshot, indicating that al-Mosawi did not fire, and that Suss-Francksen's report was "inaccurate". IHAT investigators recommended that the soldier should have been charged with unlawful killing and Suss-Francksen charged for covering up the killing, but no charges were laid.<sup>612</sup> One former IHAT investigator described this as a "cover up".<sup>613</sup>

378. The BBC/Times showed former Director of Public Prosecutions, Ken Macdonald, a copy of the evidence they had obtained on the deaths of Rhadi Nama and Abdul Jabbar Mossa Ali at Camp Stephen.<sup>614</sup> Macdonald said that it was "staggering" that no one had been charged based on that evidence.<sup>615</sup> In a piece published by the Sunday Times, Macdonald asserted that the evidence suggests that "many crimes witnessed" at Camp Stephen "were not spontaneous, but sanctioned at senior levels".<sup>616</sup> He further asserted that the geography of Camp Stephen and its layout rendered it "inconceivable that officers were unaware of the appalling excesses that occurred daily in plain sight".<sup>617</sup>

379. When the BBC/Times findings were released, the Office announced that it would have to independently assess the veracity of the underlying allegations as the reports appeared on their face highly relevant to its assessment of the genuineness of national proceedings.<sup>618</sup> The process to assess these allegations was overseen during 2020 by a

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<sup>610</sup> BBC, [Panorama: War Crimes Scandal Exposed](#), 18 November 2019, 34.35-34.45; Sunday Times, [Revealed: the evidence of war crimes ministers tried to bury](#), 17 November 2019.

<sup>611</sup> Guardian, [Why we may never know if British troops committed war crimes in Iraq](#), 7 June 2018.

<sup>612</sup> BBC, [Panorama: War Crimes Scandal Exposed](#), 18 November 2019, 08:55-15:00; Sunday Times, [British Army major 'faked witness testimony to cover up killing Iraqi policeman'](#), 17 November 2019.

<sup>613</sup> BBC, [Panorama: War Crimes Scandal Exposed](#), 18 November 2019, 08:55-15:00.

<sup>614</sup> BBC, [Panorama: War Crimes Scandal Exposed](#), 18 November 2019, 35.20-36.20.

<sup>615</sup> BBC, [Panorama: War Crimes Scandal Exposed](#), 18 November 2019, 35.20-36.20.

<sup>616</sup> Sunday Times, [Cover-ups and crime thrive when soldiers who do wrong escape justice](#), 11 November 2019.

<sup>617</sup> Sunday Times, [Cover-ups and crime thrive when soldiers who do wrong escape justice](#), 11 November 2019.

<sup>618</sup> ICC OTP, [Report on Preliminary Examination Activities](#), 2019, para. 170.

small team within the OTP, led by a Senior Trial Lawyer and a Senior Investigator and supported by staff from the Preliminary Examination Section and the Investigation Division. This involved obtaining additional information under article 15 from former IHAT personnel who were willing to speak to the Office, as well as hearing from the now former Director of IHAT (Mark Warwick), the former Deputy Head of IHAT (Jack Hawkins), the Officer in Command of SPLI (Tony Day) and the Director of Service Prosecutions (Andrew Cayley).

**(i) Former IHAT staff**

380. The Office has pursued a number of lines of inquiry to independently ascertain the veracity of the BBC/Times allegations with a view ultimately to speak with the primary sources of the allegations and other persons directly involved or with knowledge of facts related to the events. Overwhelmingly, those former IHAT staff the Office spoke to indicated that they had concerns about the outcome of IHAT's investigations. Most considered that the investigative teams did a thorough job, but when it came time for the investigations to progress to prosecutions, there was something obstructing this. The former IHAT investigators were unable to specify what this obstruction was, given their limited access to decision-making, but insisted that such obstruction came at levels higher up within IHAT or the SPA.
381. Several former IHAT investigators reported their frustration at the outcome of inquiries into systemic issues submitted for internal IHAT/IHAPT review, whether in terms of recommendation for further investigative steps or referrals for prosecution, in view of their concern that cases involving superior responsibility were prematurely terminated or that there was leadership pressure within IHAT/IHAPT not to pursue them.
382. Several former IHAT staff were of the view that IHAT's independence and impartiality was undermined by its relationship with the army and MoD, including: its physical location on a British Army base; IHAT's use of MoD resources and systems; and requirements that IHAT staff go through the RNP or MoD personnel for certain functions (such as securing custody and travel).
383. Multiple former IHAT staff described difficulties in accessing evidence in the possession of the RMP or the MoD. They described how some RMP and MoD personnel obstructed access to files, in their view unjustifiably; did not permit IHAT staff to locate documents they had been vetted to inspect; and imposed restrictions on access; or were repeatedly told that they had been given all of the relevant material pertaining to a certain matter, only to later discover that they had not. The former IHAT staff described how some storage boxes had been mislabelled,

obscuring the discovery of relevant evidence, and their view that the RMP only gave IHAT a fraction of the relevant material they possessed.

384. The former IHAT staff the Office spoke to also conveyed the difficulties the teams encountered in attempting to interview witnesses and suspects and to conduct other investigative steps. They described multiple occasions on which their requests to interview important witnesses were blocked for either unexplained reasons or for administrative ones, such as 'expenses not allowing'. They described how witness interviews were hampered by IHAT refusing to reimburse witnesses for travel, travel details being changed at the last minute and in one case a potential witness being arrested before meeting with investigators. Some had the impression that IHAT management were trying to put obstacles in their way. Multiple former IHAT staff relayed their impression that there was no will on the part of IHAT management to allow proper investigations which would result in prosecution.
385. Concern was also expressed over the SPA's involvement in the termination of cases. Several former IHAT staff that the Office spoke to felt that the SPA, as part of the MoD, was not truly independent or impartial respecting the armed forces. Multiple individuals with extensive civilian criminal investigations experience described how the investigation teams built cases which they considered were evidentially strong and ready to proceed, but the SPA refused to lay charges. With respect to certain alleged killing incidents, the view was conveyed that evidence supporting charges of manslaughter or murder, which would have proceeded in a domestic civilian police inquiry, were discontinued by the SPA.
386. As part of this process, the Office also spoke with a barrister who provided the SPA with external review on certain referred cases, but who had previously worked for SPA as Principal Legal Advisor to the DSP on other IHAT cases. This counsel stated that in his view cases had failed because of the passage of time since the events; the contradictory accounts of witnesses and victims who were often re-interviewed repeatedly; and due to the body of evidence being typically riddled with inconsistencies and other flaws. He underscored that the decision to refer an investigation at the IHAT level was based on the evidential sufficiency test, whereas the SPA has to satisfy itself that the case met both the reasonable prospect of conviction test and the public interest test (i.e. 'full code test'). This counsel also asserted that the limited or lack of cooperation of key witnesses was a key reason for cases failing.

**(ii) IHAT, SPLI and SPA leadership**

387. The Office put the allegations arising from the BBC Panorama and Sunday Times reports to the former Director and the Deputy Head of IHAT, the Officer in Command of SPLI, and the DSP (collectively referred to as “UK Officials” in this section), at a meeting arranged in cooperation with the UK authorities at the seat of the Court in February 2020. Their responses during that meeting to the allegations, as well as the additional information subsequently provided pursuant to follow-up questions posed by the Office, received in May 2020, are summarised below.
388. The Officer in Command of SPLI said that SPLI had analysed the BBC/Sunday Times allegations and found that the allegations were all based on historic material and concluded that there was nothing alleged in the programme that SPLI did not already have visibility of. He stated that the SPLI did not investigate the media claims as they provided no new evidence. He stated that the information in the media claims had been carefully examined and if it had raised any new allegations and evidence it would have been further investigated.
389. In relation to the cluster of allegations concerning Camp Stephen, the Office was told that allegations concerning the deaths of Rhadi Nama and Abdul Jabbar Mossa Ali had been transferred from IHAT to SPLI upon the former’s closure and formed part of the Whiskey 1 investigation (relating to Camp Stephen). In relation to the allegations in the Panorama programme, the Office was told that there had been numerous developments in these cases since the relevant personnel had left IHAT and that therefore the information conveyed in the documentary was out-of-date. An example was given of an individual, an Iraqi interpreter, who had been a key witness but later withdrew his evidence, stating he had been confused. The Office was told that a forensic pathologist was given the RMP photographs of Rhadi Nama’s body to try to establish a cause of death as no post-mortem had been carried out, but it was not possible to determine the cause of death from the photographs. The SPLI investigation into the allegations had uncovered conflicting evidence which ultimately resulted in the conclusion that the evidential sufficiency test had not been met in respect of the two deaths. The Office was told that despite the evidential sufficiency test not being met, the SPA had submitted all of the evidence for review by a senior treasury counsel who had confirmed that there was insufficient evidence to proceed in relation to the two deaths.
390. In terms of command responsibility for what transpired at Camp Stephen, the BBC/Times allegation that a senior commissioned officer in the Black Watch (Lieutenant-Colonel Michael Riddell-Webster) had been warned about possible ill-treatment of persons at Camp Stephen before the deaths of Rhadi Nama and Abdul Jabbar Mossa Ali was confirmed. It has been established that the officer reportedly spoke to his

subordinate officers before the deaths and told them that if there was any ill-treatment of detainees, it had to stop. After Rhadi Nama's death, the officer went to Camp Stephen in person to speak with the subordinate officers and ensure there was no further ill-treatment. Despite this, Abdul Jabbar Mossa Ali also died thereafter. The analytical findings and decision making process by which it was ultimately determined to interview the senior commissioned officer concerned as a witness rather than a suspect was explained to the Office.

391. As noted earlier, in April 2019 the SPLI ultimately proceeded to refer to the SPA other charges related to Camp Stephen against three individuals for the war crime of outrages upon personal dignity and failure to exercise command responsibility: a company sergeant-major for failures in command responsibility (section 65(2) of the ICC Act 2001) and the war crime of outrages upon personal dignity (section 51(1) of the ICC Act 2001); a corporal for the war crime of outrages upon personal dignity (section 51(1) of the ICC Act 2001); and an individual rank (full) colonel for failures to exercise command responsibility (section 65(2) of the ICC Act 2001.<sup>619</sup>
392. Upon referral, the SPA again sought review by an outside senior counsel, who found that there was insufficient evidence to proceed under the first stage of the 'full code test'. The DSP stated to the Office that he was not entirely satisfied with this advice and therefore referred the matter to another senior treasury counsel for another opinion. This counsel also found that there was no evidence to support an allegation of unlawful killing of either individual because the cause of death could not be ascertained in either case. The Office was informed that the families of Rhadi Nama and Abdul Jabbar Mossa Ali had been informed that the cases had been closed. The families have not exercised their Victims Right to Review. It was noted that if new and compelling evidence should arise, a case which had been closed would be reviewed.
393. The former Director of IHAT observed that the former IHAT investigator who spoke to the BBC/Times appeared to have made allegations about events as at a certain point in time, but had been unaware of subsequent developments in the case, adding that it was possible that the former IHAT investigator was not a senior investigator and thus only knew part of the case and did not have an overview of the entire case.
394. In relation to alleged patterns of abuse in Camp Stephen, the Office was informed that IHAT had been able to identify which troops were stationed at Camp Stephen at the relevant time, including the unit, who commanded it and how long people were deployed there. IHAT accessed radio logs of the patrols and information on personnel movements. According to IHAT, approximately 200 people were stationed at Camp

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<sup>619</sup> See above, paras. 210-212.

Stephen, with numbers fluctuating over time. IHAT had taken witness statements from 70 military personnel relating to Camp Stephen, 27 of whom provided accounts of abuse and ill-treatment they had witnessed. Witness statements were taken from a further 27 Iraqis relating to Camp Stephen.

395. With respect to the allegation that a Commissioned Officer (Major Chris Suss-Francksen) had used falsified witness testimony to exonerate a soldier for the shooting of Al-Mosawi, the Officer in Command of SPLI confirmed to the Office that discrepancies had been uncovered by IHAT/SPLI between the version of the witness testimony that was contained in the shooting incident report and what the witnessing soldier actually recalled when subsequently interviewed by IHAT/SPLI. This soldier had told IHAT/SPLI that he had not been close enough to see what had occurred, contrary to the statement attributed to him in the shooting incident report. Nonetheless, this discrepancy had not changed the SPLI's conclusion that the soldier who killed Al-Mosawi held a reasonable belief when he opened fire, since he had provided IHAT/SPLI with a compelling account. As for the discrepancy in the report, the Commissioned Officer who had drafted the shooting incident report told IHAT/SPLI that he had interviewed the two soldiers at the material time and had made some notes, but had lost these and consequently made his report from memory. The result was that IHAT/SPLI had one version from the soldier who fired the shot, another version from another soldier, and there was no other evidence to resolve the discrepancy beyond a statement from a further Commissioned Officer who was involved in the immediate aftermath of the incident in securing Al-Mosawi's weapon, but which did not add any clarity. In the absence of any other material, it was considered by SPLI that there was nowhere else to go with the inquiry into the actions of the Commissioned Officer who drafted the shooting incident report.
396. In terms of IHAT's ability to effectively carry out its functions independently, the former Director of IHAT stated that there were hundreds of death allegations and thousands of abuse allegations and so decisions had to be made on how to follow reasonable, proportionate and effective lines of inquiry. Defence Internal Notice (DIN) notices would go out to all military units with a phone number to be called confidentially if anyone in the unit had information. It was made clear to soldiers that their commanding officers would not be informed so that people would not fear repercussions. IHAT tried various techniques to get a wider group of witnesses, but ultimately focused on people they knew were in the area. However, many soldiers did not want to speak with IHAT. The former Director of IHAT said there were limitations to inquiries because of the environment and the volume of allegations. For example, hundreds of people were approached as potential witnesses using a pro forma in the Baha Mousa case.
397. Although witnesses could not be compelled to provide evidence, a suspect could be arrested to preserve and secure evidence or arrested by appointment if there was no voluntary attendance. The former Director observed that IHAT was able to interview

under caution persons they wanted to interview, giving an example of an individual who refused to be interviewed under caution and so was arrested in order to effect the interview.

398. On the broader allegations concerning political pressure, according to the former Director of IHAT, while the outward political pressure portrayed by politicians and the media may have contributed to the “closing of ranks” phenomenon, this did not impact the work of IHAT staff and had no impact on IHAT decisions to interview particular soldiers. In this context, the former IHAT Director confirmed his previous assertion in the Defence Sub-Committee hearing that the “closing of ranks” phenomenon was exaggerated and was only one among several issues relating to IHAT’s work. The former Director of IHAT stated that there was no impact from the political context on IHAT decisions to interview particular soldiers, going on to observe that his own professional ethics would prevent him from staying in an organisation where he was obstructed from carrying out an independent investigation.
399. The former IHAT Director observed that the atmosphere within IHAT, which had been good in the sense that everyone had a sense of purpose, the structure worked well, as evidenced by low staff turnover, changed when IHAT started receiving pressure from the press and some MPs, which made it “an uncomfortable place for people to be”, but that this did not stop anyone from doing their work. He opined that some of the people who spoke critically of IHAT to the BBC were among the people let go during the transition from IHAT to SPLI.
400. In terms of allegations of political pressure, including by MoD, to close cases quickly, the former Director of IHAT said that there was pressure to complete cases because of the duty to conduct effective investigations. He said that ‘closing’ a case meant exhausting all of the ongoing lines of inquiry at the time, but that the case might nonetheless form part of a bigger picture or if new evidence came in, IHAT would re-examine the case. Within IHAT he put pressure on investigators to be focused and efficient, but said that in his view there was no political pressure to close cases down. The former Deputy Head of IHAT added that, given the great expense of IHAT, people were keen to know when it would finish as part of ordinary accountability.
401. In terms of IHAT internal decision making, it was observed by the former Deputy Head of IHAT that sometimes investigators, including the Senior Investigating Officer, disagreed with decisions taken by IHAT management, that there were some professional disagreements on strategy, but that this was reasonable.
402. In relation to the allegation that a senior civil servant had been appointed as an IHAT official by the government in order to exert pressure on investigators, the former Director of IHAT refuted the allegation. He speculated that this had to relate either to himself or

to the IHAT business manager, head of the civil service side of IHAT, but who did not have a role in investigations. The former Director of IHAT said that IHAT was composed of Royal Navy Police; contractors supplied by the Red Snapper Group; and the civil service (for pay, rations, support). He stated that an individual from MoD was the head of the civil service side, acting essentially as a business manager: providing hotels, accommodation, paying bills and the required business justifications on expenditures, but did not have a role in the investigations themselves. The former Director of IHAT explained that there were two components to the command team: (1) the running of the business (human resources, business manager, press person); and (2) the investigations command team (the Director, the Deputy Head and a qualified barrister employed by Royal Navy Legal Services and contracted as a full time equivalent employee, who served as the Director's personal legal adviser (e.g. on issues such as legal privilege and jurisdiction), but did not make decisions and was not involved in cases or investigations. The IHAT Director's legal adviser liaised with the Iraq Fatality Investigations to ensure their requirements were met, but did not attend case conferences.

403. The DSP observed that the allegation in the Panorama programme that MoD lawyers stopped an investigator pursuing investigative steps was likely related to the W1 investigation and that the reference to 'MoD' as described therein was possibly a reference to the Central Legal Services (CLS) lawyers (in-house lawyers in MoD who advise on constitutional, legislative issues and commercial matters). The DSP observed that this allegation may have confused CLS with the SPA, since the CLS lawyers from the MoD had no involvement in decision making on cases.
404. The former Director was responsible for the running of IHAT and was accountable to Justice Leggatt and (on finance) to the MoD. He also had a relationship with the Director of Judicial Engagement Policy (DJEP) of the MoD on policy issues and the "wider government picture on this" but this was only a "dotted line" reporting line.<sup>620</sup> He said that if he needed money and made a reasonable business case to the MoD, there was never a time he was ever turned down. The Officer in Command of the SPLI similarly confirmed that he reports to the Provost-Marshal (Navy) on investigation progress, as well as DJEP on timelines, progress and planning assumptions (for example, resources), but that his reporting to DJEP did not impact any of his decisions.
405. On the specific examples of cover-up alleged in the BBC/Times reports, the UK Officials speculated that the allegation that an investigator was prevented from taking investigative steps may have pertained to Riddell-Webster, discussed above.<sup>621</sup>

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<sup>620</sup> For an explanation of DJEP's role *see above*, fn. 308.

<sup>621</sup> *See above* paras. 375, 390.

406. The DSP said that it is impossible to explain why Lord MacDonald disagreed with IHAT's conclusions because it is not clear what material he had access to.<sup>622</sup>

### (iii) Conclusions

407. The Office has treated the allegations of cover-up from former personnel of IHAT with the utmost seriousness. The allegations of intentional disregarding, falsification, and/or destruction of evidence, as well as the impeding or prevention of certain investigative inquiries and the premature termination of cases, are of direct relevance to the Office's genuineness assessment. Verification of these allegations could have established a basis to seek the opening of an investigation by the ICC, since the relevant domestic proceedings would have been demonstrably vitiated by an unwillingness of the State concerned to carry them out genuinely. Given the determinative nature of the results of these inquiries, the Office undertook the necessary due diligence to verify whether the allegations could be substantiated for the purpose of admissibility proceedings.

408. The Office spoke with a number of former staff of IHAT who held different levels and functions. This sample of individuals was to some extent self-selected (being persons who were willing to speak to the Office). Accordingly, there may be limits to the representativeness of their experiences as compared with that of former IHAT staff as a whole. The Office nonetheless notes that the views of these individuals were on the whole balanced, as evidenced through their advancement of both praise and critique for various aspects of IHAT's work. The Office also accepts that these individuals were not natural 'whistle-blowers'. As former law enforcement personnel bound by confidentiality undertakings with their former employer and liable for penal sanction for potentially breaching protections on classified information, they may have been naturally reticent to speak with the ICC, which also reduces their likelihood of having made frivolous or malicious allegations. On the whole, the information received by the Office corresponds to the reports made in the BBC Panorama programme and in the Sunday Times.

409. The Office views with concern the fact that professional IHAT investigators – drawn from experienced retired officers of civilian police forces or serving Royal Navy Police personnel – would have made allegations of a cover-up or expressed concerns over the fate of the IHAT investigations that they worked on. At the same time, the Office has put the specific allegations with respect to specific cases, lines of inquiry or decisions taken to the former and current leadership of IHAT, SPLI and SPA in both oral meetings and subsequent written exchanges, and considers that the

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<sup>622</sup> It has been confirmed to the Office that Lord Macdonald had sight of the documentation which was used to support the referral to the SPA, including relevant witness statements and IHAT findings.

explanations offered to the Office on each of these allegations appeared generally reasonable. More specifically, after exhausting relevant lines of inquiry, the Office has not been able to substantiate, with evidence that it could rely upon in court, the allegation that decisions were taken within IHAT or the SPA to block certain lines of inquiry or that viable cases with a realistic prospect of conviction were inappropriately abandoned. While the Office cannot categorically rule out such a hypothesis, the evidence available to it at this stage does not allow it to conclude that there was intent on the part of the UK authorities to shield persons under investigation from criminal responsibility.

410. In saying this, the Office accepts the likelihood of strong differences of views and professional assessment both within IHAT and between IHAT and IHAPT or between IHAT/SPLI and the SPA as to whether there was a realistic prospect of obtaining sufficient evidence in a given case to satisfy the evidence sufficiency test at the investigative stage or a realistic prospect of conviction to support a prosecution. It appears clear that IHAT personnel viewed the fate of cases they worked on in different terms, and that staff at all levels, from the operational level to the leadership team, held strong views on the issue. As set out earlier, the Office has also expressed its own concerns on how IHAT/SPLI and the SPA made certain decisions and applied certain aspects of the evidence sufficiency test.<sup>623</sup> However, Office cannot establish an intent to shield based upon internal or external disagreements on operational and legal assessments made by IHAT/SPLI and the SPA.
411. With respect to alleged political pressure and difficulties in securing unfettered access to materials held by the MoD, the Office recognises that IHAT personnel clearly operated in a difficult and challenging environment. It is concerning, in this respect, that former IHAT investigators stated that they felt under pressure to close cases, or that they did not always receive the levels of support for access to materials they sought from the MoD. Nonetheless, based on the information and evidence before it, the Office cannot at this stage conclude that cases were improperly and prematurely terminated due to pressure from the MoD, the UK Government or the public criticism of its work more generally.
412. The Office has expended considerable effort on its inquiry into the allegations made by former IHAT staff to the BBC Panorama programme and the Sunday Times. Nothing in the Office's findings should detract from the seriousness of the allegations made in those reports. Nonetheless, the Office has not been able to substantiate the allegations to the required level of proof before the Court to demonstrate an intent to shield perpetrators from criminal justice.

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<sup>623</sup> See above, paras. 305-312

## B. UNJUSTIFIED DELAY

### 1. Admissibility criteria

413. Article 17(2)(b) requires proof of an “unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice”. It requires that three cumulative conditions are met: (1) that there was a delay; (2) that the delay was ‘unjustified’; (3) that the unjustified delay was in the circumstances of the case accompanied by the intention not ‘to bring the person concerned to justice’. As with other sub-paragraphs, the assessment must be conducted with regard to “the principles of due process recognized by international law”.<sup>624</sup>
414. The term ‘unjustified delay’ does not have a direct analogy with standards in international instruments, which instead refer on ‘undue delay’. Indeed, the drafting history of the Statute shows that negotiating States were concerned that the initially proposed term “undue delay” (which is common to human rights instruments) would represent too low a threshold. The term ‘undue’ was therefore replaced with what was considered the more onerous and objective adjective ‘unjustified’, in order to provide the State concerned an opportunity to provide, and for the Court to consider, relevant explanations for the delay.<sup>625</sup> Moreover, to emphasise the need for case-by-case analysis, the Court is directed to consider the context as denoted by “in the circumstances” of the proceedings.<sup>626</sup> Finally, any finding of unjustified delay must be linked to a determination that this was “inconsistent with an intent to bring the person concerned to justice”. This means that, as with 17(2)(a), there is a requirement of intentionality.<sup>627</sup> Thus, that the duration of the proceedings were lengthy is not sufficient per se to render the case admissible before the Court, without a showing of intentionality.<sup>628</sup> This means that there may be some factual overlap with the evidence supporting a finding of shielding under article 17(2)(a).
415. As set out in its policy paper in preliminary examination, for the purpose of article 17(2)(b) the Office may have regard to such factors as:

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<sup>624</sup> Art. 17(2), ICC Statute.

<sup>625</sup> It should be noted, nonetheless, that it is not uncommon for human rights bodies to characterise the delay in terms of whether it was ‘justified’/‘unjustified’ by the explanations provided by the respondent State; *see e.g. Moiwana Community v. Suriname*, IACtHR, Judgment, 15 June 2005, para. 162; *Ituango Massacre v. Colombia*, IACtHR, Judgment, 1 July 2006, para. 308; *Baldeón García v. Peru*, IACtHR, Judgment, 6 April 2006, para. 153.

<sup>626</sup> William Schabas and Mohamed El Zeidy, “Article 17, Issues of admissibility” in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court, A Commentary*, 3rd edition, 2016, pp. 821-824.

<sup>627</sup> *See above*, paras. 294-300.

<sup>628</sup> William Schabas and Mohamed El Zeidy, “Article 17, Issues of admissibility” in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court, A Commentary*, 3rd edition, 2016, pp. 817, 821.

Unjustified delay in the proceedings at hand may be assessed in light of indicators such as, the pace of investigative steps and proceedings; whether the delay in the proceedings can be objectively justified in the circumstances; and whether there is evidence of a lack of intent to bring the person(s) concerned to justice.<sup>629</sup>

416. As noted earlier, the initial formulation of these factors by the Office in its 2013 Policy Paper on Preliminary Examinations drew from principles of due process set out in various international standard-setting instruments and human rights jurisprudence, in line with the chapeau requirement in article 17(2) which requires the Court have “regard to the principles of due process recognized by international law”.<sup>630</sup> As also noted above, the development of such principles under other sources of international law cannot be mechanically imported into the Rome Statute given their different context and sphere of application. Nonetheless, appropriate regard for how such principles have been interpreted and applied can, as mandated by article 17(2), help inform how the terms set out in article 17 should be understood within the particular context of ICC admissibility rulings.

417. Although article 17(2)(b) applies the higher threshold of ‘unjustified delay’ compared to ‘undue delay’, it is common for human rights bodies to stress that what constitutes ‘delay’ or ‘reasonable time’ (the inverse of delay) must be assessed against the requirement that investigations and judicial proceedings be prompt<sup>631</sup> and proceed with reasonable expedition.<sup>632</sup> This “must be assessed in each case according to its circumstances”.<sup>633</sup> To concretise the assessment, the ECtHR has set-out a three-fold test for assessing the reasonableness of the duration of criminal proceedings as requiring regard for: (i) the complexity of the case; (ii) the

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<sup>629</sup> ICC OTP, [Policy Paper on Preliminary Examinations](#), November 2013, para. 52.

<sup>630</sup> See e.g. ECtHR; [Manzoni v Italy](#), no. 11804/85, Judgment, 19 February 1991, para. 18; [Abdoella v. the Netherlands](#), no. 12728/87, Judgment, 25 November 1992, para. 24; [Dobbertin v. France](#), no. 13089/87, Judgment, 25 February 1993, paras. 39-44; UN Human Rights Committee; [Bozize v. Central African Republic](#), Communication No. 428/1990, U.N. Doc. CCPR/C/50/D/428/1990, 24 April 1994, paras. 5.1-5.3; [Desmond Taylor v. Jamaica](#), UN Human Rights Committee, Communication No. 705/1996, U.N. Doc. CCPR/C/62/D/705/1996, 4 June 1998, para. 7.1; IACtHR, [Genie-Lacayo v. Nicaragua](#), Judgment, 29 January 1997, paras. 77-81; [Updated Set of principles for the protection and promotion of human rights through action to combat impunity](#), E/CN.4/2005/102/Add.1, 8 February 2005.

<sup>631</sup> ECtHR, [Jordan v United Kingdom](#), no. 24746/94, Judgement, 14 May 2001, para. 108; [Armani Da Silva v. the United Kingdom](#), no. 5878/08, para. 237. See also UN Human Rights Committee, [Fei v. Colombia](#), Communication No. 514/1992, [CCPR/C/53/D/514/1992](#), 25 April 2005, para. 8.4; [Jessop v. New Zealand](#), Communication No. 1758/2008, [CCPR/C/101/D/1758/2008](#), 21 April 2011, para. 8.2.

<sup>632</sup> ECtHR; [Jordan v United Kingdom](#), no. 24746/94, Judgement, 4 May 2001, para. 108; [Giuliani and Gaggio v. Italy](#) 21 March 2011, para. 305. As PTC III has observed, the ICC Statute and Rules also contains notions related to of reasonableness of time in articles 61(1) and (3), 64 (2), 67 (1) (c) and 82 (1) (d), and rules 24 (2) (b), 49(1), 101(1), 106(1), 114(1), 118(1), 121(1) and (6) and 132(1); see [Situation in the Central African Republic](#), [Decision Requesting Information on the Status of the Preliminary Examination](#), fn.5.

<sup>633</sup> ECtHR, [Neumeister v. Austria](#), no. 1936/63, Judgment, 27 June 1968, para. 18 (in the light of the “reasonable time” requirement in article 5(3) of the ECHR, observing “The literal meaning of the word ‘reasonable’ (‘raisonnable’) is said to show clearly that the question whether the length of detention on remand was excessive can be settled only in the light of the circumstances of the case and not on the basis of a set of preconceived ‘criteria’, ‘elements’ or ‘factors’.” See also [König v. Germany](#), no. 6232/73., Judgment 28 June 1978, para. 99 (in the light of the “reasonable time” requirement in article 6 of the ECHR).

applicant's conduct; and (iii) the conduct of the authorities.<sup>634</sup> The test has been replicated in a number of decisions of the IACtHR,<sup>635</sup> and has been closely adhered to by the Human Rights Committee,<sup>636</sup> the ICTY<sup>637</sup> and ICTR.<sup>638</sup> The presence of one or more of these criteria does not automatically excuse delay, but provides a set of objective parameters against which to assess the particular 'circumstances' of the case.

418. Cases weighing the criteria of complexity have examined various difficulties arising in practice from the investigation or trial of a case.<sup>639</sup> This has included a review of the complexity of the case in terms of facts<sup>640</sup> or number of witnesses<sup>641</sup> or co-accused;<sup>642</sup> the highly sensitive nature of the offences charged, such as those relating to national security;<sup>643</sup> the need to obtain evidence abroad through mutual legal assistance or custody through extradition;<sup>644</sup> the complexity of legal issues that must be resolved;<sup>645</sup> the context in which the alleged acts occurred (such as challenges arising from the prevalence of armed conflict);<sup>646</sup> the passage of time;<sup>647</sup> the absence

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<sup>634</sup> ECtHR; *König v. Germany*, para. 99, drawing on *Neumeister v. Austria*, para. 21 and *Ringeisen v. Austria*, no. 2614/65, Judgment, 16 July 1971, para. 110. In a number of cases, the ECtHR has additionally considered "what was at stake for the applicant in the litigation"; see e.g. *Süßmann v. Germany*, no. 20024/92, Judgment, 16 September 1996, para. 48; *Frydlender v. France*, no. 30979/96, 27 June 2000, para. 43. See similarly at the IACtHR, *Valle Jaramillo et al. v. Colombia*, Judgment, 27 November 2008, para. 155; *Uzcátegui et al. v. Venezuela*, Judgment, 3 September 2012, para. 224; *Caso Vereda La Esperanza v. Colombia*, Judgment, 31 August 2017, para. 203.

<sup>635</sup> IACtHR; *Genie-Lacayo v. Nicaragua*, Judgment of 29 January 1997, para. 77; *Suárez-Rosero v. Ecuador*, Judgment of 12 November 1997, para. 72; *Pueblo Bello Massacre v. Colombia*, Judgment 31 January 2006, para. 171; *Quispialaya Vilcapoma v. Peru*, Judgment, 23 November 2015, para. 178.

<sup>636</sup> UN Human Rights Committee, *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, CCPR/C/GC/32, 23 August 2007, para. 35.

<sup>637</sup> ICTY, *Delalic et al., Decision On Motion For Provisional Release*, 25 September 1996, para. 26 (citing the *Neumeister* case).

<sup>638</sup> ICTR, *Mugiraneza, Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief*, ICTR-99-50-AR73, 27 February 2004, p. 3 (basing its assessment of the right to be tried without undue delay on: "(1) The length of the delay; (2) The complexity of the proceedings, such as the number of charges, the number of accused, the number of witnesses, the volume of evidence, the complexity of facts and law; (3) The conduct of the parties; (4) The conduct of the relevant authorities; and (5) The prejudice to the accused, if any", but without citing the ECtHR or IACtHR case law.

<sup>639</sup> See Mohamed El Zeidy, *The Principle of Complementarity in International Criminal Law Origin, Development and Practice* (2008), p. 187; Frédéric Edel, *The length of civil and criminal proceedings in the case-law of the European Court of Human Rights*, Council of Europe 2007, pp. 33-43.

<sup>640</sup> ECtHR, *Hageri v. Finland*, no.14724/02, Judgment, 17 January 2006, para. 29 (referring to the large amount of documentary evidence, the scale of transactions involved); *Neumeister v. Austria*, no. 1936/63, Judgment, 27 June 1968, para. 20 referring to the complex means of proof; ICtHR, *Genie Lacayo v. Nicaragua*, Judgment, 29 January 1997, para. 78.

<sup>641</sup> *Neumeister v. Austria*, (statement of facts) para. 20.

<sup>642</sup> *Ibid* (referring to the investigation of 22 suspects with respect to twenty-two counts).

<sup>643</sup> ECtHR, *Dobbertin v. France*, no. 13089/87, Judgment, 25 February 1993, para. 42.

<sup>644</sup> *Ibid* (referring to the need to resort to mutual legal assistance to track down witnesses abroad, and resultant delays of from 6-16 months from the sending of requests to the receipt of results); See also IACtHR *Heliodoro-Portugal v. Panama*, Judgment, 12 August 2008, para. 154; *Wong Ho Wing v. Peru*, Judgment, 30 June 2015, para. 210.

<sup>645</sup> See e.g. (in the context of civil criminal proceedings) the need to address complex legal questions related to jurisdiction; (*Lorenzi, Bernardini and Gritti v. Italy*, Judgment, 27 February 1992, para. 16), constitutionality (*Ruiz-Mateos v. Spain*, no.12952/87 23 June 1993, para. 41) or treaty interpretation (*Beaumont v. France*, no. 15287/89, 24 January, paras. 32-33).

<sup>646</sup> IACtHR; *"Mapiripán Massacre" v. Colombia*, Judgment, 15 September 2005, para. 221; *Ituango Massacres v. Colombia*, Judgment, 1 July 2006, para. 294.

<sup>647</sup> IACtHR; *Heliodoro-Portugal v. Panama*, Judgment, 12 August 2008, para. 150; *Radilla Pacheco v. Mexico*, Judgment, 23 November 2009, para. 245; *Wong Ho Wing v. Peru*, Judgment, 30 June 2015, para. 210.

or imprecision of previous cases or precedents on the same matter at the domestic or regional level;<sup>648</sup> as well as issues related to the procedural complexity of the case, due to the number of investigative acts performed, the volume of evidence, and/or the number and types of hearings required.<sup>649</sup>

419. As a potential counter-veiling factor to the attribution of delay to the competent authorities is whether the conduct of the applicant has contributed to the pace of proceedings.<sup>650</sup> This might involve failures to attend relevant hearings or requests for adjournments.<sup>651</sup> In this context, although the ECtHR has stressed that an accused person is not required to actively cooperate with the judicial authorities, nor may be reproached for making full use of the remedies available under domestic law, it has nonetheless considered whether the conduct of the applicant constitutes an objective fact, not capable of being attributed to the respondent State, which is to be taken into account when determining whether or not the proceedings exceeded a “reasonable time”.<sup>652</sup> In this respect, it has taken into consideration such factors as an applicant’s refusal to appoint a lawyer or submit to required medical examinations, the filing of numerous pleas for review, or requests for the examination of large numbers of witnesses.<sup>653</sup>

420. Where delays have been attributable to the authorities, the ECtHR, IACtHR and HRC have examined the relevant time period that has lapsed or the apparent inactivity of the authorities at the relevant stage of the proceedings absent adequate justification.<sup>654</sup> Other examples of delays attributable to the authorities include: lack

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<sup>648</sup> IACtHR, *Wong Ho Wing v. Peru*, Judgment, 30 June 2015, para. 210.

<sup>649</sup> ECtHR; *Calleja v. Malta*, no. 75274/01, Judgment 7 April 2005, para. 128; *Krasuski v. Poland*, no. 61444/00, Judgment, 14 June 2005, para. 56 (referring to the need to obtain and reobtain expert reports). See also IACtHR, *Genie-Lacayo v. Nicaragua*, Judgment, paras. 69, 78; *Cantos v. Argentina*, Judgment, 28 November 2002, paras. 44, 57.

<sup>650</sup> See Mohamed El Zeidy, *The Principle of Complementarity in International Criminal Law Origin, Development and Practice* (2008), p. 188.

<sup>651</sup> ECtHR *Rylski v. Poland*, 24706/02, Judgment, 4 July 2006, para. 76.

<sup>652</sup> ECtHR *Calleja v. Malta*, no. 75274/01, Judgment, 7 April 2005, para. 132, citing *Ledonne (No.1) v. Italy*, no. 35742/97, Judgment, 12 May 1999, para. 25; *I.A. v. France*, 1/1998/904/1116, Judgment, 23 September 1998, para. 121; *Eckle v. Germany*, no. 8130/78, Judgment, 15 July 1982, para. 82.

<sup>653</sup> See e.g. ECtHR, *Klamecki v. Poland*, no. 25415/94, Judgment 28 March 2002, paras. 92-93, (referring to a number of ‘delaying tactics’ adopted by the applicant).

<sup>654</sup> See e.g. ECtHR, *Eckle v. Germany*, no. 8130/78, Judgment paras. 83-84; *Pélissier and Sassi v. France*, no. 25444/94, Judgment, 25 March 1999, para. 73 (referring to unjustified delays); IACtHR, *Genie-Lacayo v. Nicaragua*, Judgment, 29 January 1997, paras. 80-81 (referring to delays at the judicial phase as well as at earlier stages by the police and the attorney-general’s office); *Myrna Mack Chang v. Guatemala*, Judgment, 25 November 2003, para. 210; *Bulacio v. Argentina*, Judgment, 18 September 2003, para. 115, *Servellón-García et al. v. Honduras*, Judgment 21 September 2006, paras. 149-152 (on the duty of the judiciary to direct the process to avoid unnecessary delays and obstructions); *Moiwana Community v. Suriname*, Judgment, 15 June 2005, paras. 86(31)-86(35), 162; *Heliodoro-Portugal v. Panama*, Judgment, 12 August 2008, paras. 152, 155; *Kawas Fernández v. Honduras*, Judgment, 3 April 2009, para. 114; *Anzualdo Castro v. Peru*, Judgment 22 September 2009, para. 157; UN Human Rights Committee, *Girjadat Siewpersaud et. al v. Trinidad and Tobago*, Communication No. 938/2000, [CCPR/C/81/D/938/2000](#), 19 August 2004, para. 6.2; *Bozize v. Central African Republic*, Communication No. 428/1990, [CCPR/C/50/D/428/1990](#) 26 April 1994, para. 5.3; *Desmond Taylor v. Jamaica*, Communication No. 705/1996, [CCPR/C/62/D/705/1996](#), 4 June 1998, para. 7.1; *Anthony Finn v. Jamaica*, Communication No. 617/1995, [CCPR/C/63/D/617/1995](#), 19 August 1998, para. 9.4.

of diligence and rigour in the handling of the proceedings;<sup>655</sup> and lack of collaboration between state investigative and prosecutorial bodies or relevant governmental organs in the conduct of investigations.<sup>656</sup>

421. In this context, respondent States have sometimes pleaded practical difficulties encountered by their judicial system, such as a backlog of cases; an increase in the volume of litigation; growth in crime; local political unrest; economic crisis and a shortage of personnel. The ECtHR, stating that “is not unaware of the difficulties which sometimes delay the hearing of cases by national courts”, has nonetheless insisted that States comply with their duty, while accepting the reasonable limitations that might exceptionally be imposed in the face of genuine efforts to address shortcomings. As the ECtHR has repeatedly upheld:

The Convention places a duty on the Contracting States to organise their legal systems so as to allow the courts to comply with the requirements of Article 6 paragraph 1, including that of trial within a “reasonable time”. Nonetheless, a temporary backlog of business does not involve liability on the part of the Contracting States provided they have taken reasonably prompt remedial action to deal with an exceptional situation of this kind.<sup>657</sup>

422. Thus, in some cases the ECtHR recognised the efforts made by the State to expedite procedures through such measures as reorganisation or additional appointment of judicial personnel or chambers, prioritisation of workloads or even legislative reform,<sup>658</sup> while in other cases it found that the State’s response was too slow or of an insufficient scale.<sup>659</sup> In addition, while the ECtHR has accepted that there may be

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<sup>655</sup> ECtHR, [Slezevicius v Lithuania](#), no. 55479/00, Judgment, 13 February 2002, para. 30; [Kuvikas v. Lithuania](#), no. 418/04 Judgment, 27 June 2006, para. 50; [Simonavicius v. Lithuania](#), no. 37415/02 Judgment, 27 June 2006, para. 41; [Gheorghe v. Romania](#), no.19215/04, Judgment, 15 March 2007, paras. 48-50.

<sup>656</sup> IACtHR, [Moiwana Community v. Suriname](#), Judgment, 15 June 2005, paras. 86(27); 162; [García Prieto et al. v. El Salvador](#), Judgment, 20 November 2007, paras. 112-116; [Gudiel Álvarez et al. \(Diario Militar\) v. Guatemala](#), Judgment, 20 November 2012, paras. 248-252.

<sup>657</sup> See e.g. (not limited to criminal proceedings) [Buchholz v. the Federal Republic of Germany](#), no.7759/77, Judgment, 6 May 1981, para.51; [Zimmermann and Steiner v. Switzerland](#), no. 8737/79, Judgment, 13 July 1983, paras.29-31; [Guincho v. Portugal](#) no.8990/80, Judgment, 10 July 1984, paras.38; 40; [Deumeland v. the Federal Republic of Germany](#), no.9384/81, Judgment 29 May 1986, para. 82; [Unión Alimentaria Sanders S.A. v. Spain](#), no. 11681/85, Judgment, 7 July 1989, para. 41; [Brigandì, Zanghi, Santilli v. Italy](#), Judgment, 19 February 1991, paras. 30; 21; 20 ; [Philis v. Greece](#) no.14003/88, Judgment, 27 August 1991, para.17; [Nibbio, Biondi, Monaco, Lestini v. Italy](#), Judgment, 26 February 1992, paras.17-18 ; [Abdoella v. the Netherlands](#), no. 12728/87, Judgment, 25 November 1992, para.24; [Bunkate v. the Netherlands](#), no. 13645/88, Judgment, 26 May 1993, para. 23; [Francesco Lombardo v. Italy](#), no. 11519/85, Judgment, 26 November 1992, para. 22; [Giancarlo Lombardo v. Italy](#), no. 12490/86, Judgment, 26 November 1992, para.21 ; [Dobbertin v. France](#), no. 13089/87, Judgment, 25 February 1993, para.44; [Pizzetti, De Micheli, Salesi, Trevisan v. Italy](#), Judgment, 26 February 1993, paras.21, para.20, para.24 and §para.18 respectively; [Ruiz-Mateos v. Spain](#), no. 12952/87, 23 June 1993, para.48; [Scuderi v. Italy](#) and [Massa v. Italy](#), Judgment, 24 August 1993, para.16 and para.31 respectively; [Muti v. Italy](#), Judgment, 23 Mach. 1994, para.15; [Schouten and Meldrum v. the Netherlands](#), no. 19005/91; 19006/91, Judgment, 9 December 1994, para.67; [Mansur v. Turkey](#), no. 21163/11, Judgment, 8 June 1995, para. 68.

<sup>658</sup> ECtHR, [Buchholz v. the Federal Republic of Germany](#), no. 7759/77, Judgment, 6 May 1981, paras. 61; 63.

<sup>659</sup> ECtHR, [Zimmermann and Steiner v. Switzerland](#), no. 8737/79, Judgment, 13 July 1983, paras. 29-31; [Guincho v. Portugal](#), no. 8990/80, Judgment, 10 July 1984, paras.37-41; [Baggetta v. Italy](#) and [Milasi v. Italy](#), Judgment, 25 June 1987, paras.22 and 24, and paras.17-18 respectively; [Martins Moreira v. Portugal](#), Judgment, 26 October 1988, para.53; [Unión Alimentaria Sanders S.A. v. Spain](#), no. 11681/85, Judgment, 7 July 1989, paras.37-42; [B. v. Austria](#),

obstacles or difficulties which prevent progress in an investigation in a particular situation, it has stated that a prompt response by the authorities may generally be regarded as essential, inter alia, in preventing any appearance of collusion in or tolerance of unlawful acts.<sup>660</sup> Moreover, the passage of time may not only undermine an investigation, but may also compromise definitively its chances of being completed.<sup>661</sup>

423. With respect to historical investigations the ECtHR has drawn the following broad parameters in relation to measures taken after new information has come to light which undermine the conclusions of an earlier investigation or which allows an earlier inconclusive investigation to be pursued further (in view of article 2 of the ECHR):

The Court has doubts as to whether it is possible to formulate any detailed test which could usefully apply to the myriad of widely-differing situations that might arise ... bearing in mind the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources, positive obligations must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities .... the Court takes the view that where there is a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing, the authorities are under an obligation to take further investigative measures. The steps that it will be reasonable to take will vary considerably with the facts of the situation. The lapse of time will, inevitably, be an obstacle as regards, for example, the location of witnesses and the ability of witnesses to recall events reliably. Such an investigation may in some cases, reasonably, be restricted to verifying the credibility of the source, or of the purported new evidence. The Court would further underline that, in light of the primary purpose of any renewed investigative efforts, the authorities are entitled to take into account the prospects of success of any prosecution .... The extent to which the requirements of effectiveness, independence, promptness and expedition, accessibility to the family and sufficient public scrutiny apply will again depend on the particular circumstances of the case, and may well be influenced by the passage of time as stated above ... Promptness will be likely not to come into play in the same way, since, for example, there may be no urgency as regards the securing of a scene of the crime from contamination or in obtaining witness statements while recollections are sharp. Reasonable expedition will remain a requirement, but what is

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Judgment, 28 March. 1990, para. 54; [Moreira de Azevedo v. Portugal](#), no. 11296/84, Judgment, 23 Oct. 1990, paras.73-75.

<sup>660</sup> ECtHR, [Al-Skeini and others v United Kingdom](#), no. 55721/07, Judgment, 7 July 2011, para. 166; [Tahsin Acar v. Turkey](#), no. 26307/95, Judgment, para. 224; [Armani Da Silva v. the United Kingdom](#), no. 5878/08 Judgment, 30 March 2016, para. 237. See also [Paul and Audrey Edwards v. the United Kingdom](#), no. 46477/99, Judgment, 14 March 2002, para. 86, "... it is crucial in cases of deaths in contentious situations for the investigation to be prompt. The passage of time will inevitably erode the amount and quality of the evidence available and the appearance of a lack of diligence will cast doubt on the good faith of the investigative efforts, as well as drag out the ordeal for the members of the family."

<sup>661</sup> ECtHR [Mocanu and Others v. Romania](#), nos. 10865/09, 45886/07 and 32431/08, Judgment, 17 September, 2014, para. 337.

reasonable is likely to be coloured by the investigative prospects and difficulties which exist at such a late stage.<sup>662</sup>

424. As noted above, although these decisions offer useful guidance for assessing what may constitute ‘undue delay’ or lack of reasonable diligence by the authorities, the ICC considers the question of delay within the context of article 17 of the Rome Statute. In particular, the ICC, unlike human rights bodies, does not determine whether a State complied with its duties to provide an effective remedy or fulfilled the procedural obligation to give effect to a fundamental human right, but rather whether the delay, where unjustified, was “inconsistent with an intent to bring the person concerned to justice”. Moreover, unlike the human rights jurisprudence which generally focuses on the delay of the proceedings after charges have been brought against a person, article 17(2)(b) may examine with a broader pattern of events and considers phases in the criminal process. This is because article 17(2)(b) is concerned with the general scheme of events, that is, a delay which directly impacts on the idea of bringing an accused to justice.<sup>663</sup>

## 2. Determination

425. The question of delay has been the subject of extensive litigation in the context of cases concerning a number of Iraqi claimants. Both the ECtHR and the High Court have found that delays in the taking of initial investigative steps at the time of the incidents, or in progressing and processing of relevant complaints by IHAT, were inconsistent with the UK’s procedural obligations to meet the requirements of promptness and reasonable expedition. In doing so, UK courts have examined in particular the case law of the ECtHR to set out the relevant standard to be met by the UK authorities.<sup>664</sup> These reviews have typically found that some early investigations

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<sup>662</sup> ECtHR, *Brecknell v. The United Kingdom*, no. 32457/04, Judgment, 27 November 2007, paras. 69-72.

<sup>663</sup> William Schabas and Mohamed El Zeidy, “Article 17, Issues of admissibility” in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court, A Commentary*, 3rd edition, 2016, p. 823.

<sup>664</sup> See e.g. *Al Skeini & Ors, R (on the application of) v Secretary of State for Defence* [2004] EWHC 2911 (Admin) (14 December 2004); *Al-Skeini & Ors, Al-Skeini & Ors, R (on the application of) v Secretary of State for Defence* [2005] EWCA Civ 1609 (21 December 2005); ECtHR, *Al-Skeini and others v United Kingdom*, no. 55721/07, Judgment, 7 July 2011, para. 170: “It was therefore essential that, as quickly after the event as possible, the military witnesses, and in particular the alleged perpetrators, should have been questioned by an expert and fully independent investigator. Similarly, every effort should have been taken to identify Iraqi eye witnesses and to persuade them that they would not place themselves at risk by coming forward and giving information and that their evidence would be treated seriously and acted upon without delay.”; UK EWHC, *R (Ali Zaki Mousa and others) v. Secretary of State for Defence No. 2*, [2013] EWHC 1412 (Admin), 24 May 2013, paras. 186-187: “The delay in relation to the cases of those who died in custody is such that, in our view, it amounts to a failure to discharge the duty, quite apart from being a source of great and increasing concern ... A further failing of the present investigation is that there seems to be recurring slippage. We are driven to the conclusion that there are likely to be further long delays before IHAT finishes its work. Indeed, there is little which shows that they have been given sufficient resources to accord priority to dealing with the death in custody cases and in particular ascertaining whether there will be a criminal prosecution of those responsible for the deaths of those claimants who died in custody”; *Al-Saadoon & Ors v Secretary of State for Defence (Rev 1)* [2016] EWHC 773 (Admin) (07 April 2016), para. 107: “No investigation was carried out by the British authorities before IHAT examined the case in 2014, some 11 years after Husam was killed. On any view that delay amounted to a breach of the requirement that an investigation must be prompt.” See also UK Army, *The Aitken Report: An*

of physical perpetrators and their immediate supervisors were beset with challenges, which were largely due to the difficult operational environment in Iraq at the time,<sup>665</sup> while the ECtHR described SIB investigations as being hampered by a number of practical difficulties governing the situation at the time.<sup>666</sup>

426. The Office acknowledges that the facts arising from the complaints were complex in their scope, involving multiple victims in multiple incidents and different alleged perpetrators, over a prolonged period, during a situation of armed conflict. It is also clear that, although the duties of a State are not dependent on notification by the victims, as a factual matter at least some of the complainants informed the authorities of their complaints years after the incidents, which in turn contributed to the delay of when initial steps were taken in relation to those cases. As to the conduct of the authorities, the ECtHR and the High Court have held, and the UK government appears to have accepted at least in some cases, that the authorities, in particular the military while in theatre, did not act with the necessary diligence to investigate relevant allegations at the time of their occurrence or in some cases after they were informed of the complaint.<sup>667</sup> A number of these findings have been linked to findings on the lack of independence of the initial investigative steps undertaken by the Royal Military Police, including its Special Investigation Branch.<sup>668</sup> The early criticisms of IHAT were similarly focussed on its independence

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[investigation into cases of deliberate abuse and unlawful killing in Iraq in 2003 and 2004](#), 25 January 2008, para. 38; House of Commons Defence Committee, '[Who guards the guardians? MoD support for former and serving personnel](#)', 10 February 2017, Annex 1: Principles for future investigations; under the heading 'Support for former and service personnel'.

<sup>665</sup> UK Army, [The Aitken Report: An investigation into cases of deliberate abuse and unlawful killing in Iraq in 2003 and 2004](#), 25 January 2008, para. 13.

<sup>666</sup> ECtHR, [Al-Skeini and others v United Kingdom](#), no. 55721/07, Judgment, 7 July 2011, para. 30.

<sup>667</sup> See e.g. UK EWHC, [R \(Ali Zaki Mousa and others\) v. Secretary of State for Defence No. 2](#), [2013] EWHC 1412 (Admin), 24 May 2013, para. 128, noting: "the investigation by the Royal Military Police had been inadequate and further investigation by IHAT was required"; ECtHR, [Al-Skeini and others v United Kingdom](#), no. 55721/07, Judgment, 7 July 2011, paras. 173-174: "During the initial phase of the investigation, material was collected from the scene of the shooting and statements were taken from the soldiers present. However, Lance Corporal S., the soldier who shot the applicant's brother, was not questioned by Special Investigation Branch investigators during this initial phase. It appears that the Special Investigation Branch interviewed four Iraqi witnesses, who may have included the neighbours the applicant believes to have witnessed the shooting, but did not take statements from them. In any event, as a result of the lack of independence, the investigation was terminated while still incomplete. It was subsequently reopened, some nine months later, and it would appear that forensic tests were carried out at that stage on the material collected from the scene, including the bullet fragments and the vehicle. The Special Investigation Branch report was sent to the Commanding Officer, who decided to refer the case to the Army Prosecuting Authority. The prosecutors took depositions from the soldiers who witnessed the incident and decided, having taken further independent legal advice, that there was no evidence that Lance Corporal S. had not acted in legitimate self-defence. As previously stated, eyewitness testimony was central in this case, since the cause of the death was not in dispute. The Court considers that the long period of time that was allowed to elapse before Lance Corporal S. was questioned about the incident, combined with the delay in having a fully independent investigator interview the other military witnesses, entailed a high risk that the evidence was contaminated and unreliable by the time the Army Prosecuting Authority came to consider it. Moreover, it does not appear that any fully independent investigator took evidence from the Iraqi neighbours who the applicant claims witnessed the shooting ... It appears that the delay seriously undermined the effectiveness of the investigation, not least because some of the soldiers accused of involvement in the incident were by then untraceable".

<sup>668</sup> See below, paras. 443-446.

and its timeliness in responding to complaints, which were related to its capacity constraints and funding.

427. In its 2013 judgment in *R (Ali Zaki Mousa and others) and Secretary of State for Defence No. 2*, for example, the High Court held “[t]he delay in relation to the cases of those who died in custody is such that, in our view, it amounts to a failure to discharge the duty, quite apart from being a source of great and increasing concern.” The judgment further recalled the report produced on behalf of the MoD by Brigadier Robert Aitken concerning six cases of alleged deliberate abuse and killing of Iraqi citizens. Writing in 2008, the report held, with respect to investigations preceding IHAT:

The amount of time taken to resolve some of the cases with which this report is concerned has been unacceptable. Baha Mousa died in September 2003, and his death was reported immediately; and yet the court martial of the individuals accused of his murder did not convene until September 2006 – and only now that the court martial has concluded can we consider what further inquiries may be necessary, and determine the need for subsequent administrative action; in other words, nearly four years after the event, the case has still not been concluded. Sa’eed Shabram died in May 2003, but the Formal Preliminary Examination was not held until March 2006, and the case formally discontinued in July 2006 – over three years after the event. The court martial in connection with the death of Ahmed Jabber Kareem did not convene until September 2005, 28 months after he died; by that time, three of the seven soldiers who had been accused of his murder had left the Army, and a further two were absent without leave. /In most cases, it is inappropriate for the Army to take administrative action against any officer or soldier until the disciplinary process has been completed, because of the risk of prejudicing the trial. When that disciplinary process takes as long as it has taken in most of these cases, then the impact of any subsequent administrative sanctions is significantly reduced – indeed, such sanctions are likely to be counterproductive. Moreover, the longer the disciplinary process takes, the less likely it is that the chain of command will take proactive measures to rectify the matters that contributed to the commission of the crimes in the first place.<sup>669</sup>

428. The High Court went on to observe with respect to the effect of this on IHAT’s work, “[a] further failing of the present investigation is that there seems to be recurring slippage. We are driven to the conclusion that there are likely to be further long delays before IHAT finishes its work”.<sup>670</sup>

429. As recounted earlier, the authorities appear to have taken a number of efforts to remedy the situation. For example, on 2 October 2013, when the High Court noted

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<sup>669</sup> UK EWHC, *R (Ali Zaki Mousa and others) v. Secretary of State for Defence No. 2*, [2013] EWHC 1412 (Admin), 24 May 2013, para. 186, citing UK Army, [The Aitken Report: An investigation into cases of deliberate abuse and unlawful killing in Iraq in 2003 and 2004](#), 25 January 2008, para. 38.

<sup>670</sup> UK EWHC, *R (Ali Zaki Mousa and others) v. Secretary of State for Defence No. 2*, [2013] EWHC 1412 (Admin), 24 May 2013, para. 187.

the unprecedented scale of IHAT's task and the risk of delays, it decided to appoint Justice George Leggatt, a judge of the High Court, as Designated Judge, primarily to ensure that the risks of delay and a lack of direction were minimised, but also to ensure all applications would be to a single judge familiar with the overall issues.<sup>671</sup> IHAT was required to submit periodic reports about the progress of its investigations.<sup>672</sup> The budget and the staffing of the IHAT were also subsequently strengthened. In 2014, the MoD approved a budget increase from £33.2m to £57.2m, in a three-year extension of funding until 2019.<sup>673</sup> After the full staff complement of September 2013, IHAT comprised some 145 employees, including Royal Navy Police personnel, civilian investigators and civil servants.<sup>674</sup>

430. In *Al-Saadoon & Ors v Secretary of State for Defence*, Justice Leggatt recalled the earlier above finding with respect to past conduct of the British authorities in not carrying out relevant investigations before IHAT examined the specific cases before it by observing: “[o]n any view that delay amounted to a breach of the requirement that an investigation must be prompt”.<sup>675</sup> The judgment nonetheless went on to consider the test to which IHAT should be held, namely how IHAT itself should be assessed against the procedural requirements of article 2 and 3 of the ECHR, having found that the UK authorities formerly failed to comply with those terms. The High Court held that that duty continues “throughout the period in which the authorities can reasonably be expected to take measures with an aim to elucidate the circumstances of the death and establish responsibility for it”, citing inter alia the ECtHR,<sup>676</sup> and that “if a credible new allegation or evidence of unlawful killing or ill-treatment is brought to the attention of the state authorities many years after the incident occurred, a fresh duty to take investigative measures will generally arise, although the extent of the duty may well be affected by the lapse of time”. Citing the ECtHR in *Brecknell*, Justice Leggatt observed:

... the duty to investigate historic allegations, like other positive obligations, “must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities” and only requires the authorities to take such steps as it is reasonable in all the circumstances to take to investigate the allegation: see *Brecknell v United Kingdom*, para 70. To assess what steps it is reasonable to take, it is necessary to consider what potential lines of enquiry exist and what prospect there is that pursuing those lines of enquiry will yield evidence capable of establishing the

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<sup>671</sup> UK EWHC, *R (Ali Zaki Mousa and others) v. Secretary of State for Defence No. 2*, [2013] EWHC 1412 (Admin), 24 May 2013, paras. 4-6.

<sup>672</sup> See IHAT, [Quarterly updates](#), last updated 13 September 2017.

<sup>673</sup> Independent, [No justice in sight for Iraqi victims of alleged murder, rape, and torture](#), 9 November 2014.

<sup>674</sup> Arabella Lang, Iraq Historic Allegations Team, Commons Briefing papers [CBP-7478](#), 22 January 2016, p. 7.

<sup>675</sup> *Al-Saadoon & Ors v Secretary of State for Defence (Rev 1)* [2016] EWHC 773 (Admin) (07 April 2016), para. 107.

<sup>676</sup> *Al-Saadoon & Ors v Secretary of State for Defence (Rev 1)* [2016] EWHC 773 (Admin) (07 April 2016), para. 162, citing ECtHR, *Šilih v Slovenia*, Judgment, 9 April 2009, at para. 157.

truth (or falsity) of the allegation. Factors relevant in making the assessment must, in my view, include: (i) the strength of the existing evidence; (ii) the gravity of the allegation; and (iii) the likely difficulty and cost of the possible investigative steps weighed against the likelihood that they will yield further significant evidence and the potential value of that evidence.<sup>677</sup>

431. As set out earlier, IHAT/SPLI and the SPA appear to have taken several steps to expedite their pace of activities including by introducing several filters designed to prioritise cases for investigation and prosecution, including being subject to Justice Leggatt's oversight.<sup>678</sup> In 2015, IHAT told the Office that because many of the criminal allegations it was investigating were also the subject of extensive civil litigation in the UK domestic courts, in both public law and private law proceedings, and because IHAT's own independence and effectiveness were challenged by way of judicial review twice before the High Court and once in the Court of Appeal (Ali Zaki Mousa), preparing evidence for this civil litigation at times had served to distract IHAT from its core business of conducting criminal investigations. Headquarters staff and senior investigating officers were frequently required to prepare evidence and draft witness statements.<sup>679</sup> IHAT stated that the most serious cause of delay to the progress of investigations was the severe difficulty it had experienced in obtaining the evidence of Iraqi complainants, as well as delays it said it had encountered in securing the agreement between IHAT and PIL on how the interview process would be conducted. The latter led at one point to access to witnesses and victims being suspended for 27 months.<sup>680</sup>

432. Clearly, numerous factors appear to have caused delays in the launching and carrying out of relevant criminal proceedings. Given the general requirement of a 'prompt' investigation under human rights law and international humanitarian law,<sup>681</sup> UK courts and the ECtHR have generally found that the initial measures taken at the time of the alleged offences in Iraq constituted undue delay, including due to lack of resources and access to suitably qualified and experienced investigators, poor record keeping due to negligence or even deliberate destruction of records, and other serious deficiencies in evidence collection and analyses.<sup>682</sup> With

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<sup>677</sup> [Al-Saadoon & Ors v Secretary of State for Defence \(Rev 1\)](#) [2016] EWHC 773 (Admin) (07 April 2016), para. 162, citing ECtHR, [Šilih v Slovenia](#), Judgment, 9 April 2009, at para. 198, and further at paras. 199-203.

<sup>678</sup> See above, paras. 194-196, 305-311.

<sup>679</sup> Information received from the UK authorities, 2 April 2015, para. 27.

<sup>680</sup> Information received from the UK authorities, 2 April 2015, paras. 30-40. See similarly UK EWHC, [R \(Ali Zaki Mousa and others\) v Secretary of State for Defence No. 2](#), [2013] EWHC 1412 (Admin), 24 May 2013, para. 82: "It is clear that some delay was caused by a dispute between those representing some of the claimants and the IHAT team about how the interviews were to be conducted. It is unnecessary to set out the detail, but it is clear that there has been an impasse from November 2011 in relation to a number of matters ...."

<sup>681</sup> See above, para. 417, and accompanying footnotes.

<sup>682</sup> See e.g. ECtHR, [Al-Skeini and others v United Kingdom](#), no. 55721/07, Judgment, 7 July 2011, paras. 30, 173-174; [Al-Skeini & Ors, R \(on the application of\) v Secretary of State for Defence](#) [2005] EWCA Civ 1609 (21 December 2005), paras. 140, 171.

respect to the subsequent steps taken by IHAT and SPLI, the Office concurs with Justice Leggatt's observation that "the occurrence of past delay makes yet further delay more legitimate", while also recognising that the standard of timeliness that IHAT and SPLI could reasonably have been anticipated to fulfil must be measured against the standards for historical, and not contemporaneous, investigations.<sup>683</sup> But even against that standard, it is difficult to ignore the prejudice that past failings during Op TELIC have caused to the ability of IHAT and SPLI to subsequently carry out effective investigations. While the reasons for delay on the part of IHAT or SPLI in reaching determinations on certain allegations does not appear unjustified, nor commensurate with an intent to shield persons from criminal responsibility, the frequency of recourse to the 'passage of time' criteria, discussed earlier,<sup>684</sup> shows how determinative a factor this became in shaping IHAT/SPLI's practical ability to progress many allegations of past detainee abuse.

433. Accordingly, the information available does not demonstrate a lack of willingness to genuinely carry out the proceedings, pursuant to article 17(2)(b).

### C. LACK OF INDEPENDENCE AND IMPARTIALITY

#### 1. Admissibility criteria

434. Article 17(2)(c) requires proof that "[t]he proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice". As with sub-paragraphs (a) and (b), the assessment must be conducted with regard to "the principles of due process recognized by international law".<sup>685</sup> Similar to findings under other subparagraphs of article 17(2), a finding of lack of independence or impartiality on its own is insufficient, since this must be linked to a determination that the proceedings "were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice".<sup>686</sup>

435. As set out in its policy paper on preliminary examination, for this purpose the Office may have regard to such factors as:

Independence in the proceedings at hand may be assessed in light of such indicators as, inter alia, the alleged involvement of the State apparatus, including those

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<sup>683</sup> [Al-Saadoon & Ors v Secretary of State for Defence \(Rev 1\)](#) [2016] EWHC 773 (Admin) (07 April 2016), para. 162, citing ECtHR, *Šilih v Slovenia*, Judgment, 9 April 2009, at para. 33.

<sup>684</sup> See above, para. 360.

<sup>685</sup> Art. 17(2), ICC Statute.

<sup>686</sup> See above, paras. 294-300, 414.

department (sic) responsible for law and order, in the commission of the alleged crimes; the constitutional role and powers vested in the different institutions of the criminal justice system; the extent to which appointment and dismissal of investigators, prosecutors and judges affect due process in the case; the application of a regime of immunity and jurisdictional privileges for alleged perpetrators belonging to governmental institutions; political interference in the investigation, prosecution or trial; recourse to extra-judicial bodies; and corruption of investigators, prosecutors and judges.

Impartiality in the proceedings at hand may be assessed in light of such indicators as, inter alia, connections between the suspected perpetrators and competent authorities responsible for investigation, prosecution or adjudication of the crimes as well as public statements, awards, sanctions, promotions or demotions, deployments, dismissals or reprisals in relation to investigative, prosecutorial or judicial personnel concerned.<sup>687</sup>

436. As noted earlier, the initial formulation of these factors by the Office in its 2013 Policy Paper on Preliminary Examinations drew from principles of due process set out in various international standard-setting instruments and human rights jurisprudence, in line with the chapeau requirement in article 17(2) that the Court have “regard to the principles of due process recognized by international law”.<sup>688</sup> As also noted above, the development of such principles under other sources of international law cannot be mechanically imported into the Rome Statute given their different context and sphere of application. Nonetheless, appropriate regard for how such principles have been interpreted and applied can, as mandated by article 17(2), help inform how the terms set out in article 17 should be understood within the particular context of ICC admissibility rulings.

437. Notably, the terms ‘independence’ and ‘impartiality’ appear in numerous international instruments to describe the defining attributes of a court or tribunal.<sup>689</sup> As set out below, the terms have been applied to all stages of the case under consideration, from the investigative phase to judicial proceedings.

438. In terms of statutory or institutional independence, beyond being independent of the executive and legislative branches of government,<sup>690</sup> it has generally been

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<sup>687</sup> ICC OTP, [Policy Paper on Preliminary Examinations](#), November 2013, paras. 53-54.

<sup>688</sup> See e.g. UN Human Rights Committee, *Bahamonde v. Equatorial Guinea*, Communication No. 468/1991, U.N. Doc. [CCPR/C/49/D/468/1991](#), 10 November 1993 para. 9.4; ECtHR, *Coyne v. U.K.*, no. 124/1996/743/942, ECtHR, Judgment, 24 September 1997, paras. 54-58; *Çiraklar v. Turkey*, no. 70/1997/854/1061, Judgment, 28 October 1998, paras. 38-40; IACtHR, *Villagrán Morales et al.*, Judgment, 19 November 1999, paras. 229-233; Human Rights Committee, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, [HRI/GEN/1/Rev.1](#), *General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14)*, 24 July 1994; *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, [E/CN.4/2005/102/Add.1](#), 8 February 2005.

<sup>689</sup> See e.g. art 14(1) ICCPR; art 6(1) ECHR; art 8(1) IACHR.

<sup>690</sup> Human Rights Committee, *General Comment No. 32*, Article 14: Right to equality before courts and tribunals and to a fair trial, [CCPR/C/GC/32](#), 23 August 2007, para. 18.

regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events.<sup>691</sup> This means not only a lack of hierarchical or institutional connection but also a practical independence.<sup>692</sup> This does not require that the persons and bodies responsible for the investigation enjoy absolute independence, but rather that they are sufficiently independent of the persons and structures whose responsibility is likely to be engaged.<sup>693</sup> The adequacy of the degree of independence must be assessed in the light of all the circumstances, which are necessarily specific to each case.<sup>694</sup> This calls for a concrete examination of the independence of the investigation in its entirety, rather than an abstract assessment.<sup>695</sup>

439. In comments which may be equally applicable to personnel involved in all stages of a criminal proceedings, the Human Rights Committee has held that the requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature. The status of judges, including their term in office, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by the law. Judges may be dismissed only in accordance with procedures ensuring objectivity and impartiality as set out by the law.<sup>696</sup> Moreover, a situation where the function and

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<sup>691</sup> ECtHR, *Oğur v. Turkey*, no. 21594/93, Judgement, 20 May 1999, paras. 91-92; *Giuliani and Gaggio*, no. 23458/02, Judgement, 24 March 2011, para. 300; *Mustafa Tunç and Fecire Tunç*, no. 24014/05, Judgment, 14 April 2015 para. 177; *Hugh Jordan v United Kingdom*, no. 24746/94, Judgement, 4 May 2001, para. 106; IACtHR, *Durand-Ugarte v. Perú*, Judgment, 16 August 2000, paras. 125-126; *Cantoral- Benavides v. Perú*, Judgment, 18 August 2000, para. 114; *Castillo Petruzzi et al. v. Peru*, Judgment 30 May 1999, para. 130.

<sup>692</sup> ECtHR, *Güleç v. Turkey*, no. 21593/93, Judgment, 27 July 1998, paras. 78-82; *Giuliani and Gaggio*, no. 23458/02, Judgment, 24 March 2011, para. 300; *Mustafa Tunç and Fecire Tunç*, no. 24014/05, Judgment, 14 April 2015, para. 177; *Hugh Jordan v United Kingdom*, no. 24746/94, Judgement, 4 May 2001, para. 106; *Armani Da Silva v. the United Kingdom*, no. 5878/08, Judgment, 30 March 2016, para. 232.

<sup>693</sup> E.g., the ECtHR has found that independence was lacking in investigations where the investigators were potential suspects (*Bektaş and Özalp v. Turkey*, para. 66; *Orhan v. Turkey*, para. 342, *Hugh Jordan v United Kingdom*, para. 142); were direct colleagues of the persons subject to investigation or likely to be so (*Ramsahai and Others v. the Netherlands* paras. 335-341; *Emars v. Latvia*, paras.85, 95); were in a hierarchical relationship with the potential suspects (*Sandru and Others v. Romania*, para. 74; *Enukidze and Girvliani v. Georgia*, paras. 247 et seq.). Compare *Jaloud v. the Netherlands*, para. 189 and *Mustafa Tunç and Fecire Tunç v. Turkey* para. 254.

<sup>694</sup> *Mustafa Tunç and Fecire Tunç v. Turkey*, no. 24014/05, Judgment, 14 April 2015, para. 223.

<sup>695</sup> *Mustafa Tunç and Fecire Tunç v. Turkey*, no. 24014/05, Judgment, 14 April 2015, para. 222. The approach of the ECtHR is to examine whether and to what extent the disputed circumstance has compromised the investigation's effectiveness and its ability to shed light on the circumstances of the death and to punish those responsible (*Id.*, para. 224). In this respect, it has emphasised that public prosecutors inevitably rely on the police for information and support and that this is not in itself sufficient to conclude that they lack sufficient independence vis-à-vis the police. Rather, problems arise if a public prosecutor has a close working relationship with a particular police force; *Ramsahai and Others v. the Netherlands* no. 52391/99, Judgment, 15 May 2007, para. 344.

<sup>696</sup> Human Rights Committee, *General Comment No. 32*, Article 14: Right to equality before courts and tribunals and to a fair trial, *CCPR/C/GC/32*, 23 August 2007, paras. 19-20.

competences of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible the notion of independence.<sup>697</sup>

440. A lack of independence might also be indicated by specific actions or omissions of the national authorities, such as the failure to carry out certain measures which would shed light on the circumstances of the case;<sup>698</sup> giving excessive weight to the statements of the suspects;<sup>699</sup> failure to undertake apparently obvious and necessary lines of inquiry;<sup>700</sup> and inertia.<sup>701</sup>

441. The notion of impartiality normally attaches to the individual exercise of the functions of public authority, whether as an investigator, prosecutor or judge.<sup>702</sup> It formally denotes the “absence of prejudice or bias”.<sup>703</sup> For this purpose, a distinction is often made between a subjective and objective approach. The former seeks to ascertain the personal conviction or interest of a given judge in a given case.<sup>704</sup> Arguably this notion that would be extendable to any other individuals in positions of public authority with carriage over the conduct of criminal proceedings in a particular case. The objective approach seeks to determine “whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts which may raise doubts as to its impartiality”.<sup>705</sup> What is decisive is whether the fear that a particular body lacks impartiality can be held to be objectively justified.<sup>706</sup> As with the other subparagraphs under article 17(2), there

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<sup>697</sup> *Id.*, citing UN Human Rights Committee, *Bahamonde v. Equatorial Guinea*, UN Human Rights Committee, Communication No. 468/1991, U.N. Doc. CCPR/C/49/D/468/1991, 10 November 1993, para. 9.4.

<sup>698</sup> ECtHR, *Sergey Shevchenko v. Ukraine*, no. 32478/02, Judgment 4 July 2006, para. 72-73.

<sup>699</sup> ECtHR, *Kaya v. Turkey*, 158/1996/777/978, Judgment, 19 February 1998, para. 89.

<sup>700</sup> ECtHR, *Oğur v. Turkey*, no. 21594/93, Judgment, 20 May 1999, paras. 90-91.

<sup>701</sup> ECtHR, *Rupa v. Romania (no. 1)*, no. 58478/00, Judgment, 16 March 2019, paras. 123-124; ; *Orhan v. Turkey*, no. 25656/94, Judgment, 18 June 2002, para. 344.

<sup>702</sup> See similarly art 41, ICC Statute.

<sup>703</sup> ECtHR, *Piersack v. Belgium*, no. 8692/79, Judgment 1 October 1982, para. 30; while recalling that personal impartiality is to be presumed until there is proof to the contrary (*Le Compte, Van Leuven and De Meyere v. Belgium*, no. 6878/75, 7238/75, Judgment, 23 June 1981, para. 58). See also *Hauschildt v. Denmark*, no. 10486/83, Judgment, 24 May 1989, para. 47.

<sup>704</sup> *Ibid.* ECtHR, *Warsicka v. Poland*, no. 2065/03, Judgment, 16 January 2007, para. 35; *Demicoli v. Malta*, no. 13057/87, Judgment, 27 August 1991, para. 40; IACtHR, *Herrera Ulloa v. Costa Rica*, Judgment, 2 July 2004, paras. 170-171; *Palamara Iribarne v. Chile*, Judgment, 22 November 2005, para. 146; *Granier et al. (Radio Caracas Televisión) v. Venezuela*, Judgment, 22 June 2015, para. 304; *Duque v. Colombia*, Judgment, 26 February 2016, para. 162; Human Rights Committee, *General Comment No. 32*, [CCPR/C/GC/32](#) para. 21, citing *Karttunen v. Finland*, Communication No. 387/1989, para. 7.2.

<sup>705</sup> ECtHR, *Warsicka v. Poland*, no. 2065/03, Judgment, 16 January 2007, para. 37. See also *Piersack v. Belgium*, no. 8692/79, Judgment, 1 October 1982, para. 30.

<sup>706</sup> ECtHR, *Ferrantelli and Santangelo v. Italy*, no. 19874/92, Judgment, 7 August 1996, para. 58; *Wettstein v. Switzerland*, no. 33958/96, Judgment, para. 44. See also Human Rights Committee, *General Comment No. 32*, [CCPR/C/GC/32](#), para. 21, citing *Karttunen v. Finland*, Communication No. 387/1989, para. 7.2, observing a tribunal must appear to a reasonable observer to be impartial.

may thus be some factual overlap with the evidence supporting a finding of shielding.

442. Although these decisions offer useful guidance for assessing what may constitute ‘independence’ or ‘impartiality’, the ICC will of course need to consider these terms within the context of article 17 of the Rome Statute. In particular, it should be recalled that the ICC, unlike human rights bodies, is not being tasked with determining whether a State complied with its duties to provide an effective remedy or fulfilled the procedural obligation to give effect to a fundamental human right, but whether, in the circumstances, the lack of independence or impartiality in the proceedings was “inconsistent with an intent to bring the person concerned to justice”.

## 2. Determination

### a) Royal Military Police

443. As with the issue of delay, the lack of independence and impartiality of initial investigative steps undertaken by the Royal Military Police, including its Special Investigation Branch, has also featured in judgements examining the early response of the UK authorities in the immediate aftermath of the alleged crimes. For example, the High Court in *Al Skeini* found:

... the immediate investigations were in each case conducted, as a matter of policy, by the unit involved: only in case 4, that concerning Mr Waleed Muzban, was there any involvement of the SIB, and that was stood down, at any rate before being re-opened (at some uncertain time) upon a review of the file back in the UK. The investigations were therefore not independent. Nor were they effective, for they essentially consisted only in a comparatively superficial exercise, based on the evidence of the soldiers involved themselves, and even then on a paucity of interviews or witness statements, an exercise which was one-sided and omitted the assistance of forensic evidence such as might have become available from ballistic or medical expertise.<sup>707</sup>

444. Although the appeal in the case turned on the extra-territorial application of the ECHR, the Court of Appeal nonetheless observed:

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<sup>707</sup> [\*Al Skeini & Ors, R \(on the application of\) v Secretary of State for Defence\*](#) [2004] EWHC 2911 (Admin) (14 December 2004), para. 337; also observing at para. 331, “Even if an investigation solely in the hands of the SIB might be said to be independent, on the grounds that the SIB are hierarchically and practically independent of the military units under investigation, as to which we have doubts in part because the report of the SIB is to the unit chain of command itself, it is difficult to say that the investigation which has occurred has been timely, open or effective.”

Needless to say, the obligation to comply with these well-established international human rights standards would require, among other things, a far greater investment in the resources available to the Royal Military Police than was available to them in Iraq, and a complete severance of their investigations from the military chain of command ... In other words, if international standards are to be observed, the task of investigating incidents in which a human life is taken by British forces must be completely taken away from the military chain of command and vested in the RMP. It contains the requisite independence so long as it is free to decide for itself when to start and when to cease an investigation, and so long as it reports in the first instance to the APA [Army Prosecuting Authority] and not to the military chain of command.<sup>708</sup>

445. A similar finding was entered when the case came before the ECtHR:

It follows that the initial investigation into the shooting of the fourth applicant's brother was flawed by the lack of independence of the Special Investigation Branch officers. During the initial phase of the investigation, material was collected from the scene of the shooting and statements were taken from the soldiers present. However, Lance Corporal S, the soldier who shot the applicant's brother, was not questioned by Special Investigation Branch investigators during this initial phase. It appears that the Special Investigation Branch interviewed four Iraqi witnesses, who may have included the neighbours the applicant believes to have witnessed the shooting, but did not take statements from them. In any event, as a result of the lack of independence, the investigation was terminated while still incomplete.<sup>709</sup>

446. Overall, the Office concludes that early steps taken by the UK authorities to investigate allegation appear to have been marred by a lack of independence and impartiality inconsistent with an intent to bring the persons concerned to justice. As found earlier by the ECtHR, these investigations were neither independent nor impartial, nor executed with necessary diligence to prevent suspicion of intent to shield persons from criminal responsibility. Moreover the Office recalls that the courts martial concerning the treatment of Baha Mousa and his co-detainees accepted that the men had been required to 'condition' detainees; although this finding appears to have spurred in part the mandate of the subsequent public inquiry into the circumstances surrounding his death and formed part of the mandate given to IHAT to investigate the allegations afresh.

447. While these inadequacies were acknowledged and resulted in the subsequent transfer of investigations to IHAT and later SPLI, these initial failings appear to have had a detrimental impact on the ability of subsequent historical investigations

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<sup>708</sup> *Al-Skeini & Ors, R (on the application of) v Secretary of State for Defence* [2005] EWCA Civ 1609 (21 December 2005), paras. 139-140.

<sup>709</sup> ECtHR, *Al-Skeini and others v United Kingdom*, no. 55721/07, Judgment, 7 July 2011, para. 173. See also UK Army, [The Aitken Report: An investigation into cases of deliberate abuse and unlawful killing in Iraq in 2003 and 2004](#), 25 January 2008, para. 42.

to establish relevant facts to the necessary standard. Given the frequency of the application of the ‘passage of time’ criteria by IHAT and SPLI, it would appear that these initial failings contributed not only to frustrating genuine RMP investigations, but necessarily impacted on the quality of later IHAT and SPLI inquiries. The issue does not directly engage the genuineness of IHAT or SPLI’s work, but does call into question the efficacy of measures taken to remedy those initial failings and the extent to which those failings might ultimately have affected the outcome of later inquiries.

#### **b) IHAT/SPLI and SPA**

448. The High Court also accepted that concerns arose with respect to independence and impartiality of domestic criminal inquiries also arose in relation to IHAT.<sup>710</sup> IHAT was initially staffed by a combination of RMP and civilian personnel and led by a civilian who reported to the Provost-Marshal of the Army (Head of the RMP). In 2011, the High Court observed that since the Provost-Marshal of the army was “plainly involved in matters surrounding the detention and internment of suspected persons in Iraq ... the practical independence of IHAT is, at least as a matter of reasonable perception, substantially compromised.”<sup>711</sup>

449. IHAT was reconfigured between 2012 and 2013 by MoD to become part of the Royal Navy Police (RNP), and reported to the Provost-Marshal of the Navy.<sup>712</sup> IHAT’s original mandate was also expanded to include fatality cases and to examine the findings of the Baha Mousa public inquiry to determine whether any additional prosecutions could be brought.<sup>713</sup> In May 2013, the High Court ruled that it was satisfied that IHAT was now “perceived in its investigative role to be institutionally independent from the Ministry of Defence and the hierarchy of the armed forces”.<sup>714</sup>

450. As emphasised by the UK Government in its April 2015 response to the Office, IHAT in conducting its investigations, served as a dedicated investigative resource of the RNP, which was ensured independence from the MoD by statutory and

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<sup>710</sup> [Mousa, R \(on the application of\) v Secretary of State for Defence & Anor](#) [2011] EWCA Civ 1334 (22 November 2011), paras. 34-38.

<sup>711</sup> [Mousa, R \(on the application of\) v Secretary of State for Defence & Anor](#) [2011] EWCA Civ 1334 (22 November 2011), paras. 34-38.

<sup>712</sup> Sir David Calvert-Smith, [Review of the Iraq Historic Allegations Team](#), 15 September 2016, Appendix C, IHAT ‘Terms of Reference’ 2.0, May 2014.

<sup>713</sup> Arabella Lang, Iraq Historic Allegations Team, Commons Briefing papers [CBP-7478](#), 22 January 2016, pp. 5-6.

<sup>714</sup> UK EWHC, [R \(Ali Zaki Mousa and others\) v. Secretary of State for Defence No. 2](#), [2013] EWHC 1412 (Admin), 24 May 2013, para. 121. The Iraqi Fatality Investigations, referred to earlier, was set up by the MoD as an inquisitorial body following the same High Court ruling, to undertake examine fatality cases where there is no IHAT investigation and/or no prospect of further prosecution; see paras. 212-225.

administrative safeguards, and was itself operationally independent from the MoD. The SPA, while funded by the MOD, derives its powers from the DSP, who also enjoys a number of safeguards in terms of his independence, including that his prosecutorial work is conducted under the general oversight of the Attorney General and not of the Secretary of State for Defence.<sup>715</sup>

451. The High Court also appointed Justice Sir George Leggatt as Designated Judge to minimise the risks of delay and lack of direction, and to ensure that all applications would be made to a single judge familiar with the overall issues.<sup>716</sup>
452. The Office has also considered the impact of parliamentary and executive criticism of IHAT's work which ultimately triggered the closure of IHAT. In particular, in April 2016, the Defence Sub-Committee of the UK parliament (composed of members of parliament from various political parties and appointed by the House of Commons to examine the expenditure, administration and policy of the MoD) commenced an inquiry into MoD's support for former and serving personnel subject to judicial processes and, in particular, the work of IHAT. The report, issued in February 2017, was scathing of IHAT, criticising it for inefficiency and lack of professionalism, in some cases rising to "malpractice". The Sub-Committee noted that IHAT had cost approximately £60 million and "as yet, not a single conviction has been made". It recommended the closure of IHAT.<sup>717</sup> Following an announcement by Defence Secretary Sir Michael Fallon, IHAT was permanently closed on 30 June 2017.<sup>718</sup>
453. The Office also recalls that solicitors from the two firms (PIL and Leigh Day) that provided the bulk of claims to IHAT were referred by the MoD to the Solicitors Regulation Authority for disciplinary proceedings, and that the UK Government publicly welcomed the outcome of the SDT judgment and the closure of PIL.<sup>719</sup>
454. On 29 June 2017 and 1 September 2017, ECCHR made two further follow-up submissions in which it accused the UK Government of attempting to shield "the

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<sup>715</sup> Information received from the UK authorities, 2 April 2015, para. 4. As the SPA further submitted to the Office, while the Director of Public Prosecutions and the Crown Prosecution Service work under the superintendence of the Attorney General (S 3(1) of the Prosecution of Offences Act of 1986), and while no similar provision appears in Armed Forces Act of 2006, the Attorney General and Solicitor General have a role in overseeing and ensuring the independence of all prosecutors, and prosecutors from state agencies can consult with them as necessary. The Attorney General and Solicitor General also meet with the DSP frequently and the Attorney General has asked to be kept personally informed of the progress of the IHAT cases; Information received from the UK authorities, 26-27 June 2014, para. 17.

<sup>716</sup> UK EWHC, *R (Ali Zaki Mousa and others) v. Secretary of State for Defence No. 2*, [2013] EWHC 1412 (Admin), 24 May 2013, paras. 4-6.

<sup>717</sup> House of Commons Defence Committee, '[Who guards the guardians? MoD support for former and serving personnel](#)', 10 February 2017, p. 36.

<sup>718</sup> UK Government, '[News Story: 'IHAT to close at the end of June: Defence Secretary Sir Michael Fallon has confirmed the date that IHAT will close'](#)', 5 April 2017.

<sup>719</sup> House of Commons Defence Committee, '[Who guards the guardians? MoD support for former and serving personnel](#)', 10 February 2017, paras. 9-11; Forces, '[Iraq War Law Firm Closure Welcomed By MoD](#)', 15 August 2016 (citing statement of Defence Secretary); MoD, '[Defence in the Media: Friday 3 February 2017](#)', 3 February 2017.

armed forces from legal scrutiny in cases of serious crimes and human rights abuses”.<sup>720</sup> ECCHR noted that they had, together with two other organisations, “presented information about the interference of the British Government with the work of lawyers involved in claims against the Ministry of Defence and security services in the United Kingdom in a letter to the United Nations Special Rapporteur on the independence of judges and lawyers to express its serious concerns”.<sup>721</sup>

455. With respect to the independence and impartiality of IHAT/SPLI investigations, the Office recalls that IHAT was re-configured to ensure that allegations were investigated in compliance with jurisprudence from the ECtHR. At least since 2014, the organisation seems to have possessed adequate material and human resources, including in terms of relevant expertise and capability of its investigators. In addition, cases were systematically reviewed in consultation with SPA/DSP through the Joint Case Review Panel (JCRP), with SPA lawyers partially embedded in IHAT to maximize expertise and share good practices.
456. With respect to the disciplinary action brought against solicitors of PIL and Leigh Day, notwithstanding the evident position and interest of the MoD, the subsequent SDT proceedings do not appear to have been prejudged or prejudiced. The Office also notes that Phil Shiner made a number of admissions to the SRA and did not appeal the SDT decision, while the SDT cleared solicitors from Leigh Day of all charges. In its response to the OTP in June 2017, IHAT also submitted that the closure of PIL did not affect the way information continued to be obtained from claimants, and that this was facilitated through the use of Iraqi based representatives, tasked directly by IHAT’s Overseas Cell. The tasks entrusted to the Iraqi based representatives included the collation of evidence, facilitating interviews via video conferencing or in person,<sup>722</sup> and the delivery of correspondence.<sup>723</sup>
457. The Office notes with concern the strong government and parliamentary pressure to close down IHAT before the original scheduled timeframe,<sup>724</sup> which appears to have been driven largely by political considerations in the form of a publicly stated commitment to protect the UK armed forces. This factor could be a relevant consideration for assessing whether ‘the State’ was acting with an intent to shield

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<sup>720</sup> ECCHR, [June 2017 Submission to the Office of the Prosecutor](#), 29 June 2017, pp. 1-2. *See also* ECCHR, [September 2017 Submission to the Office of the Prosecutor](#), 1 September 2017.

<sup>721</sup> ECCHR, [June 2017 Submission to the Office of the Prosecutor](#), 29 June 2017, p. 4.

<sup>722</sup> In relation to those cases that warrant further investigation, witnesses would be first interviewed via video communication system, and if required, subsequently in person. Annex A, p. 2

<sup>723</sup> Information received from the UK authorities, June 2017, p. 2.

<sup>724</sup> IHAT’s date for completion had been extended to December 2019; [Review of the Iraq Historic Allegations Team](#), para. 3.5.

persons from criminal responsibility within the meaning of article 17. However, in situations where different national institutions may demonstrate varying and inconsistent degrees of willingness/unwillingness, primary consideration should be given to the conduct of the competent authorities responsible for carrying out the proceedings in question.

458. With respect to the work of IHAT after its reconfiguration, and that of SPLI and SPA, the Office has not concluded that the proceedings were not or are not being conducted independently or impartially, of that they were or are being conducted in a manner inconsistent with an intent to bring a person concerned to justice. The Office has carefully considered allegations that the MoD of the UK Government sought to interfere with the activities of IHAT. The Office does not discount the impact that such political pressure may have had on the timelines and the material resources available to IHAT to complete its work. However, as discussed above, the Office has not identified specific information that would substantiate the conclusion that political pressure to close IHAT undermined or jeopardised the independence or impartiality of IHAT/SPLI and the SPA's work in the specific cases under investigation or referred for prosecution.

459. For the reasons set out below, this assessment may be revisited in future in consideration of the impact of any new legislation on the ability of competent domestic authorities to respond to new evidence which may come to light with respect to crimes alleged to have been committed by members of UK armed forces in Iraq.

### **c) UK Government**

460. The role that successive UK governments have played in supporting accountability efforts in relation to the alleged conduct of UK personnel in Iraq presents a mixed picture and displays varying degrees of willingness/unwillingness. On the one hand, it is acknowledged that the UK Government, and in particular the MoD, have set up the various entities charged with uncovering the facts of the events, as mandated by UK courts, such as the two public inquiries, setting up IHAT, the IFI, the SIWG, settling numerous compensation claims, and implementing the various recommendations with respect to doctrine and training, in particular on the prohibited techniques.

461. At the same time, the overall position of the UK Government can perhaps best be described as forward looking, seeking to prevent a recurrence. In terms of addressing criminal accountability for past abuses, the approach suggests that the

UK Government, and in particular the MoD, have at best been reluctant, if not at times hostile, partners to pursuing claims of criminal responsibility against members of UK armed forces. Successive statements, including by then-Prime Minister Theresa May and then-Defence Secretary, Penny Mordaunt, pledged to “stamp out” such litigation, describing the Iraqis’ claims as “spurious” and “totally without foundation,” vowing to never again let “activist left wing human rights lawyers harangue and harass the bravest of the brave,”<sup>725</sup> and asserting that the “behaviour of parasitic law firms churning out spurious claims against our armed forces on an industrial scale is the enemy of justice and humanity [...]”.<sup>726</sup> The MoD also vigorously pursued disciplinary action against the two leading law firms representing Iraqi claimants (PIL and Leigh Day). Before the House of Commons, Secretary of State for Defence, Ben Wallace, asserted that: “In 2004, Phil Shiner, a lawyer, went fishing. He fished for stories, he fished for victims and he fished for terrorists”.<sup>727</sup> And amidst a deeply unpopular political mood, IHAT itself also came under sustained criticism from the UK Government and the defence parliamentary committee, until it was ultimately closed down ahead of schedule by the then Defence Minister in a commitment to protect the armed forces from vexatious litigation.

462. Such statements appear to have been triggered by the findings of the Al Sweady Inquiry and disciplinary findings against Phil Shiner/PIL. However, the statements appear to considerably exaggerate or misstate those findings. For example, while the Al Sweady Inquiry did find the most serious allegations of torture and unlawful killing involving the six claimants in that case to be baseless and lies, it upheld as proven other lesser allegations of ill treatment. Moreover, the Al Sweady Inquiry did not judge other Iraqi claimants and the underlying facts attached to their complaints. Indeed, numerous other claims have been accepted by UK courts, the Baha Mousa Inquiry, the various IFIs, and a significant volume of compensation awards at the civil law standard have been settled out of court by the MoD. Moreover, official UK bodies and inquiries, including those of the MoD (such as the SIWG), have accepted as proven that various prohibited acts complained of (such as the use of the five techniques) occurred as a matter of practice at least during the early period of Op TELIC. Given these findings, it appears disingenuous to describe the entire body of claims, involving hundreds of claimants, as baseless or spurious.

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<sup>725</sup> Evening Standard, [Theresa May attacks 'left-wing human rights lawyers harassing UK troops'](#), 6 October 2016; Independent, [Theresa May speech: Tory conference erupts in applause as PM attacks 'activist left wing human rights lawyers'](#), 6 October 2016.

<sup>726</sup> UK Parliament, [House of Commons Hansard: Daily](#), 27 January 2016.

<sup>727</sup> UK Parliament, [House of Commons Hansard: Overseas Operations \(Service Personnel And Veterans\) Bill](#), 23 September 2020.

463. With respect to the findings by the SDT against Phil Shiner/PIL, it should also be recalled that the disciplinary tribunal made no findings on the underlying claims, and that the specific findings against Phil Shiner/PIL were conducted over a two-day summary hearing, with unrepresented respondents who largely did not contest the charges. A parallel disciplinary hearing before a different division of the SDT against Leigh Day, conducted over six-weeks with represented respondents, and overlapping with respect to a number of core issues (such as payments to witness and fee sharing arrangements between Leigh Day, PIL and intermediary Mazin Younis), cleared Leigh Day and its three respondent solicitors; a finding that was later upheld by the High Court. As such, it again appears difficult to support the proposition that the entire body of allegations has been made on the basis of vexatious or discredited claims.
464. In May 2019, the then Defence Secretary, Penny Mordaunt, called for the introduction of a ten-year statute of limitations on the prosecution of service personnel. The proposal, which was meant to govern both Northern Ireland and more recent conflicts, such as in Afghanistan and Iraq, was to stipulate that such prosecutions would not be in the public interest unless there were “exceptional circumstances”, such as if compelling new evidence emerged.<sup>728</sup> This was followed by the publication by the House of Commons Defence Committee of a report entitled *Drawing a line: Protecting veterans by a Statute of Limitations*, proposing a statutory “presumption against prosecution” to ensure that former and current service personnel be afforded “protection from vexatious claims or cycles of endless re-investigation”, qualified by an exception where compelling new evidence has been discovered.<sup>729</sup> The report also favoured amending the Human Rights Act to restrict its limited territorial application to overseas operations, contrary to the findings of the ECtHR in *Al-Skeini v UK*, and to seek to derogate from the ECHR in advance of future conflicts.<sup>730</sup>
465. On 18 March 2020, the Overseas Operations (Service Personnel and Veterans) Bill was introduced in the UK parliament.<sup>731</sup> According to the Bill’s sponsor, Defence Secretary Ben Wallace, the Bill aims “to protect our veterans against repeated

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<sup>728</sup> UK Parliament, [Statement made by Penny Mordaunt: Legal Protections and Support for Armed Forces Personnel and Veterans](#), 21 May 2019.

<sup>729</sup> House of Commons Defence Committee, [Drawing a line: Protecting veterans by a Statute of Limitations](#), Seventeenth Report of Session 2017–19, Report, together with formal minutes relating to the report Ordered by the House of Commons to be printed 16 July 2019, p. 4.

<sup>730</sup> *Id.*, paras. 146-148, citing with approval Professor Ekins’ position, advanced at paras. 115-122.

<sup>731</sup> UK Parliament, [Overseas Operations \(Service Personnel and Veterans\) Bill 2019-21](#), last accessed 26 November 2020.

reinvestigations where there is no new and compelling evidence against them, and to end vexatious claims against our Armed Forces”.<sup>732</sup>

466. In a press release on the Bill, the UK Government described it as having a “triple lock” effect, which would “give service personnel and veterans greater certainty”.<sup>733</sup> In its current form, the “triple lock” consists of: (i) a statutory presumption against the prosecution of current or former UK service personnel for offences allegedly committed in overseas operations more than five years before;<sup>734</sup> (ii) a requirement for prosecutors to give particular weight to specified factors in deciding whether to prosecute;<sup>735</sup> and (iii) a requirement to obtain the consent of the Attorney General before a prosecution may proceed.<sup>736</sup> One Member of Parliament observed that this triple lock would render a “decision to allow a prosecution to proceed following an allegation of torture after five years had elapsed” “virtually impossible”.<sup>737</sup>
467. The factors that a prosecutor must give weight to in deciding whether to prosecute include the demands of overseas military operations and the adverse effects that deployment can have on service personnel.<sup>738</sup> The Ministry of Defence has explained that giving weight to these matters “may reduce the culpability of the accused individual and move the balance of decision-making by the prosecutor in favour of not prosecuting”.<sup>739</sup>
468. The Bill would impose an absolute maximum six year time limit on bringing civil claims in connection with overseas military operations for personal injury, death and Human Rights Act actions, as well as qualify the courts’ existing discretion to extend time limits.<sup>740</sup> Additionally, the Bill would create a duty for future governments to consider derogating from the European Convention on Human Rights before “significant” overseas operations,<sup>741</sup> purportedly to maintain

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<sup>732</sup> UK Government, [Press Release: Armed Forces protected from vexatious claims in important step](#), 18 March 2020.

<sup>733</sup> UK Government, [Press Release: Armed Forces protected from vexatious claims in important step](#), 18 March 2020.

<sup>734</sup> UK Parliament, [Overseas Operations \(Service Personnel and Veterans\) Bill 2019-21](#), last accessed 26 November 2020, sections 1 and 2.

<sup>735</sup> UK Parliament, [Overseas Operations \(Service Personnel and Veterans\) Bill 2019-21](#), last accessed 26 November 2020, section 3.

<sup>736</sup> UK Parliament, [Overseas Operations \(Service Personnel and Veterans\) Bill 2019-21](#), last accessed 26 November 2020, sections 1, 2, 5.

<sup>737</sup> MP Dan Jarvis, UK Parliament, [House of Commons Hansard: Overseas Operations \(Service Personnel And Veterans\) Bill](#), 23 September 2020. *See also* MP Joanna Cherry’s similar comments: UK Parliament, [House of Commons Hansard: Overseas Operations \(Service Personnel And Veterans\) Bill](#), 23 September 2020.

<sup>738</sup> UK Parliament, [Overseas Operations \(Service Personnel and Veterans\) Bill 2019-21](#), last accessed 26 November 2020, section 3.

<sup>739</sup> MoD, [Overseas Operations \(Service Personnel and Veterans\) Bill: Explanatory Notes](#), 18 March 2020, para. 18.

<sup>740</sup> UK Parliament, [Overseas Operations \(Service Personnel and Veterans\) Bill 2019-21](#), last accessed 26 November 2020, sections 8-11.

<sup>741</sup> UK Parliament, [Overseas Operations \(Service Personnel and Veterans\) Bill 2019-21](#), last accessed 26 November 2020, section 12.

operational effectiveness; for example, “enabling detention where appropriate for imperative reasons of security”.<sup>742</sup>

469. While certain sexual offences are excluded from the Bill’s application,<sup>743</sup> the Bill would apply to other serious offences such as torture and murder. Defence Secretary Ben Wallace has explained that the reason for this differential treatment is that sexual offences are “not part of war in any way” and “not a debatable point”.<sup>744</sup> Another Member of Parliament observed that this differentiation arguably “raises the inference” that “there are circumstances in which torture is acceptable”.<sup>745</sup>

470. On 23 September 2020, the Bill passed second reading, 331 to 77.<sup>746</sup> On 21 October 2020, the House of Commons/House of Lords Joint Committee on Human Rights issued its report on the Bill, stating that “[t]he introduction of an absolute time limit to bringing human rights claims or civil litigation risks breaching the UK’s human rights obligations and preventing access to justice”. It noted that “had an absolute time limit existed in the past this would have prevented litigation that has brought to light mistreatment of detainees by UK Armed Forces, or UK complicity in extraordinary rendition and torture.”<sup>747</sup> In November 2020, the Equality and Human Rights Committee published a briefing on the Bill, noting that it was “profoundly concerned by the risk to human rights that this Bill poses”.<sup>748</sup> The Committee found that the proposed presumption against prosecution amounted to a statute of limitations which would, in principle, be applicable to international crimes and contrary to customary international law.<sup>749</sup> Nonetheless, the Bill received its report stage and Third Reading on 3 November 2020.<sup>750</sup> The Bill will now proceed to the House of Lords for consideration.

471. Various stakeholders have criticised the Bill for creating a risk of impunity for international crimes; breaching the UK’s obligations under international law (in

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<sup>742</sup> MoD, [Overseas Operations \(Service Personnel and Veterans\) Bill: Explanatory Notes](#), 18 March 2020, para. 5c.

<sup>743</sup> UK Parliament, [Overseas Operations \(Service Personnel and Veterans\) Bill 2019-21](#), last accessed 26 November 2020, section 6; Schedule 1.

<sup>744</sup> UK Parliament, [House of Commons Hansard: Overseas Operations \(Service Personnel And Veterans\) Bill](#), 23 September 2020.

<sup>745</sup> MP Michael Carmichael, UK Parliament, [House of Commons Hansard: Overseas Operations \(Service Personnel And Veterans\) Bill](#), 23 September 2020.

<sup>746</sup> UK Parliament, [House of Commons Hansard: Overseas Operations \(Service Personnel And Veterans\) Bill](#), 23 September 2020.

<sup>747</sup> House of Commons/House of Lords Joint Committee on Human Rights, [Legislative Scrutiny: The Overseas Operations \(Service Personnel and Veterans\) Bill](#), Ninth Report of Session 2019–21, 21 October 2020 para.69, going on to observe that it was “deeply concerned that the introduction of a presumption against prosecution may mean that members of the British Armed Forces are at risk of being prosecuted either in another State or before the International Criminal Court”.

<sup>748</sup> Equality and Human Rights Commission, [Briefing: House of Commons Report Stage debate on the Overseas Operations \(Service Personnel and Veterans\) Bill](#), November 2020, p. 3.

<sup>749</sup> Equality and Human Rights Commission, [Briefing: House of Commons Report Stage debate on the Overseas Operations \(Service Personnel and Veterans\) Bill](#), November 2020, pp. 5, 8.

<sup>750</sup> UK Parliament, [Overseas Operations \(Service Personnel and Veterans\) Bill 2019-21](#), last accessed 26 November 2020.

respect of investigations, prosecutions and reparations); and incentivising delays in the investigation and prosecution of service personnel.<sup>751</sup> Human Rights Watch claims that the Bill “will encourage a culture of delay and cover-up of criminal investigations”.<sup>752</sup> Former Defence Secretary Sir Malcolm Rifkind reportedly said that the Bill would create a two-tiered system in which the military had a favoured position when faced with accusations of war crimes and risked “undermining the UK’s position as a champion for the rule of law”.<sup>753</sup> Conversely, the Ministry of Defence has asserted that the Bill “will not prevent prosecutions, but will require prosecutors, when deciding whether to prosecute, to give particular weight to: the adverse effects that the prevailing conditions during that overseas operation are likely to have had on the ability of that service person or veteran to make sound judgements or exercise self-control or on their mental health; and, in cases where there has been a previous investigation and no compelling new evidence has emerged, the public interest in finality”.<sup>754</sup>

472. Among the primary stated aims of the proposed legislation is the curbing of the purported phenomena of vexatious litigation against current and former service personnel. As stated earlier, central to this has been the reliance by the Bill’s proponents on the findings on the SDT’s findings against Phil Shiner and PIL. Various British MPs have asserted that the Bill is aimed at curbing “vexatious claims” against troops, referring to the purported need to “protect our armed forces from a long shadow of vexatious claims” and asserting that “[w]hat mattered to the ambulance chasers was the money”.<sup>755</sup> However, as set out earlier, there is reason to question the soundness of this thesis to the extent that it relies on the SDT’s disciplinary findings against Phil Shiner and PIL, and overlooks the contrary findings with respect to the same body of facts in the disciplinary proceedings against Leigh Day, which was upheld by the High Court.<sup>756</sup> Moreover, as stated above, it also considerably exaggerates the findings of the Al Sweady Inquiry which were limited to the six core claimants in that case, and overlooks the numerous other claims have been accepted by UK courts, the Baha Mousa Inquiry, the various IFIs, and a significant volume of compensation awards at the civil law standard have been settled out of court by the MoD. The suggestion that all claims lodged by

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<sup>751</sup> Guardian, [The UK government is attempting to bend the rules on torture](#), 20 September 2020; Human Rights Watch, Human Rights Watch, [UK Bill a License for Military Crimes?](#), 20 March 2020; Redress, [Briefing Note on Overseas Operations Bill](#), 18 March 2020; Redress, [Overseas Operations Bill: True Freedom requires the rule of law and justice](#), 17 June 2020; The Times, [Law to protect soldiers ‘would harm reputation of UK forces’](#), 18 September 2020.

<sup>752</sup> Human Rights Watch, [UK Bill a License for Military Crimes?](#), 20 March 2020.

<sup>753</sup> Guardian, [Rifkind criticises bill to restrict British soldier torture prosecutions](#), 21 September 2020. *See also* Guardian, [The UK government is attempting to bend the rules on torture](#), 20 September 2020.

<sup>754</sup> MoD, [Overseas Operations \(Service Personnel and Veterans\) Bill: Explanatory Notes](#), 18 March 2020, para. 5.

<sup>755</sup> UK Parliament, [House of Commons Hansard: Overseas Operations \(Service Personnel And Veterans\) Bill](#), 23 September 2020.

<sup>756</sup> *See above*, paras. 313-350.

Phil Shiner and PIL have been baseless also appears to be contradicted by how UK investigative and prosecutorial bodies have treated such allegations. IHAT and SPLI, on the advice of the DSP, did not dismiss PIL claims en masse, but rather continued to examine them, albeit against an elevated threshold.<sup>757</sup> As recently as February 2020, the Officer in Command of SLPI observed that of the 82 live SPLI investigations, 71 were based on claimants originating from PIL.<sup>758</sup>

473. In terms of the perceived risk of vexatious prosecutions, moreover, the record of prosecutions directed by the SPA has shown that the very few cases that have been referred to it have been dismissed based on the application of the ‘full code test’.<sup>759</sup> As for those that have resulted in civil claims, the information available does not suggest that these were accepted at face value. Moreover, a significant number of such civil claims were disputed by the MoD in litigation before the High Court.<sup>760</sup> As the Joint Committee on Human Rights recently observed:

We also recall that there are existing powers to strike out unmeritorious claims (including those that are an abuse of process) or repeated claims brought by vexatious litigants or lawyers acting unscrupulously. We are not aware of any suggestion that the Courts have allowed wholly unmeritorious or vexatious claims through any failure or reluctance to use these powers. We call on MoD Ministers to desist from using politicised and inaccurate language in relation to claims where the MoD did have a case to answer.<sup>761</sup>

474. In sum, the Office considers that the impact of the SDT’s findings against Phil Shiner/PIL in justifying the need to introduce legislation aimed at curbing the phenomena of vexatious litigation has been considerably exaggerated.

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<sup>757</sup> See above, para. 330-335.

<sup>758</sup> See above, para. 346.

<sup>759</sup> See similarly House of Commons/House of Lords Joint Committee on Human Rights, [Legislative Scrutiny: The Overseas Operations \(Service Personnel and Veterans\) Bill](#), Ninth Report of Session 2019–21, 21 October 2020, paras. 43-46: “It is difficult to understand why the MoD is legislating to limit the ability of its own prosecutors to bring prosecutions when so few prosecutions have been brought, and when there is no suggestion that prosecutions brought by the Service Prosecuting Authority have been vexatious. /There has been no suggestion that the Service Prosecuting Authority is bringing excessive or unjustified prosecutions of members against the Armed Forces, therefore we can see no justification for introducing the statutory presumption against prosecution of Armed Forces personnel... /We cannot see any justification for introducing a statutory presumption against prosecution in cases where the Service Prosecuting Authority considers that there is sufficient evidence that a member of the Armed Forces committed an offence and has already decided that it is in the public interest to bring a prosecution.”

<sup>760</sup> See above, paras. 270-272.

<sup>761</sup> House of Commons/House of Lords Joint Committee on Human Rights, [Legislative Scrutiny: The Overseas Operations \(Service Personnel and Veterans\) Bill](#), Ninth Report of Session 2019–21, 21 October 2020, p. 4, going on to observe “Moreover, in the UK, solicitors, barristers and advocates are members of a regulated legal profession with clear codes of conduct and ethical standards. Sometimes the client they represent is the Government. Sometimes it is a member of the Armed Forces, a veteran or a civilian who wishes to bring a claim against the MoD. It is not appropriate for public office holders such as Ministers to refer generally to lawyers as “ambulance-chasing lawyers” (or other politically charged and inaccurate terms) when lawyers represent members of the Armed Forces, or civilians in their claims against the MoD—many of which have been well-founded claims. The calculated and repeated use of such derogatory language against legal professions is unbecoming and should have no place in a democracy that respects the rule of law. Similarly, the use of the term “lawfare” to describe generally any litigation brought by civilians or members of the Armed Forces against the MoD to seek justice for injuries or deaths of loved ones is also inflammatory and inaccurate.” See also *id* at paras. 118-125.

475. As to the potential relevance of the proposed legislation to the alleged conduct at issue in this report, the Office sought clarity on 24 April 2020 from the UK authorities on the impact of the proposed legislation on: (i) the cases within the scope of the preliminary examination; and (ii) any new historical allegations that might emerge in the future concerning the conduct of British forces in Iraq.<sup>762</sup> On 24 June 2020, the UK authorities responded stating, in terms of point (i):

... the Director of Service Prosecutions has confirmed that all prosecutorial decisions that are within the scope of the Iraq preliminary examination will have been taken before the Bill becomes law. Therefore, UK processes will be completed before the Bill becomes law. Given this, the Bill will have no impact on any of those cases currently with the SPLI and/or SPA.

With respect to the Office's second question (ii) above, the UK authorities responded:

The UK Government considers that such hypothetical allegations fall outside the scope of the Iraq preliminary examination and that the question of the Bill's impact upon them can therefore have no bearing on the OTP's complementarity assessment.<sup>763</sup>

476. In its letter, the UK authorities went on to say:

... the statutory presumption measure is consistent with the UK's historic commitment to international criminal justice and the rule of law, and the UK's obligations under the Rome Statute. To reiterate, for the avoidance of all doubt: the UK's position is that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level. It remains the UK's position that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes. As such, the statutory presumption measure will have no bearing on the ability or willingness of independent investigators or prosecutors in the UK to investigate or prosecute alleged crimes within the jurisdiction of the ICC, bearing in mind the admissibility provisions of Article 17 of the Rome Statute.

Rather, it creates a rebuttable presumption which leaves a prosecutor with full discretion to prosecute where they consider it would be appropriate to do so. It bears no resemblance to a legislative bar to investigations or prosecutions, such as a statute of limitations or amnesty.

Allegations of serious offences, including crimes within the jurisdiction of the ICC, will be investigated and, where appropriate, prosecuted.<sup>764</sup>

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<sup>762</sup> OTP, Letter from the Office of the Prosecutor to British Embassy of The Hague, 24 April 2020.

<sup>763</sup> Information received from the UK authorities, 24 June 2020.

<sup>764</sup> Information received from the UK authorities, 24 June 2020.

477. Although the UK authorities did not directly address whether new allegations arising from the conduct of British forces in Iraq would be impacted by the legislation, their response does emphasise the UK's persisting duty to investigate and prosecute alleged crimes within the jurisdiction of the Court. The Office notes that there remains some scope for uncertainty as to the extent and execution of that duty in the light of the wording of the proposed legislation. Indeed, the inclusion of a section on 'excluded offences' suggests that the legislation has the potential to impact the ordinary course of criminal inquiries into certain categories of conduct. The UK's assurance that "all allegations of serious offences, including those within the jurisdiction of the Court, will be investigated and, where appropriate, prosecuted" would be clearer, for example, if the crimes within the jurisdiction of the Court were set out in the exceptions section of the draft legislation. The Joint Committee on Human Rights similarly observed that war crimes, crimes against humanity, genocide and torture should be removed from the scope of the presumption against prosecution under the draft legislation.<sup>765</sup>
478. The Office's view on the compatibility of amnesties with the Rome Statute has been set out in detail both in specific cases litigated before the Court as well as in the context of other preliminary examinations.<sup>766</sup> In the Gaddafi case, Pre-Trial Chamber I, citing consistent international and regional human rights practice, found "a strong, growing, universal tendency that grave and systematic human rights violations – which may amount to crimes against humanity by their very nature – are not subject to amnesties or pardons under international law" and therefore cannot be applied to the crimes proscribed by the Rome Statute.<sup>767</sup>
479. The effect of applying a statute of limitations to block further investigations and prosecution of crimes alleged committed by British service members in Iraq would be to render such cases admissible before the ICC as a result of State inaction or alternatively State unwillingness or inability to proceed genuinely under articles 17(1)(a)-(c). The Office will continue to monitor the development of this proposed

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<sup>765</sup> House of Commons/House of Lords Joint Committee on Human Rights, [Legislative Scrutiny: The Overseas Operations \(Service Personnel and Veterans\) Bill](#), Ninth Report of Session 2019–21, 21 October 2020, para. 64.

<sup>766</sup> [Prosecution response to 'Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17\(1\)\(c\), 19 and 20\(3\) of the Rome Statute'](#); [Prosecution Response to Mr Saif Al-Islam Gaddafi's Appeal against the "Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17\(1\)\(c\), 19 and 20\(3\) of the Rome Statute'; OTP Statement](#), "The Role of the ICC in the Transitional Justice Process in Colombia, speech by James Stewart, Deputy Prosecutor of the ICC, 30 May 2018, paras. 123-131.

<sup>767</sup> [Gaddafi Admissibility Decision](#), paras. 61. The Appeals Chamber did not directly address the compatibility of amnesties under international law generally in its appeals judgment, except to note the above passage of the PTC; [Gaddafi Admissibility AJ](#), para. 96. Compare [Separate and Concurring Opinion of Judge Luz del Carmen Ibáñez Carranza](#), para. 144, citing with approval the PTC's further finding that "granting amnesties and pardons for serious acts such as murder constituting crimes against humanity is incompatible with internationally recognized human rights. Amnesties and pardons intervene with States' positive obligations to investigate, prosecute and punish perpetrators of core crimes. In addition, they deny victims the right to truth, access to justice, and to request reparations where appropriate".

legislation and its impact which may cause it to revisit its assessment in the light of new facts or evidence.<sup>768</sup>

#### **d) UK Courts**

480. Despite indications of unwillingness on the part of the UK Government and the MoD to genuinely investigate and prosecute past abuses committed by British personnel in Iraq, civilian courts, both criminal and civil, as well as other judicial mechanisms, such as relevant public inquiries and public inquests, have demonstrated a consistent record of diligence, independence and impartiality. In tandem with rulings from the ECtHR, civilian courts appear to have been largely responsible for ensuring access to justice and shown a commitment to uncovering the truth. The Office has no reason to doubt the willingness of civilian courts in seeking to ensure that the authorities genuinely investigate and prosecute such crimes.

#### **D. CONCLUSION ON GENUINENESS**

481. The seven-year long efforts of IHAT and subsequent investigations by SPLI represent a mixed picture. IHAT and SPLI have been criticised for the lack of convictions they have yielded.<sup>769</sup> To date none of the cases resulting from completed IHAT or SPLI investigations and referred for further action appear to have resulted in any prosecution in court. While acknowledging that a conviction rate should not, of itself, be determinative of the effectiveness of an institution, the Office has nonetheless examined whether this may be said to demonstrate an intent to shield.

482. The Office has identified several areas of concern with respect to IHAT/SPLI and SPA's work and their decision-making processes. These include:

- the criteria applied by IHAT/SPLI to filter allegations during different stages of the procedure following the SDT findings against Phil Shiner/PIL as well as their overall proportionality assessments with respect to the relative gravity of the offence vis-à-vis the passage of time;
- the extent to which the 'closing of ranks' phenomenon may have affected IHAT/SPLI's work;

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<sup>768</sup> See also below, para. 505.

<sup>769</sup> With respect to IHAT, see e.g. House of Commons Defence Committee, '[Who guards the guardians? MoD support for former and serving personnel](#)', 10 February 2017, para. 40.

- allegations made by some former IHAT employees that cases, including those involving superior responsibility were prematurely terminated or that there was leadership pressure not to pursue them; and
- the undoubted strain that the working operations of IHAT came under given the imminent announcement of its premature closure.

483. Against this backdrop, compensation claims continue to be settled, and for those cases not settled, litigation before the High Court has established that the underlying facts did constitute ill-treatment. This suggests that the bulk of claims meet the threshold for objective attribution to the UK armed forces. The MoD's apparent acceptance of such a large number of claims (albeit without prejudice), when considered against the small number of cases that have progressed at the criminal investigation stage, and the lack of any prosecutions resulting from IHAT/SPLI's activities, has added to those concerns.

484. Nonetheless, it is not sufficient for the Office to have concerns. The factors it has identified must be capable of demonstrating that the authorities acted in bad faith, i.e. that the relevant domestic proceedings were not conducted genuinely which, in the circumstances, demonstrates an intent to shield persons from criminal responsibility. As the Appeals Chamber has observed, this is a high threshold.<sup>770</sup>

485. The primary task of the Office is not to express its view on how it might have proceeded differently in the circumstances, nor to identify areas of disagreement with IHAT/SPLI and SPA's decision-making and operational assessments of whether cases presented a realistic prospect of obtaining sufficient evidence at the investigative stage or a realistic prospect of conviction to support a prosecution. Nor is it the Office or the Court's mandate to pronounce on whether a State complied with its duties to provide an effective remedy and fulfilled its procedural obligation to give effect to fundamental human rights enshrined in instruments such as the ECHR. The question is whether there is evidence to establish that the State concerned was unwilling to investigate or prosecute.

486. In this context, some information providers have suggested that the correct way to understand the complex issue of shielding in the context of the Iraq/UK preliminary examination is to look at the totality of factors to discern how shielding is entrenched within the military criminal justice system, rather than focussing on decisions taken in individual cases. In other words, that the Office is unlikely to ever find a 'smoking gun' with respect to shielding, but may be able to identify

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<sup>770</sup> See above, para. 283.

certain factors and patterns. Such patterns are said to start on the ground when an incident happens, where the Commanding Officer has oversight and a discretion over whether an incident proceeds to the RMP or not. In many instances, where allegations did not proceed to the RMP, this was due to a decision by the Commanding Officer to mark the incident as, for example, self-defence or a heart attack. In other instances, where incidents involving alleged abuse by interrogators were subjected to investigation, critical information was often not disclosed, meaning that the investigation came to an end. Within IHAT and SPLI, the process has tended to focus on individual cases and direct perpetrators, which prevents those institutions from clearly seeing systemic issues or identifying those higher up in the chain of command. Other indicators come from the number of IHAT investigators who complained to the BBC/Sunday Times that they were blocked both on cases focussed on individuals, as well as on systemic issues. Because IHAT could not progress these cases, the question of leadership responsibility could not be brought to light. In this context, it is noted that the risks for whistle-blowers is incredibly high given the heavy penal sanctions that apply under the Official Secrets Act. Moreover, within the military, despite efforts by some individuals to flag issues, problems continue to persist, as evidenced by recurrent reporting.<sup>771</sup> On this line of reasoning, shielding should properly be seen as entrenched in the system from the ground up: in the relationship that exists between the Commanding Officer and the RMP; in how the RMP/Service Police conducts itself; and in the powers that they do not have, which then has ripple-on effects on the effectiveness of later investigations.

487. The Office agrees that the correct approach is to examine the totality of the relevant factors in their context to determine whether shielding occurred or not. Applying this approach to the facts at issue, the Office cannot infer that the individual factors constitute a larger pattern of shielding. The Office also recalls the observation of the Appeals Chamber that, “it is an essential tenet of the rule of law that judicial decisions must be based on facts established by evidence. Providing evidence to substantiate an allegation is a hallmark of judicial proceedings; courts do not base their decisions on impulse, intuition and conjecture or on mere sympathy or

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<sup>771</sup> See e.g. the 2018 Report of the Intelligence and Security Committee of Parliament, [Detainee Mistreatment and Rendition: 2001–2010](#), 28 June 2018, pp. 26-28, describing a case study from Iraq where an investigation by the Service Police into alleged abuse by a UK interrogator was discontinued due to the non-disclosure of information by the Secret Intelligence Service (SIS). The case study notes that the “SIS informed the MoD that the threshold to allow it to disclose information (through the statutory disclosure gateway in the Intelligence Services Act 1994) had not been reached”, and goes on to note the response of the Service Police Special Investigations Branch as follows: “Given the refusal of SIS to allow access to any witnesses, I hope you agree that we have covered those Lines Of Enquiry that would allow us to commence an investigation proper”.

emotion’.”<sup>772</sup> While the Office has identified a number of concerns outlined above, it is not satisfied that it could demonstrate that this amounted to shielding.

488. Specifically, having thoroughly considered the information available, and despite the concerns that it has identified in this report, the Office is not satisfied that it could demonstrate in proceedings before the Court that the investigative actions taken by IHAT/SPLI and/or the prosecutorial decisions made by the SPA were vitiated by a lack of willingness to genuinely investigate or prosecute.

489. In the light of the above, the Office considers that the potential cases arising from the situation currently appear to be inadmissible in view of complementarity. Should new facts or evidence become available, this assessment may be revisited in the light of the Prosecutor’s functions and powers under article 15(6). In this context, the Office views with particular concern the possible passage of legislation that could effectively provide an amnesty to current and former service personnel for allegations arising from Iraq. The Office will study the future impact of such legislation, if passed, in order to consider whether the re-opening of the preliminary examination is warranted on the basis of the State’s unwillingness or inability to pursue relevant lines of criminal inquiry genuinely.

490. By setting out its assessment of the deficiencies of the domestic processes that, while falling short of the threshold of establishing shielding, nonetheless give rise to the concerns in this report, the Office seeks to convey an accurate and fair account of the domestic responses in the UK. However, these conclusions should not detract from the necessity of continuing efforts at the domestic level to bring to justice those accused of serious international crimes and thereby give effect to “the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”.<sup>773</sup>

491. In this respect, the Office recalls that the role of the ICC is not to assess whether the UK authorities have complied with their procedural obligations under article 2 and 3 of the ECHR and/or those deriving from other human rights treaty mechanisms or national legislation, a function the Office is not competent to carry out and remains unaffected by its assessment.

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<sup>772</sup> *Situation in Uganda*, Appeals Judgment on Decision on victims’ applications for participation, 23 February 2009, para. 36; *Ruto and Sang*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011, 30 August 2011, para. 62.

<sup>773</sup> Preamble, [Rome Statute](#).

## XI. CONCLUSION

492. The Iraq/UK preliminary examination has given rise to complex factual and legal assessments on complementarity.
493. In terms of subject-matter jurisdiction, the preliminary examination has shown that there is a reasonable basis to believe that various forms of abuse were committed by members of British forces against Iraqi civilians in detention. This includes the war crimes of murder, torture, rape and/or other forms of sexual violence, and forms of mistreatment amounting to inhumane and cruel treatment or outrages against personal dignity.
494. In terms of complementarity, the initial measures taken by the British army to investigate and prosecute alleged crimes in the midst and immediate aftermath of the armed conflict fell short of the standards set out in article 17(1)(a)-(b) and article 17(2) of the Statute, both in terms of inaction and unwillingness to genuinely carry out the relevant investigations.
495. In terms of subsequent steps taken by the UK authorities to establish an independent investigative body to re-examine all historical allegations against members of UK armed forces arising from the conflict in Iraq, the Office has concluded that the information available shows that the UK authorities have not remained inactive in relation to the allegations brought to the attention of the Office. Rather, they have initiated a number of criminal proceedings (involving pre-investigative assessment of claims, investigations, and a more limited number of prosecutions) in relation to the conduct of UK armed forces in Iraq. This appears to include the most notorious incidents which would likely arise from an investigation of the situation by the Office. A number of other non-criminal proceedings have also brought to light facts that appear to have fed into relevant criminal inquiries. The Office considered whether it would be correct to characterise as 'inaction' decisions taken by IHAT/SPLI or the SPA to not proceed further with the investigation and/or prosecution of certain allegations, including by means of criteria that had been developed and/or had been approved by the High Court. The Office concluded that decisions taken by domestic body on whether to progress certain investigative inquiries and/or submit specific cases to prosecution form part of the sequence of actions foreseen in article 17(1)(a)-(b).
496. The lengthy domestic process, spanning more than ten years and involving the examination of thousands of allegations, has resulted in not one single case being submitted for prosecution: a result that has deprived victims of justice. Although

IHAT and SPLI did refer a handful of cases to the SPA for prosecution, the SPA declined to prosecute in each instance on the grounds that the cases failed to meet the evidential test or the public and service interest component of the 'full code test'.<sup>774</sup>

497. Although IHAT and SPLI mainly focussed on the role of physical perpetrators and their immediate supervisors, they appear to have also examined patterns that might be evidence of systematic or systemic criminal behaviour and which might give rise to responsibility at the command/superior level. Systemic issues was one of the principal aspects of IHAT's mandate and appear to have formed a specific focus of IHAT/SPLI's work. Its early inadequacies in this regard resulted in High Court criticism in 2013 and led to adjustments of its working methodology to group allegations displaying certain 'Problem Profiles'. Some of these inquiries, including the use of certain interrogation techniques revealed by videotape evidence, appear to have formed the focus of specific lines of inquiry. In this context, the Office concluded that the UK authorities had not remained inactive in relation to broader allegations of systemic abuse or of military command or civilian superior responsibility, in the sense of failing to take "steps directed at ascertaining whether those suspects are responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses" and undertaking "tangible, concrete and progressive investigative steps". The more pertinent question for the Office in this regard was whether UK authorities have been unwilling genuinely to carry out the investigation or prosecution (article 17(1)(a)) or if a decision not to prosecute resulted from unwilling genuinely to prosecute (article 17(1)(b)).

498. In terms of unwillingness genuinely to carry out the proceedings, the Office applied the criteria in article 17(2)(a)-(c) and the factors in its own Policy Paper on Preliminary Examinations to the decisions made by IHAT/SPLI on their investigations and by the SPA on the cases referred to it for prosecution. In this context, the Office also considered the impact of various other domestic processes which either directly impacted on IHAT/SPLI and the SPA's work or helped frame the broader context in which case-specific determinations were rendered. Since the very high volume of allegations submitted to the domestic authorities (over 3,000 claims) resulted in a significantly smaller number of cases being submitted to full investigation and still fewer to prosecution, the Office focussed in particular on three sets of filtering criteria that significantly impacted on the way IHAT and the

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<sup>774</sup> See above, Section IX.E (Individual Cases).

SPA processed the numerous Iraq related claims. These included: (i) filtering criteria set out by Justice Leggatt of the High Court; (ii) filtering criteria applied after the Solicitors Disciplinary Tribunal ('SDT') findings against Phil Shiner/PIL; and (iii) filtering criteria based on an assessment of the severity of the offences. The Office also considered the extent to which IHAT/SPLI examined systemic issues and related questions of command and supervisory responsibility and undertook an inquiry into the allegations made by a number of former IHAT staff members that there was intentional disregarding, falsification, and/or destruction of evidence, as well as impeding or prevention of certain investigative inquiries and premature termination of cases.

499. For the Office to reach a conclusion on such a complex array of factors was not a straightforward process. This report has identified numerous concerns about IHAT/SPLI or SPA's decision-making and in how they had interpreted certain facts or applied the legal test at various stages of the evidentiary assessment. These concerns were exacerbated by criticisms made by a number of former IHAT investigators who expressed their view that relevant lines of inquiry that they had worked on had not advanced, that inquiries into command responsibility had been blocked, that cases had not been referred for prosecution, and that cases had been discontinued for lack of a realistic prospect of conviction. Nonetheless, the responses of the former and current leadership of IHAT, SPLI and SPA to these allegations and other concerns raised by the Office were generally reasonable. The Office cannot conclude on the basis of the information before it that there was an intent by the UK authorities to shield persons from criminal responsibility, within the meaning of article 17(2).
500. The Office also examined whether the UK authorities unjustifiably delayed proceedings, or whether relevant proceedings were marred by a lack of independence and impartiality to carry them out genuinely, in a manner that was inconsistent with an intent to bring the person(s) concerned to justice. The Office has concerns about the impact of the initial failings by the UK authorities to conduct independent and impartial investigations into allegations in the midst and immediate aftermath of the conflict in Iraq, as well as the delay in conducting relevant investigative inquiries that resulted from this failure. Those failings had a direct impact on the later effectiveness and pace of IHAT and SPLI investigations and the Office concludes that those initial responses were vitiated by unjustified delay as well as a lack of independence and impartiality which in the circumstances was inconsistent with bringing the person(s) concerned to justice, pursuant to articles 17(2)(b)-(c) of the Statute. However, the Office's assessment of the genuineness of IHAT/SPLI and SPA's work was more complex. While the Office

identified various issues of concern on the issue of delay, it could not attribute them to a lack of willingness to carry out the proceedings genuinely within the terms of those two sub-provisions. Of more immediate and potentially tangible an impact on the admissibility assessment was the recent proposed legislation that would introduce a presumption against prosecution for the crimes set out in this report (currently excluding SGBC). Since the adoption of any such legislation remains prospective, the Office will only be able to factor in its impact, once it is adopted, on the ability of the UK authorities to address ongoing cases or any historical allegations that may arise in the future, and thereafter assess whether there is a basis for the Office to reconsider its determination under article 15(6) of the Statute.

501. The Office must now decide whether it should keep the preliminary examination open; close the preliminary examination; or open an investigation. Although the Appeals Chamber has recently held that admissibility does not form part of a Pre-Trial Chamber's determination under article 15(4), it nonetheless stressed the persisting duty of the Prosecutor, under rule 48, to be satisfied that all of the factors relevant to the opening an investigation, including admissibility, are met before proceeding with an article 15 application.<sup>775</sup> Moreover, such a requirement is necessary to anticipate possible deferral requests under article 18 of the Statute.<sup>776</sup> As set out elsewhere in this report, to satisfy this requirement, mere disagreement or conflicting opinion is not enough: the Office would need to be able to substantiate why it should proceed, based on an assertion of unwillingness on the part of the domestic authorities to genuinely investigate and prosecute such conduct as a result of shielding.

502. The Office recalls that, based on its evaluation of the totality of the information available, it cannot conclude that the UK authorities have been unwilling genuinely to carry out relevant investigative inquiries and/or prosecutions (article 17(1)(a)) or that decisions not to prosecute in specific cases resulted from unwillingness genuinely to prosecute (article 17(1)(b)). Specifically, for the purpose of article 17(2), the Office cannot conclude that the relevant investigative inquiries or investigative/prosecutorial decisions were made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; that there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; or that the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the

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<sup>775</sup> [Afghanistan AJ](#), paras. 35-40.

<sup>776</sup> See [Afghanistan AJ](#), paras. 42-43.

circumstances, is inconsistent with an intent to bring the person concerned to justice.

503. On this basis, having exhausted all avenues available and assessed all information obtained, the Office has determined that the only appropriate decision is to close the preliminary examination and to inform the senders of communications. While this decision might be met with dismay by some stakeholders, while viewed as an endorsement of the UK's approach by others, the reasons set out in this report should temper both extremes.
504. The Office has set out in some detail its assessment of various aspects of the domestic processes which, while falling short of evidence demonstrating unwillingness, continue to be areas of concern. The Office's findings are also without prejudice to a State's duty to provide an effective remedy to the victims under national or international law more generally.
505. The Office's conclusion that the information provided does not constitute a reasonable basis for an investigation does not preclude the Prosecutor from considering, under article 15(6), further information submitted to him or her regarding the same situation in the light of new facts or evidence. In the light of the due diligence implicit in this provision, the Office will consider any new information it may receive on the remaining allegations under investigation by SPLI and/or under consideration by SPA, including the pending 'Problem Profile' cases concerning possible pattern evidence and command responsibility; and any additional information substantiating allegations into intentional and improper interference with the conduct of genuine domestic inquiries; and the impact of any new legislation on the ability of the competent domestic authorities to consider new allegations arising from the conduct of UK armed forces in Iraq.