Extracts from the OTP's Final Report on the Situation in Iraq/UK submitted to the Joint Committee on Human Rights

The following passages, extracted from the final report of the Office of the Prosecutor ('OTP' or 'Office') into the Situation in Iraq/UK, of 9 December 2020, relate to the questions:

(i) whether the claims concerning the conduct of UK service members in Iraq were vexatious (paragraphs 1-7, 313-350); and

(ii) the possible impact of the Overseas Operations (Service Personnel and Veterans) Bill on the exercise of jurisdiction by the International Criminal Court ('ICC' or 'Court) (paragraphs 460-479, 489).

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 the 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.[1] 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.[2] This spilled over into the early rotations of Operation Telic ("Op TELIC"), with UK service members holding differing views on what was permissible.[3] 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 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

[1] *See below*, para. 56.
[2] *See below*, paras. 56-58.
[3] *See below*, para. 59.

investigations into allegations of wilful killing and abuse of detainees in Iraq.[4] 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 on 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'.[5] 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

[4] 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 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.
[5] *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

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.[532]

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".[533] 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

[532] *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).
[533] Al Sweady Inquiry, Report: Volume II, December 2014, para. 5.201.

were armed insurgents and not Iraqi civilians.[534] 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.[535]

316. The SDT panel found Phil Shiner (of PIL) guilty of 12 allegations of professional misconduct, including of having acted dishonestly in five charges.[536] 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.[537]

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.[538]

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 "(…)

[534] *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.
[535] SRA, Al Sweady Inquiry Statement, 7 April 2016.
[536] Solicitors Disciplinary Tribunal, *Solicitors Regulation Authority and Philip Joseph Shiner*, Judgement, 29 March 2017.
[537] *Ibid*.
[538] *Ibid*.

had sought to conceal his wrongdoing through the construction of elaborate strategies to mislead the SRA (…)".[539]

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 2nd August 2016 that it had terminated its contract with and funding of PIL due to proven contractual breaches by the latter.[540]

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.[541] 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.[542]

321. The SDT's findings with respect to Leigh Day and its solicitors were later upheld on appeal.[543] 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,

---

[539] *Id*, p. 76, para. 102.
[540] *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".
[541] Solicitors Disciplinary Tribunal, *Solicitors Regulation Authority and Day & Ors*, Judgment, 22 September 2017.
[542] *Id*, para. 33; *see also* paras. 146.63 and 147.44.
[543] 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;[544] 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); [545] or that there was payment of a prohibited referral fee to Mazin Younis.[546] 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.[547]

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

[544] *Id*, paras. 88-110.
[545] *Id*, paras. 197-207.
[546] *Id*, paras. 235-236.
[547] *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.[548] 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'.[549]

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.[550] 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.[551]

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

---

[548] *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.

[549] 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.

[550] Information received from the UK authorities, 5 June 2017.

[551] 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. [552]

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[553] 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".[554] 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.[555]

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.

---

[552] 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.

[553] 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.

[554] Typed version of Paul Mcnab's manuscript note; Information received from the UK authorities, 5 June 2017.

[555] 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.[556]

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.[557]

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.[558]

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

[556] Information received from the UK authorities, 5 June 2017, Annex A, p. 4.
[557] *Id*, p. 6.
[558] *Id*, p. 5.

allegations, and 4 relate to circumstances which involve allegations of both unlawful killing and ill treatment.)"[559]

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.[560]

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."[561] 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. [562]

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. [563]

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.

---

[559] *Id*, p. 6.
[560] *Id*, p. 5.
[561] *Id*, p. 5.
[562] *Id*, p. 5.
[563] *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.[564] 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.[565] 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

[564] *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.
[565] *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.[566]

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.[567]

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.[568]

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.[569]

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.[570] 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.[571] 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.

---

[566] Information received from the UK authorities, 5 June 2017, para. 18.
[567] *Id,* paras. 20-21.
[568] *Id*, paras. 18, 20-21. *See also* Solicitors Disciplinary Tribunal, *Solicitors Regulation Authority and Philip Joseph Shiner*, Judgement, 29 March 2017, paras. 99, 101 and 102.
[569] Information received from the UK authorities, 5 June 2017, Annex A, p. 1.
[570] Solicitors Disciplinary Tribunal, *Solicitors Regulation Authority and Day & Ors*, Judgment, 22 September 2017, paras. 33, 146.63 and 147.44.
[571] *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.[572]

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:

[572] Information received from the UK authorities, 8 August 2018, para. 16.

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,"[725] 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 […]".[726] 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".[727] 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.

[725] 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.
[726] UK Parliament, House of Commons Hansard: Daily, 27 January 2016.
[727] 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.[728] 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.[729] 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.[730]

465. On 18 March 2020, the Overseas Operations (Service Personnel and Veterans) Bill was introduced in the UK parliament.[731] According to the Bill's sponsor, Defence Secretary Ben Wallace, the Bill aims "to protect our veterans against repeated

[728] UK Parliament, Statement made by Penny Mordaunt: Legal Protections and Support for Armed Forces Personnel and Veterans, 21 May 2019.
[729] 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.
[730] *Id*, paras. 146-148, citing with approval Professor Ekins' position, advanced at paras. 115-122.
[731] 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".[732]

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".[733] 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;[734] (ii) a requirement for prosecutors to give particular weight to specified factors in deciding whether to prosecute;[735] and (iii) a requirement to obtain the consent of the Attorney General before a prosecution may proceed.[736] 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".[737]

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.[738] 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".[739]

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.[740] Additionally, the Bill would create a duty for future governments to consider derogating from the European Convention on Human Rights before "significant" overseas operations,[741] purportedly to maintain

[732] UK Government, Press Release: Armed Forces protected from vexatious claims in important step, 18 March 2020.
[733] UK Government, Press Release: Armed Forces protected from vexatious claims in important step, 18 March 2020.
[734] UK Parliament, Overseas Operations (Service Personnel and Veterans) Bill 2019-21, last accessed 26 November 2020, sections 1 and 2.
[735] UK Parliament, Overseas Operations (Service Personnel and Veterans) Bill 2019-21, last accessed 26 November 2020, section 3.
[736] UK Parliament, Overseas Operations (Service Personnel and Veterans) Bill 2019-21, last accessed 26 November 2020, sections 1, 2, 5.
[737] 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.
[738] UK Parliament, Overseas Operations (Service Personnel and Veterans) Bill 2019-21, last accessed 26 November 2020, section 3.
[739] MoD, Overseas Operations (Service Personnel and Veterans) Bill: Explanatory Notes, 18 March 2020, para. 18.
[740] UK Parliament, Overseas Operations (Service Personnel and Veterans) Bill 2019-21, last accessed 26 November 2020, sections 8-11.
[741] 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".[742]

469. While certain sexual offences are excluded from the Bill's application,[743] 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".[744] Another Member of Parliament observed that this differentiation arguably "raises the inference" that "there are circumstances in which torture is acceptable".[745]

470. On 23 September 2020, the Bill passed second reading, 331 to 77.[746] 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."[747] 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".[748] 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.[749] Nonetheless, the Bill received its report stage and Third Reading on 3 November 2020.[750] 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

---

[742] MoD, Overseas Operations (Service Personnel and Veterans) Bill: Explanatory Notes, 18 March 2020, para. 5c.
[743] UK Parliament, Overseas Operations (Service Personnel and Veterans) Bill 2019-21, last accessed 26 November 2020, section 6; Schedule 1.
[744] UK Parliament, House of Commons Hansard: Overseas Operations (Service Personnel And Veterans) Bill, 23 September 2020.
[745] MP Michael Carmichael, UK Parliament, House of Commons Hansard: Overseas Operations (Service Personnel And Veterans) Bill, 23 September 2020.
[746] UK Parliament, House of Commons Hansard: Overseas Operations (Service Personnel And Veterans) Bill, 23 September 2020.
[747] 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".
[748] 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.
[749] 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.
[750] 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.[751] Human Rights Watch claims that the Bill "will encourage a culture of delay and cover-up of criminal investigations".[752] 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".[753] 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".[754]

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".[755] 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.[756] 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

[751] 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.
[752] Human Rights Watch, UK Bill a License for Military Crimes?, 20 March 2020.
[753] 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.
[754] MoD, Overseas Operations (Service Personnel and Veterans) Bill: Explanatory Notes, 18 March 2020, para. 5.
[755] UK Parliament, House of Commons Hansard: Overseas Operations (Service Personnel And Veterans) Bill, 23 September 2020.
[756] *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.[757] 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.[758]

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'.[759] 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.[760] 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.[761]

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.

---

[757] *See above*, para. 330-335.
[758] *See above*, para. 346.
[759] *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."
[760] *See above*, paras. 270-272.
[761] 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.[762] 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.[763]

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.[764]

[762] OTP, Letter from the Office of the Prosecutor to British Embassy of The Hague, 24 April 2020.
[763] Information received from the UK authorities, 24 June 2020.
[764] 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.[765]

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.[766] 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.[767]

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

[765] 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.
[766] 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.
[767] *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.[768]

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.[769] 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;

[768] *See also* below, para. 505.
[769] 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.

emotion'."[772] 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".[773]

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.

[772] *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.
[773] Preamble, Rome Statute.