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War crimes by UK forces in Iraq

**Follow-up communication by the European Center for Constitutional and Human
Rights to the Office of the Prosecutor of the
International Criminal Court**

31 July 2019

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I. INTRODUCTION

In 2017, the European Center for Constitutional and Human Rights (ECCHR) submitted to the Office of the Prosecutor (hereinafter “the OTP”) updated information and analysis relevant to the preliminary examination on the responsibility of UK officials for war crimes involving systematic detainee abuse – including but not limited to torture, sexual violence, inhuman treatment and outrages upon personal dignity – in Iraq from 2003 to 2008.¹ This followed the more extensive communication submitted to the OTP together with Public Interest Lawyers in January 2014 (hereinafter the “2014 Communication”)² and the OTP’s decision in May 2014 to re-open the preliminary examination of the situation.

In its 2017 Report on Preliminary Examination Activities, the OTP announced it had concluded that there is a reasonable basis to believe that members of the UK armed forces committed war crimes within the jurisdiction of the International Criminal Court against persons in its custody and that it was focusing on the assessment of admissibility.³ In its most recent report from December 2018, the OTP noted that it continues to assess both complementarity and gravity as part of its admissibility assessment and that it expects to finalize this assessment in the near future.⁴

With this submission, ECCHR wishes to provide the OTP with information on domestic proceedings and other developments in the UK that have occurred since its last submissions as well as an analysis of how this information may feed into the OTP’s ongoing admissibility assessment.

¹ Submitted on 29 June 2017 and on 1 September 2017. Both submissions are available at www.ecchr.eu/en/case/war-crimes-by-uk-forces-in-iraq/.

² Communication to the Office of the Prosecutor of the International Criminal Court, The Responsibility of Officials of the United Kingdom for War Crimes Involving Systematic Detainee Abuse in Iraq from 2003-2008, submitted on 10 January 2014 by the European Center for Constitutional and Human Rights (ECCHR) and Public Interest Lawyers (PIL) [hereinafter the “2014 Communication”], available at https://www.ecchr.eu/fileadmin/Juristische_Dokumente/January_2014_Communication_by_ECCHR_and_PIL_to_ICC_OTP_re_Iraq_UK_public_version_.pdf. See also subsequent submissions to the OTP by Public Interest Lawyers.

³ Office of the Prosecutor, Report on Preliminary Examination Activities 2017, 4 December 2017, para. 45.

⁴ Office of the Prosecutor, Report on Preliminary Examination Activities 2018, 5 December 2018, paras. 200-209, 213.

In summary, ECCHR finds that UK authorities have failed to undertake any investigations or prosecutions to determine the liability of those bearing the greatest responsibility for the war crimes committed in Iraq, despite significant and growing evidence indicating that liability extends up the chain of command to senior military and civilian officials. Domestic proceedings undertaken to date in the UK have been limited in focus to a handful of low-level perpetrators and have been beset by problems indicating an unwillingness on the part of the government to allow genuine investigations. ECCHR reiterates that the scale and nature of the alleged crimes, the manner in which they were committed and the very serious long term impact on survivors indicate the requisite gravity. Iraqi victims of abuse by UK forces are still waiting for justice after the vast majority of their cases have been dismissed in the UK, while members of the executive branch – along with the parliamentary committees which are supposed to provide scrutiny of government – ignore the overwhelming evidence of widespread detainee abuse, dismiss Iraqi testimonies as spurious lies and discuss strategies to prevent prosecutions for crimes in Iraq.

ECCHR considers that the information available establishes a reasonable basis to proceed and urges the OTP to request the authorization to open an investigation in accordance with Article 15(3) of the Rome Statute.

II. OVERVIEW OF DOMESTIC PROCEEDINGS CARRIED OUT IN THE UK TO DATE

This section provides a summary of the various domestic proceedings carried out in the UK to date relating to the treatment of detainees in Iraq. The relevance of these proceedings with respect to the OTP's complementarity analysis is addressed below at Section IV.

A. Proceedings of a criminal law nature

1. Prosecutions

Publicly available information indicates there were courts-martial held in connection with at least four incidents of the abuse and/or deaths of Iraqi detainees or civilians.⁵ Four soldiers were convicted in 2005 in connection with abuse photographed at Camp Breadbasket.⁶ In a separate court-martial in 2005, charges of murder and violent disorder were dropped against seven soldiers in the case of an 18 year old Iraqi who died after being assaulted.⁷ A court-martial in 2006 on the death of a 15 year old Iraqi ended in the acquittal of all four defendants.⁸ One soldier was convicted of inhumane treatment in 2006/7 in the case of the death of Baha Mousa.⁹

⁵ The courts-martial are set out in detail in the 2014 Communication, *supra* note 2, at pp. 221-224. See also Dr Carla Ferstman, Dr Thomas Obel Hansen and Dr Noora Arajärvi, 'The UK Military in Iraq: Efforts and Prospect for Accountability for International Crimes Allegations', 1 October 2018, available at https://www1.essex.ac.uk/hrc/documents/THE_UK_MILITARY_IN_IRAQ_1Oct2018.pdf, which states that a total of seven soldiers were convicted at court-martial in connection with criminal activity in Iraq. Courts-martial were also held in cases concerning burglary, see UK Ministry of Defence, 'Systemic Issues Identified from Service Police and Other Investigations into Military Operations Overseas: August 20018,' available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/737152/20180830-Review_of_systemic_issues_arising_from_military_operations_overseas_Fourth_Report.pdf, at para. 6.1.6.

⁶ 2014 Communication at pp. 221-222. This included one case against three soldiers (*R v. Kenyon, Larkin and Cooley*) as well as a separate court-martial for a fourth soldier who pleaded guilty to taking the photographs. See 'Iraq abuse case soldiers jailed', *BBC*, 25 February 2005, available at http://news.bbc.co.uk/2/hi/uk_news/4296511.stm. See also Rachel Kerr, 'The UK in Iraq and the ICC: Judicial Intervention, Positive Complementarity and the Politics of International Criminal Justice', in Morten Bergsmo and Carsten Stahn (eds.), *Quality Control in Preliminary Examination: Volume 1*, Appendix 2, at pp. 487-488.

⁷ 2014 Communication, *supra* note 2, at p. 222. This case concerned the death of Nadhem Abdullah.

⁸ *Ibid.*, at p. 223. This case concerned the death of Ahmed Jabbar Kareem.

⁹ *Ibid.*, at p. 223. The other six accused in this case were not convicted.

At least one other case was referred to the Crown Prosecution Service and resulted in a not guilty verdict.¹⁰ Twelve other allegations were investigated but did not lead to prosecutions.¹¹

2. *The Iraq Historic Allegations Team and the Service Police Legacy Investigations*

The Iraq Historic Allegations Team, set up to review and investigate allegations of unlawful killings and ill-treatment of Iraqi civilians by UK armed forces personnel from March 2003 to July 2009,¹² was shut down in June 2017.¹³ IHAT received or identified a total of 3,629 allegations.¹⁴ 70% of the allegations were dismissed before reaching the full investigation stage.¹⁵ At the time of closing IHAT had completed or discontinued investigations into 2,367 of the 3,629 allegations.¹⁶

None of IHAT's investigations resulted in prosecutions in connection with unlawful killing or the ill-treatment of detainees.¹⁷ IHAT referred one case of unlawful killing and one case of ill-treatment to the Director of Service Prosecutions for prosecution who in both cases decided not to proceed.¹⁸ Two cases (again, one concerning unlawful killing and one concerning ill-treatment) were referred to the Royal Air Force Police for further investigation but were subsequently closed.¹⁹ One soldier, who admitted his responsibility for the brutal beating of an

¹⁰ 'The UK Military in Iraq: Efforts and Prospect for Accountability', *supra* note 5, at p. 12.

¹¹ *Ibid.*

¹² IHAT's mandate and structure have been previously set out in the 2014 Communication, at pp. 229-234.

¹³ On the political pressure surrounding to the decision to close IHAT see Section IV.B.2.2.

¹⁴ 'Systemic Issues Identified from Service Police and Other Investigations into Military Operations Overseas: August 2018,' *supra* note 5, at p. 1.

¹⁵ See 'Work Completed', information from the IHAT website, available at <https://www.gov.uk/government/groups/iraq-historic-allegations-team-ihat>.

¹⁶ 'Systemic Issues Identified from Service Police and Other Investigations into Military Operations Overseas: August 2018,' *supra* note 5, at p. 1.

¹⁷ Criminal proceedings were undertaken in one case connected with IHAT's investigations. An IHAT investigator was convicted in a Magistrates' court of impersonating a police officer in the course of an IHAT investigation. See: Defence Committee, Sixth Report of Session 2016-17, 'Who guards the guardians? MoD support for former and serving personnel', Appendix, Government's response, 5 April 2017, available at <https://publications.parliament.uk/pa/cm201617/cmselect/cmdfence/1149/114902.htm>. See para. 13.

¹⁸ IHAT Quarterly update, October to December 2016, dated 14 March 2016, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/617305/2017_116-Quarterly_Update_website_Dec16.pdf. See pp. 2-3.

¹⁹ *Ibid.* The information provided by IHAT does not give any more details on the nature of these cases.

Iraqi civilian that was captured on video and sent to the Mail on Sunday, was referred by IHAT to his commanding officer for disciplinary action and fined £3,000.²⁰

After IHAT was shut down, 1,260²¹ remaining allegations were reintegrated into the service police system and assigned to the Service Police Legacy Investigations (SPLI), a body set up for this purpose and led by a senior Royal Navy Police Officer.²² The SPLI's most recent quarterly update reports that SPLI has closed or is closing 1,133 allegations.²³ As of 31 March 2019, 145 allegations were still under investigation.²⁴ It appears that SPLI is considering circa 20 new allegations. i.e. allegations that were not inherited from IHAT.²⁵ SPLI inherited one referral from IHAT to the Service Prosecuting Authority, which subsequently discontinued work on the case.²⁶ Publicly available information makes no mention of any cases referred for prosecution by SPLI to date.

B. Proceedings not of a criminal law nature

For the sake of completeness, ECCHR includes here an overview of fact-finding inquiries and other proceedings which are *not* carried out with a view to conducting criminal investigations and/or prosecutions.

1. Iraq Fatalities Investigations

The Iraq Fatalities Investigations is an ad-hoc judicial inquiry tasked with investigating the circumstances surrounding Iraqi deaths involving British forces. Similar to an inquest into a

²⁰ See IHAT Work Completed Table, updated October 2017, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/649525/20171003-IHAT_NEW_master_copy_website_work_completed_table-HQComms_O.pdf. See Case Number IHAT 97.

²¹ Initial SPLI reports stated that SPLI inherited 1,262 allegations. This figure was corrected to 1,260 in the SPLI Quarterly Update, July to September 2018, dated 30 September 2018, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/758500/20181120-SPLI_FINAL_QTR_REPORT_Jul-Sep18.pdf. The report states that one allegation had been incorrectly classified; it is unclear why the total number of allegations was then reduced by two.

²² See SPLI website at <https://www.gov.uk/guidance/service-police-legacy-investigations>.

²³ SPLI Quarterly Update, January to March 2019, dated 1 January [sic] 2019, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/804428/20190510-SPLI_QTR_RPT_1JAN19_31MAR19_FINAL_EM.pdf. See para. 2.1.

²⁴ *Ibid.*, at para. 2.2.

²⁵ *Ibid.*, Table 1, comparing allegations received/identified in July 2017 with allegations received/identified in March 2019.

²⁶ *Ibid.*, at para. 3.

death, the IFI seeks to bring to light all the facts relating to the immediate and surrounding circumstances in which the deaths occurred but does not determine civil or criminal liability. Cases are referred by the Ministry of Defence to the IFI “only after it has been decided that there is no realistic prospect of a criminal conviction”.²⁷ Reports have now been issued into 7 deaths and an investigation is ongoing into the death of Saeed Radhi Shabram Wawi Al-Bazooni, who drowned in a river on 23 May 2003 following an interaction with a British 2nd Lieutenant.²⁸ A follow-up report is due to be published in the case of Ahmed Jabbar Kareem Ali, a 15-year old boy who drowned in a canal in May 2003 after British soldiers forced him into the water and “failed to go to his assistance when he floundered, thereby causing his death”.²⁹

The most recent development in these proceedings is the release, on 26 March 2019, of the IFI report into the death of Tariq Sabri Mahmud, who died in custody while being transported by helicopter by UK RAF personnel in April 2003.³⁰

The incident first came to light as a consequence of an anonymous telephone call from someone with knowledge of the mission³¹ who said that a prisoner had been beaten to death in a helicopter by three RAF Regiment personnel.³² According to the IFI, the caller said that

On the way back one of the prisoners tried to escape and a scuffle broke out. Once the prisoner was back under control he was continually beaten and ended up dead. During the assault those carrying it out were laughing ... The dead POW was buried in the

²⁷ ‘About the Iraq Fatality Investigations’, information from the IFI website, available at <https://www.gov.uk/government/collections/iraq-fatality-investigations#current-cases>.

²⁸ ‘Concluded cases’, *ibid.* See also ‘In the matter of an investigation into the death of Mr Saeed Radhi Shabram Wawi Al-Bazooni, First Outline Statement of Issues for Investigation’, 8 November 2018, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/754960/First_Outline_Statement.pdf.

²⁹ See ‘Details’, information on the Investigation into the death of Ahmed Jabbar Kareem Ali, available at <https://www.gov.uk/government/publications/investigation-into-the-death-of-ahmed-jabbar-kareem-ali>. This case is addressed in the 2014 Communication at p. 107.

³⁰ This case was detailed in the 2014 Communication at p. 106.

³¹ Iraq Fatality Investigations, Consolidated Report into the death of Tariq Sabri Mahmud, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/789240/MAH_MUD_FINAL_The_Iraq_Fatality_Investigations_2019_Web_accessible.pdf. See para. 6.97.

³² Ian Cobain, ‘RAF helicopter death revelation leads to secret Iraq detention camp’, *The Guardian*, 7 February 2012, available at <https://www.theguardian.com/world/2012/feb/07/iraq-death-secret-detention-camp>.

*desert and the incident covered up by saying that he had choked on the sandbag. There was no Post Mortem.*³³

In his report, IFI chairman Sir George Newman found that Tariq Mahmud more likely than not died as a result of his handling in the aircraft and did not die from a heart attack as originally claimed by service personnel.³⁴ The precise cause of death could not be established, given the absence of a post mortem and medical evidence.³⁵ Tariq Mahmud was restrained using significant force³⁶ to get him to the ground by kicking his legs from beneath him and lying him on his front where he was plasticuffed at the back and hooded.³⁷ The report indicates that hooding with sandbags representing standard practice at the relevant time.³⁸

The timeline for the IFI's future work is currently uncertain following the recent death of its chairman, Sir George Newman.³⁹

A separate judicial review process overseen aimed at providing oversight of the IFI, IHAT and now SPLI investigations is still ongoing.⁴⁰

2. Public inquiries

There have been two public inquiries set up in the UK which have examined issues relating to the treatment of detainees by British forces in Iraq. The Baha Mousa Inquiry, which published its report in September 2011, examined the death of Iraqi citizen Baha Mousa after he was violently assaulted by British soldiers. The Inquiry, including its findings on failures in training that contributed to the abuse, is set out in detail in the 2014 Communication.⁴¹ The Al-Sweady Inquiry, which concluded in December 2014, was set up to investigate allegations of unlawful

³³ Consolidated Report into the death of Tariq Sabri Mahmud, *supra* note 31, at para 6.95.

³⁴ *Ibid.*, at paras. 11.1, 11.21, 11.30.

³⁵ *Ibid.*, at para. 12.7.

³⁶ *Ibid.*, at para 5.4.

³⁷ *Ibid.*, at paras. 6.38, 11.26.

³⁸ *Ibid.*, at paras. 5.2, 6.10.

³⁹ Robert Mendick, 'Soldiers facing investigation over Iraq deaths in further limbo after judge in charge of inquiry dies', *The Independent*, 15 June 2019, available at <https://www.telegraph.co.uk/news/2019/06/15/soldiers-facing-investigation-iraq-deaths-limbo-judge-charge/>.

⁴⁰ *Al-Saadoon and others v Secretary of State for Defence* CO/5608/2008.

⁴¹ 2014 Communication at pp. 20-32, 170. See also ECCHR's June 2017 submission, *supra* note 1 at pp. 5-6.

killing and ill-treatment of Iraqis by British soldiers at Camp Abu Naji and a detention facility at Shaibah Logistics Base.⁴² The Inquiry dismissed as unfounded the allegations of unlawful killing but confirmed that detainees were subjected to ill treatment in the form of forced stripping (involving humiliation)⁴³, blindfolding⁴⁴, sleep deprivation,⁴⁵ invasion of detainees' personal space,⁴⁶ and harshing techniques⁴⁷ including the inadequate provision of food.⁴⁸

3. *Systemic Issues Working Group*

The Systemic Issues Working Group was set up by the Ministry of Defence with the stated aim of identifying, reviewing, and correcting areas where its doctrine, policy and training had contributed to practices or conduct that breach international humanitarian law.⁴⁹ To date, it has published four reports into issues identified in the course of investigations into military operations in Iraq and Afghanistan, including assault, hooding, sleep deprivation and stress positions.⁵⁰

4. *Civil litigation*

The High Court handed down its judgment in *Alseran and others v Ministry of Defence* on 14 December 2017.⁵¹ The judgment addressed four lead cases brought forward from over 600 civil claims filed in the UK by Iraqis seeking compensation for torture, inhuman and degrading treatment, assault and unlawful detention⁵² – and in some cases the unlawful killing of next-of-

⁴² See also 2014 Communication at pp. 228-229. See ECCHR's June 2017 submission, *supra* note 1 at pp. 6-7.

⁴³ Al-Sweady Inquiry Report, Vol.II, at para. 3.165.

⁴⁴ Al-Sweady Inquiry Report, Vol.II, at paras. 3.766, 3.767.

⁴⁵ Al-Sweady Inquiry Report, Vol.II, at paras. 3.736, 3.737.

⁴⁶ Al-Sweady Inquiry Report, Vol.II, at paras. 3.344-3.347.

⁴⁷ Al-Sweady Inquiry Report, Vol.II, at para. 3.372.

⁴⁸ Al-Sweady Inquiry Report, Vol.II, at para. 3.705.

⁴⁹ Systemic Issues Identified from Investigations into Military Operations Overseas: July 2014, published 7 July 2014, available at <https://www.gov.uk/government/publications/review-of-systemic-issues-arising-from-military-operations-overseas>. See p. 1.

⁵⁰ The most recent report covering the period 2016-2017 was published in August 2018. The reports (from July 2014, July 2015, September 2016 and August 2018) are available at <https://www.gov.uk/government/collections/review-of-systemic-issues-arising-from-military-operations-overseas-index>. The report covering the period 2017-2018 has not yet been published, see the response to an enquiry by Dr. Carla Ferstman, available at https://www.whatdotheyknow.com/request/reports_of_the_systemic_issues_w.

⁵¹ *Alseran & Ors v Ministry of Defence* [2017] EWHC 3289 (QB).

⁵² See Leigh Day, 'Claims by Iraqi civilians litigation', available at [https://www.leighday.co.uk/International/Cases-against-governments/Abuses-in-Iraq-Afghanistan/Iraq-\(1\)](https://www.leighday.co.uk/International/Cases-against-governments/Abuses-in-Iraq-Afghanistan/Iraq-(1)).

kin⁵³ – by UK armed forces in Iraq between 2003 and 2009. This case marked the first time in this ongoing civil litigation that Iraqi claimants testified in an English courtroom. Mr Justice Leggatt ultimately awarded damages to all four claimants for unlawful detention and ill-treatment.

Claimant Mr Abd Ali Hameed Ali Al-Waheed, arrested by UK forces in February 2007, was found to have been “systematically beaten with one of more implements (probably rifle butts)” and punched in the face by UK forces while being transferred to Basra Airport base,⁵⁴ constituting an unlawful assault and inhuman treatment under Article 3 of the European Convention on Human Rights.⁵⁵ He was found to have been subjected to sensory deprivation by being forced to wear blacked out goggles and ear defenders “as a form of deliberate ‘conditioning’, in order to maximize vulnerability and the ‘shock of capture’.”⁵⁶ He was found to have been subjected to degrading treatment in the form of “harshing” involving insulting, abusing, and humiliating him,⁵⁷ as well as sleep deprivation calculated to cause undue suffering.⁵⁸

The video recording of his interrogation session, which was viewed in court, shows that Mr Al-Waheed complained to his interrogator that he was having difficulty remembering information because he had been beaten so badly on his head. The interrogator seems neither surprised nor concerned to hear that a detainee has been badly beaten, responding “I understand, I understand”.⁵⁹

⁵³ *Alseran & Ors v Ministry of Defence*, *supra* note 51 at para.1.

⁵⁴ *Ibid.*, at para. 654.

⁵⁵ *Ibid.*, at para. 657.

⁵⁶ *Ibid.*, at para. 665.

⁵⁷ *Ibid.*, at paras. 673, 719.

⁵⁸ *Ibid.*, at para. 690.

⁵⁹ *Ibid.*, at para. 651: “Furthermore, the soldiers who interrogated Mr Al-Waheed must have been aware that he had sustained injuries which were being investigated by the RMP. I am sure that they must also have been told the result of the RMP investigation. There is direct evidence in the video recording of interrogation session number 16, which was viewed in court, that they knew that Mr Al-Waheed claimed to have been beaten. When asked whether he had been able to remember anything further, he can be heard to say, whilst gesturing to his head, words which have been translated as:

‘I am sitting trying to gather information my head is ... has headache because of so much beating ... I am sitting ... just a while ... I will try hard and remember.’

The interrogator responds ‘I understand, I understand’.”

Claimant Mr Kamil Najim Abdullah Alseran, who was captured by UK forces on circa 30 March 2003,⁶⁰ was found to have been “assaulted by British soldiers, who made him (and other prisoners) lie face down in the ground and ran over their backs”.⁶¹

Claimants MRE and KSU were found to have been hooded with sandbags during their transportation to Camp Bucca, and MRE was hit on the head and kicked by a British soldier.⁶² They were also found to have been subjected to excessive force at the time of capture and subjected to forced nudity, physical assault and sexual humiliation, although the judge found that ultimately it could not be adequately established that this abuse was carried out by UK forces and not US forces.⁶³

A total of 967 compensation claims for alleged unlawful detention, ill-treatment and in some cases unlawful killing were issued by Leigh Day & Co Solicitors. At the time the *Alseran* judgment was handed down in December 2017, circa 330 of these cases had been settled by the MoD and four had been discontinued or struck out.⁶⁴ Approximately 625 civil cases were still waiting to be resolved.⁶⁵ There is no more recent publicly available information on the number of settlements made to date. Given the findings in the test cases of *Alseran*, it seems likely that many of these will be settled by the MoD out of court.

5. *Disciplinary proceedings against army medic*

In December 2012, army doctor Derek Keilloh was struck off the medical register following professional disciplinary proceedings in connection with the death of Baha Mousa.⁶⁶ He was

⁶⁰ Ibid., at para. 197.

⁶¹ Ibid., at para. 333.

⁶² Ibid., at para. 537.

⁶³ Ibid., at paras. 455-457.

⁶⁴ Leigh Day, ‘High Court finds MoD breached the Geneva Conventions during the Iraq War’, 14 December 2017, available at <https://www.leighday.co.uk/News/News-2017/December-2017/High-Court-finds-MoD-breached-the-Geneva-Conventio>. See also Evidence of Martyn Day, Defence Committee, Oral evidence: Statute of Limitations—Veterans Protection, 8 January 2019, available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/defence-committee/statute-of-limitations-veterans-protection/oral/94769.html>, at question 237.

⁶⁵ Defence Committee, Oral evidence: Statute of Limitations Veterans Protection, *ibid.*, at question 252.

⁶⁶ ‘Doctor Derek Keilloh ruled ‘dishonest’ over death of Iraqi detainee’, *BBC*, 16 December 2012, available at <https://www.bbc.co.uk/news/uk-scotland-north-east-orkney-shetland-20749265>. ‘Struck-off Dr Derek Keilloh decides against appeal’, *BBC*, 19 January 2013, available at <https://www.bbc.com/news/uk-england-york-north-yorkshire-21101769>.

found to have failed to have protected persons detained with Baha Mousa from injury and was also found to have lied to investigators, courts-martial and a public inquiry about Baha Mousa's injuries.⁶⁷

C. Related proceedings

1. *Disciplinary action against the director of Public Interest Lawyers*

On 23 March 2017, the Solicitors Disciplinary Tribunal issued its decision in proceedings brought by the Solicitors Disciplinary Tribunal against solicitor Phil Shiner, director of Public Interest Lawyers [PIL], at the instigation of the MoD.⁶⁸ The Tribunal found several of the allegations against Phil Shiner – which related mainly to legal action brought in connection with the Battle of Danny Boy in Iraq in May 2004 – to be proven and struck him off the Roll of Solicitors.⁶⁹ The proceedings against Phil Shiner, which concluded in March 2017, are described in more detail in ECCHR's 2017 submissions to the OTP.⁷⁰

2. *Disciplinary action against Leigh Day*

On 19 October 2018, the UK High Court issued its judgment in the case between the Solicitors Regulation Authority and Leigh Day.⁷¹ This case came before the court after the Solicitors Regulation Authority appealed the September 2017 decision of the Solicitors' Disciplinary Tribunal dismissing all allegations of breaches of professional rules of conduct against the law firm Leigh Day and three of the firm's lawyers. As with the proceedings against Phil Shiner, this case originally came about after the UK Ministry of Defence made a formal complaint to

⁶⁷ Ian Cobain, 'Baha Mousa doctor Derek Keilloh struck off after "repeated dishonesty"', *The Guardian*, 21 December 2012, https://www.theguardian.com/world/2012/dec/21/baha-mousa-doctor-struck-off?CMP=twf_fd.

⁶⁸ See ECCHR's September 2017 submission to the OTP, *supra* note 1 at p. 3.

⁶⁹ *Solicitors Regulation Authority v Philip Joseph Shiner*, 23 March 2017, available at <https://www.solicitorstribunal.org.uk/sites/default/files-sdt/11510.2016.Philip%20Joseph%20Shiner.pdf>.

⁷⁰ See ECCHR's June 2017 submission to the OTP, *supra* note 1 at p. 3.

⁷¹ *Solicitors Regulation Authority v Day & Ors* [2018] EWHC 2726, 19 October 2018, available at [https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Admin/2018/2726.html&query=\(SRA\)+AND+\(%22leigh\)+AND+\(Day%22\)](https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Admin/2018/2726.html&query=(SRA)+AND+(%22leigh)+AND+(Day%22)).

the Solicitors Regulation Authority about Leigh Day in connection with the Al Sweady Public Inquiry.⁷²

The matter was heard at first instance before the Solicitors Disciplinary Tribunal over 6 weeks in 2017. On 22 September 2017 the Tribunal by majority dismissed all allegations against Leigh Day. On appeal the High Court upheld the Tribunal’s decision to clear Leigh Day of all charges against it. Two relevant points from its decision are set out briefly below.

The Court found that referral agreements reached between Leigh Day and PIL concerning how the firms would receive and handle Iraqi cases were “entirely in accordance with permitted practice at that time”.⁷³ Another point at issue in the case was the work leave payments made to Iraqi witnesses to allow them to leave Iraq for the purposes of being interviewed as part of the preparation of litigation in the UK. The Court upheld the tribunal’s finding that there was nothing improper about such payments, adding that such a step appeared to be clearly necessary in order to take witness statements and allow the lawyers involved to find out the truth about what happened.⁷⁴

⁷² “In February 2015, the MOD lodged a formal complaint with the SRA alleging that solicitors from the law firms Public Interest Lawyers and Leigh Day had breached the SRA Code of Conduct during the Al Sweady Public Inquiry. It was this complaint that led to the SRA investigation into the conduct of these two law firms and the subsequent misconduct proceedings before the Solicitors Disciplinary Tribunal (SDT)”, see letter from the Ministry of Defence’s Directorate of Judicial Engagement Policy in response to a request for information, 9 January 2019, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/771311/14074.pdf.

⁷³ *Solicitors Regulation Authority v Day & Ors*, *supra* note 51 at para. 26.

⁷⁴ *Ibid.*, at para. 250.

III. NEW INFORMATION INDICATING POLITICAL INTERFERENCE IN DOMESTIC INVESTIGATIONS

Concerns about the independence of IHAT were set out in ECCHR's previous communications to the OTP.⁷⁵ Information that has emerged since those submissions were made again points to a high level of political interference in the proceedings. In June 2018, The Guardian published an extensive exposé on IHAT which included interviews conducted with two former IHAT employees.⁷⁶ One former IHAT investigator, a retired police detective, spoke of his frustration that his investigative work was being actively limited to low-ranking individuals:

Wanting to investigate the chain of command, in one case, he requested permission from Ihat's leadership to interview a senior army officer in relation to an alleged unlawful killing. This was refused. Every time he tried to pursue this line of inquiry, he claims that it was shut down by Ihat's leadership or MoD lawyers.⁷⁷

Another former IHAT employee, who travelled on several occasions to Turkey to meet Iraqi witnesses said he felt "that there was a lot of evidence of criminal wrongdoing, and that nobody has been held to account". Of his colleagues within IHAT he said:

many complained that they had gathered what they thought was enough evidence to prosecute, and then they'd have an MoD lawyer go to the senior leadership of Ihat and tell them to drop the case.⁷⁸

ECCHR has also spoken with a former IHAT employee who confirmed that pressure was exerted on investigators from at least one senior IHAT official – a senior civil servant placed in the role by the government for this purpose – to ensure that investigators did not look further up the chain of command beyond low-level perpetrators. This was echoed by Dr. Thomas Obel

⁷⁵ 2014 Communication, *supra* note 2 at pp. 240-241, September 2017 Communication, *supra* note 1 at p. 4.

⁷⁶ Samira Shackle, "Why we may never know if British troops committed war crimes in Iraq," *The Guardian*, 7 June 2018, available at www.theguardian.com/news/2018/jun/07/british-troops-war-crimes-iraq-historic-allegations-team.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

Hansen, who has stated that limiting IHAT investigations to direct, physical perpetrators appears to be a deliberate policy to avoid uncovering any evidence of more senior responsibility.⁷⁹ His research suggests that whenever investigators were pursuing some lines of inquiry that would move beyond direct perpetrators, the investigative team in question would be split apart and their work terminated.⁸⁰

This interference occurred alongside the very public denouncing of IHAT's work by the Defence Secretary and the Prime Minister.⁸¹ This was criticized by the UK's Law Society, which noted that this political interference risked undermining "the independence of the legal profession, the rule of law, and the separation of powers."⁸²

⁷⁹ See remarks made at a seminar in early 2019, "The Alseran case one year on: International human rights law, international humanitarian law, and future military operations", seminar held on 25 January 2019 at the Bonavero Institute of Human Rights at the University of Oxford. Recordings of the event are available at <http://podcasts.ox.ac.uk/series/bonavero-institute-human-rights>. The remarks in question can be found in the closing discussion at the end of the second session, from minute 59:00: <https://podcasts.ox.ac.uk/alseran-ruling-one-year-session-2-critical-assessment-recent-investigations-and-prevention>.

⁸⁰ Ibid.

⁸¹ See e.g. Ministry of Defence, 'IHAT to close at the end of June', published 5 April 2017, available at <https://www.gov.uk/government/news/ihat-to-close-at-the-end-of-june>; Sean O'Neill, 'We will protect soldiers, says Fallon as he shuts down Iraq inquiry team', *The Times*, 11 February 2017, available at <https://www.thetimes.co.uk/article/we-will-protect-soldiers-says-fallon-as-he-shuts-down-iraq-inquiry-team-xxx3n8thb>. See also Damien Gayle, 'May vows to protect UK troops who fought in Iraq from legal "abuse": PM restates determination to protect armed forces from "vexatious complaints" relating to eight-year occupation', *The Guardian*, 23 September 2016, available at <https://www.theguardian.com/uk-news/2016/sep/23/theresa-may-british-troops-uk-protect-abuse-legal-system-soldiers-war-crimes-iraq>.

⁸² Damien Gayle, 'May vows to protect UK troops who fought in Iraq from legal "abuse": PM restates determination to protect armed forces from "vexatious complaints" relating to eight-year occupation,' *ibid*.

IV. COMPLEMENTARITY

A. Complementarity: Applicable Legal Standards

In accordance with Article 53(1)(b) of the Rome Statute, the OTP shall, in deciding whether to initiate an investigation, consider whether the case is or would be admissible under Article 17. The complementarity element of admissibility as set out in Article 17 is a two-part test. Under the first limb of this test, the question is whether there have been any relevant national investigations or prosecutions.⁸³ If such proceedings exist, the second limb of the test requires an examination – on the basis of the factors set out in Article 17 (2) and (3) – of whether the State is unwilling or unable genuinely to carry out the investigation or prosecution.

Since at the preliminary examination stage there is as yet no “case”, the OTP has indicated that determinations are to be made in light of “potential cases” identified on the basis of the information available and that would likely arise from an investigation into the situation.⁸⁴ It has also indicated that these potential cases are defined by criteria

*such as: (i) the persons or groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping a future case or cases; and (ii) the crimes within the Court’s jurisdiction allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping a future case or cases.*⁸⁵

Addressing the first limb of this test, the question as to whether or not there have been relevant national investigations or proceedings requires

an examination of whether the national proceedings encompass the same persons for the same conduct as that which forms the basis of the proceedings before the Court.

⁸³ The Office of the Prosecutor, *Policy Paper on Preliminary Examinations*, November 2013, at para. 47.

⁸⁴ *Ibid.*, at para. 43, citing Situation in the Republic of Kenya, Request for authorisation of an investigation pursuant to Article 15, ICC-01/09-3, 26 November 2009, paras. 51 and 107; Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Corr, 31 March 2010, paras. 50, 182 and 188.

⁸⁵ Situation in the Islamic Republic of Afghanistan, Prosecution’s Request seeking authorisation of an investigation pursuant to article 15 (public redacted version), 20 November 2017, ICC-02/17-7-Red, at para. 262 citing Kenya Article 15 Decision, para. 59 and Côte d’Ivoire Article 15 Decision, paras. 190-191.

*Inactivity 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.*⁸⁶

Where national proceedings *are* underway, the OTP must examine whether “such proceedings relate to potential cases being examined by the Office and in particular, whether the focus is on those most responsible for the most serious crimes committed”.⁸⁷ If so, the Office shall then assess, in the second limb of the test, whether such national proceedings are vitiated by an unwillingness or inability to genuinely carry out the proceedings.”⁸⁸

Under Article 17(2) of the Rome Statute, this involves considering, having regard to the principles of due process recognized by international law, whether the 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, whether 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, and whether the proceedings were not or are not being conducted independently or impartially, and were or are being conducted in a manner which is inconsistent with an intent to bring the person to justice.

There are several factors which may be considered as part of these assessments. These include: manifestly insufficient steps in the investigation or prosecution; 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; failures of disclosure; the application of a regime of immunity and jurisdictional privileges for alleged perpetrators belonging to governmental institutions; political interference in the investigation; connections between the suspected

⁸⁶ The Office of the Prosecutor, *Policy Paper on Preliminary Examinations*, *supra* note 83, paras. 47-48. Source footnotes and paragraph numbers omitted.

⁸⁷ *Ibid.*, at para. 49.

⁸⁸ *Ibid.* See also *Gaddafi et al*, Decision on the admissibility of the case against Abdullah Al-Senussi, 11 October 2013, (ICC-01/11-01/11), at para. 26.

perpetrators and competent authorities responsible for investigation, prosecution or adjudication of the crimes; public statements, awards, sanctions, promotions or demotions, deployments, dismissals or reprisals in relation to investigative, prosecutorial or judicial personnel concerned,⁸⁹ as well as amnesties and grossly inadequate sentences.⁹⁰

There is a certain overlap in the assessment of two limbs of the test. Facts pertinent to the assessment of whether relevant domestic proceedings are ongoing may also be considered when assessing the genuineness of those domestic proceedings that are underway.⁹¹

B. Complementarity: Analysis

1. Absence of any national investigations or prosecutions concerning those bearing most responsibility

The extensive evidence pointing to the criminal responsibility under Articles 25 and 28 of the Rome Statute of named and described persons and groups of persons – along with an analysis of the potential modes of liability attaching to such persons – is set out in detail in the 2014 Communication.⁹² That submission sets out the evidence indicating *inter alia*

⁸⁹ The Office of the Prosecutor, *Policy Paper on Preliminary Examinations*, *supra* note 83 at paras. 51, 53, 54.

⁹⁰ Agirre *et al.*, Informal Expert Paper: The Principle of Complementarity in Action, 2003, available at https://www.icc-cpi.int/RelatedRecords/CR2009_02250.PDF.

⁹¹ As recognized by Pre-Trial Chamber I in *Gaddafi et al.*, Decision on the admissibility of the case against Abdullah Al-Senussi, 11 October 2013, (ICC-01/11-01/11), para. 210:

The Chamber recognizes that the two limbs of the admissibility test, while distinct, are nonetheless intimately and inextricably linked. Therefore, evidence put forward to substantiate the assertion of ongoing proceedings covering the same case that is before the Court may also be relevant to demonstrate their genuineness. Indeed, evidence related, inter alia, to the appropriateness of the investigative measures, the amount and type of resources allocated to the investigation, as well as the scope of the investigative powers of the persons in charge of the investigation are relevant for both limbs since such aspects, which are significant to the question of whether there is no situation of “inactivity” at the national level, are also relevant indicators of the State’s willingness and ability genuinely to carry out the concerned proceedings.

See also William A. Schabas, *The International Criminal Court, A Commentary on the Rome Statute*, 2nd ed., at p. 459: “Because ‘the two limbs of the admissibility test, while distinct, are nonetheless intimately and inextricably linked’, evidence about the appropriateness of investigative measures, the resources devoted to them, and the scope and powers of those conducting the investigation, will be relevant with respect to both limbs.”

⁹² 2014 Communication, *supra* note 2, at pp. 156 - 201.

- the criminal liability of officials within the Ministry of Defence including but not limited to the responsibility under Article 28 of former Defence Secretary Geoffrey Hoon and former Minister of State for the Service Personnel Adam Ingram.⁹³
- the criminal liability under Articles 25 and 28 of persons within the military chain of command for crimes against detainees committed during arrest and transit, including with respect to the training in and sanctioning of the use of “conditioning” techniques and the potential authorization of covert operations and the moving of detainees to secret sites.⁹⁴
- the criminal liability under Articles 25 and 28 of persons for crimes against detainees committed during detention and interrogation, including with respect to flawed doctrine and policy, the ordering/sanctioning of prohibited practices and for cruel/inhuman treatment that occurred as a consequence of “force drift”. This analysis addresses *inter alia* the potential criminal responsibility of Officers Commanding of the Joint Forward Interrogation Team (JFIT), the Divisional J2X, and individuals higher up in the chain of command from the Chief of Staff of 1 UK Armoured Division to the Chief of the Defence Staff and the Defence Secretary, along with the potential criminal liability of senior MoD civil servants and lawyers.⁹⁵

The evidence set out in the 2014 Communication is supported by information which has emerged since that submission. On the question of the level of knowledge of detainee abuse on the part of senior civilian superiors, described on pages 190-198 of the 2014 Communication, ECCHR notes also subsequent remarks made by Nicholas Mercer, who was the army’s chief legal advisor at the beginning of the war, indicating that at a ministerial level, “they (politicians) knew there were allegations not only of hooding and stress positions but also mistreatment itself within the first month of the war.”⁹⁶ In the 2014 Communication ECCHR also detailed

⁹³ Ibid., at pp. 186-199.

⁹⁴ Ibid., at pp. 169-171.

⁹⁵ Ibid., at pp. 171-186.

⁹⁶ Jonathan Owen, ‘Lieutenant Colonel Nicholas Mercer says it is “beyond question” that British soldiers tortured Iraqis’, *The Independent*, 8 January 2016, available at <https://www.independent.co.uk/news/uk/home->

information indicating that failures in training on both detention and interrogation contributed to the abuse of detainees in Iraq, pointing in turn to the responsibility of senior officers within the military chain of command.⁹⁷ That failures in the training of military interrogators may have contributed to war crimes in Iraq is also acknowledged in a Defence Committee report published in February 2017, which states:

*It is not disputed that there were incidents of abuse of Iraqi prisoners by British armed forces service personnel. However, it appears that this may have been at least partly because the training given to military interrogators was inaccurate and may have placed them, unwittingly, at risk of breaking the Geneva Conventions in their work.*⁹⁸

With respect to the question of the authorization of unlawful techniques, ECCHR also notes Nicholas Mercer's evidence to a parliamentary Defence Committee inquiry in 2016 in which he stated that when he challenged some of the interrogators in Iraq, they told him they did not answer to the Division but rather that "they answered to London," and thus were outside of the normal chain of command.⁹⁹ This, he said, was confirmed by a number of witnesses to the Baha Mousa Inquiry.¹⁰⁰ This indicates that interrogators may have been coming under a separate command, which raises important questions about who was directing or authorizing the techniques.¹⁰¹

[news/lieutenant-colonel-nicholas-mercero-says-it-is-beyond-question-that-british-soldiers-tortured-iraqis-a6803281.html](https://www.theguardian.com/news/2014/feb/10/lieutenant-colonel-nicholas-mercero-says-it-is-beyond-question-that-british-soldiers-tortured-iraqis-a6803281.html).

⁹⁷ 2014 Communication, *supra* note 2 at e.g. pp. 172-173, 176.

⁹⁸ House of Commons Defence Committee, 'Who guards the guardians? MoD support for former and serving personnel', 10 February 2017, available at <https://publications.parliament.uk/pa/cm201617/cmselect/cmdfence/109/109.pdf>. See para. 83 [footnotes in original have been omitted in this citation].

⁹⁹ Oral evidence of Reverend Nicholas Mercer to Defence Committee, MoD support for former and serving personnel subject to judicial processes, 8 June 2016, available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/defence-subcommittee/mod-support-for-former-and-serving-personnel-subject-to-judicial-processes/oral/34267.pdf>. See question 47.

¹⁰⁰ Written evidence of Reverend Nicholas Mercer to Defence Committee, MoD support for former and serving personnel subject to judicial processes, 6 June 2016, available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/defence-subcommittee/mod-support-for-former-and-serving-personnel-subject-to-judicial-processes/written/34405.pdf>. See para. 29.

¹⁰¹ Note also remarks by Nicholas Mercer at a seminar on 25 January 2019 at the Bonavero Institute of Human Rights at the University of Oxford: 'The Alseran case one year on: International human rights law, international humanitarian law, and future military operations'. Recordings of the event are available at <http://podcasts.ox.ac.uk/series/bonavero-institute-human-rights>. The remarks in question can be found in the

These additional pieces of information which emerged since ECCHR's previous submissions add further weight to the conclusion reached in 2014 that the greatest responsibility for war crimes against detainees in Iraq extends up the chain of command to senior military and civilian officials.

In the 2014 Communication, ECCHR and PIL submitted that

*the UK has not conducted any investigations or prosecutions with respect to those individuals who bear the greatest responsibility for the war crimes alleged in this Communication. Efforts to date have been confined to a limited number of lower level perpetrators.*¹⁰²

This remains the case today, five and a half years after that communication was submitted. In a study on accountability for international crimes by UK forces in Iraq, a report published by the Human Rights Centre at the University of Essex and the Transitional Justice Institute of Ulster University in October 2018 concluded that

*[u]p to 15 years have passed since the alleged crimes in Iraq took place, and yet only very few direct perpetrators – and not a single commander or senior official – have been prosecuted.*¹⁰³

In this case therefore the answer to the question contained in the first limb of the complementarity test – as to whether there have been relevant domestic proceedings, focusing on those most responsible – is no. Available information about the interference with IHAT investigations¹⁰⁴ indicates that the absence of such domestic proceedings is in part the result of

closing discussion at the end of the second session, from minute 57:06: <https://podcasts.ox.ac.uk/alseran-ruling-one-year-session-2-critical-assessment-recent-investigations-and-prevention>. See also 2014 Communication, *supra* note 2 at 171.

¹⁰² 2014 Communication, *supra* note 2, at p. 216.

¹⁰³ The UK Military in Iraq: Efforts and Prospect for Accountability for International Crimes Allegations, *supra* note 5, at p. 48. See also, at p.116, Human Rights Watch, 'Pressure Point: The ICC's Impact on National Justice. Lessons from Colombia, Georgia, Guinea, and the United Kingdom', 2018, available at <https://www.legal-tools.org/doc/442f1c/pdf/>.

¹⁰⁴ See Section III.

a deliberate focus on low-level perpetrators despite evidence pointing to the role of more senior individuals.

2. Issues relating to existing domestic proceedings indicating that the UK is unwilling genuinely to carry out the investigation or prosecution

Where there are no domestic proceedings focusing on those most responsible, it is unnecessary to examine the second limb of the test on whether national proceedings are vitiated by an unwillingness or inability to genuinely carry out proceedings. Nonetheless, and in light of the overlap between the facts that are relevant for the assessment of the first and second limbs of the complementarity test, this section examines several aspects of existing proceedings in the UK, which focus on lower-level perpetrators, along with the associated political climate, to demonstrate the UK's unwillingness to genuinely investigate those cases.

2.1. Questionable rationale for discontinuing investigations

As set out in Section II, hundreds of investigations into war crimes allegations have been shut down by IHAT and SPLI. While IHAT and SPLI are entitled to shut down investigations in the course of their work where there are legitimate grounds to do so, an examination of the reasons put forward for these decisions raise serious doubts about their genuineness, especially in light of the political context in which these decisions were taken.

A report of the Systemic Issues Working Group summarizes some of the justifications given for not continuing to a full investigation:

Some were discontinued because of a lack of evidence (including, in some cases, a failure by complainants or witnesses to provide statements). Others were discontinued because the Service Police assessed them in terms of severity as falling at the lower end (ranging from very minor ill-treatment to assaults occasioning actual bodily harm) or middle (ill-treatment of medium severity and/or assault not reaching the threshold of grievous bodily harm) of the spectrum, and determined that a full investigation would be disproportionate. The vast majority of the latter investigations were discontinued

following the Solicitors Disciplinary Tribunal into allegations of serious misconduct (including dishonesty) by Phil Shiner, formerly principal of Public Interest Lawyers, which heard evidence that he had authorised payments to an unspecified number of Iraqis seeking to bring claims against the Ministry of Defence in the High Court. These revelations contributed to the Service Police’s decision to discontinue investigations into uncorroborated allegations of low- or medium-level ill-treatment¹⁰⁵

In September and October 2016, the Deputy Head of IHAT took the decision to discontinue work on a total of 557 “lower level allegations of ill-treatment” as it was “not proportionate” to continue to investigate.¹⁰⁶ IHAT closed other cases due to “a lack of evidence of a serious criminal offence” among other reasons.¹⁰⁷ SPLI appears to be taking a similar approach. Publicly available information on the hundreds of cases closed by SPLI show that each of these cases was closed either on the basis of “proportionality” or a “lack of evidence”:

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 account findings against UK solicitors involved in legal proceedings concerning military operations in Iraq.¹⁰⁸

¹⁰⁵ Systemic Issues Working Group, ‘Systemic issues identified from Service Police and other Investigations into Military Operations Overseas: August 2018’, *supra* note 5, at note 3 in that report.

¹⁰⁶ Work on 68 allegations was discontinued on 19 September 2016, on another 489 allegations on 24 October 2016. See IHAT Work Completed Table, *supra* note 20.

¹⁰⁷ *Ibid.*

¹⁰⁸ SPLI, Information for Claimants Table, undated, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/789077/20190325-SPLI_Information_for_complainants_table.pdf.

Several problematic aspects of these justifications for closing cases are addressed below.

2.1.1. Issues attaching to discontinuing cases because they were assessed as “falling at the lower end or middle of the spectrum”

A full investigation was deemed by UK investigatory authorities to be “disproportionate” in cases “falling at the lower end (ranging from very minor ill-treatment to assaults occasioning actual bodily harm) or middle (ill-treatment of medium severity and/or assault not reaching the threshold of grievous bodily harm) of the spectrum”.¹⁰⁹ There are serious conceptual problems with this approach, as noted recently by the UN Committee against Torture.¹¹⁰ These concerns are set out in an NGO shadow report¹¹¹ submitted on behalf of 74 NGOs to the Committee against Torture and based on research by Dr. Elizabeth Stubbins Bates.¹¹²

Dr. Stubbins Bates’ analysis of domestic investigations in the UK highlights the kinds of war crimes that are excluded from investigation under this restrictive approach, namely 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.¹¹³

By limiting investigations to cases of grievous bodily harm as understood under the domestic criminal law of assault,¹¹⁴ the Service Police has effectively determined that allegations pertaining to potential war crimes involving the use of the “five techniques” in Iraq (hooding, stress positions, noise bombardment, sleep deprivation and deprivation of food and water) will

¹⁰⁹ Systemic Issues Working Group Report August 2018, *supra* note 5, at note 3 in that report (quoting the definition used by the SPLI).

¹¹⁰ 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, at para. 32.

¹¹¹ The UK’s Implementation of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Punishment, Civil Society Alternative Report, March 2019, at pp. 73-74, available at https://redress.org/wp-content/uploads/2019/05/UK-Implementation-of-UNCAT_REDRESS_March2019_Web.pdf.

¹¹² Elizabeth Stubbins Bates, ‘Distorted Terminology: The UK’s Closure of Investigations into Alleged Torture and Inhumane Treatment in Iraq’, (2019), 68 *International & Comparative Law Quarterly* 719.

¹¹³ *Ibid.*, at pp. 728-729, 730, 735-736, 738.

¹¹⁴ *Ibid.*, at pp. 720, 724, 727.

not be investigated. The same applies to many of the other techniques deployed by British forces in Iraq and detailed in the 2014 Communication, such as “harshing”, sexual and religious humiliation, threats (including threats of rape and death) and exposure to temperature extremes.

This approach also excludes cases of beatings and assaults that fail to reach the threshold of grievous bodily harm. Stubbins Bates examines the example of the claimants in the *Alseran* civil litigation,¹¹⁵ who were found by the High Court to have suffered inhuman and degrading treatment and in most cases assault. As described earlier, one of the claimants was found to have been systematically beaten and punched in the face and subjected to degrading treatment. Another was beaten and a third was subjected to assault including being made to lie face down on the ground while soldiers ran over his back. None of these claimants’ cases, Bates concludes, would have reached the required threshold of grievous bodily harm and would thus not have been subjected to a criminal law investigation.¹¹⁶

This is borne out when one examines the kinds of cases discontinued by IHAT on this basis. ECCHR understands that several extremely egregious cases of beatings, including the brutal beating of children as young as 12, and cases involving the rape of detainees have been closed by IHAT on the basis that these cases represented “lower-level allegations” and it was thus not “proportionate” to continue investigative work, even in cases where there was video evidence of the crimes.¹¹⁷

Thus even on the basis of the limited information available it is apparent that IHAT/the Service Police have concluded that a full investigation would be “disproportionate” in cases with fact patterns that clearly point to potential war crimes under the Rome Statute.

2.1.2. Issues attaching to discontinuing cases because of proceedings before the Solicitors Disciplinary Tribunal

¹¹⁵ The case is detailed above at p. 11 ff.

¹¹⁶ Elizabeth Stubbins Bates, ‘Distorted Terminology: The UK’s Closure of Investigations into Alleged Torture and Inhumane Treatment in Iraq’, (2019), *supra* note 112, at p. 724.

¹¹⁷ More information is provided in confidential Annex A.

While IHAT, SPLI and the UK Ministry of Defence have all pointed to disciplinary proceedings against one or more of the lawyers representing Iraqi litigants in Iraq as justification for closing investigations into detainee abuse in Iraq,¹¹⁸ such a conclusion is not supported by the findings of the disciplinary proceedings or by findings of other courts in subsequent proceedings.

In 2017 the then Defence Secretary stated that the Ministry of Defence could “wind down” IHAT because the claims originating from Phil Shiner now “fall away” after the MoD was “successful in exposing just how false these allegations were.”¹¹⁹ However, the disciplinary proceedings (themselves initiated by the MoD¹²⁰) made no findings whatsoever on the veracity of the claims brought forward.¹²¹

In separate proceedings against the law firm Leigh Day, allegations were made that lawyers from the firm “authorized and/or arranged the payment of sums of money [...] which they knew or suspected to be improper and failed to take proper steps to satisfy themselves that such disbursements were proper”.¹²² The evidence heard in those proceedings made reference to arrangements made with Phil Shiner for paying work leave payments for witnesses to allow

¹¹⁸ As detailed above at Section 2.1.

¹¹⁹ See ECCHR’s September 2017 submission, *supra* note 1, citing ‘Defence Secretary announces IHAT will close this summer (video)’, *The Daily Mail*, undated, available at <http://www.dailymail.co.uk/video/news/video-1410347/Defence-Secretary-announces-IHAT-close-summer.html>; See also the statement made during the High Court hearing in *Al-Saadoon and others v Ministry of Defence and others* on 8 June 2017, in which the MoD’s legal representative confirmed that following the SDT proceedings against Phil Shiner, a new investigative strategy had been developed by IHAT leading to a substantial increase in the tempo of its work i.e: the closure of a substantial number of investigations. Court transcript of hearing [on file with ECCHR], at para. 12.

¹²⁰ *Ibid.*, citing: Defence Committee Report, ‘Who guards the guardians? MOD support for former and serving personnel’, *supra* note 17 at 10: “The Secretary of State asserted that the firm would not have been “dismantled” in the way that it was without the intervention of the MoD”. See also the Government’s response to this report, at 4-5, at paras. 9-11. See also ‘Defence Secretary announces IHAT will close this summer (video)’, *The Daily Mail*, *Ibid.* In another article in the Daily Mail, Defence Secretary Fallon states that he personally directed the investigations against Phil Shiner: “Last week the Solicitors Disciplinary Tribunal found that Phil Shiner should be struck off because of his reckless campaign of false and exaggerated allegations against our armed forces. That decision was made possible because two years ago I took the unprecedented step of directing officials to assemble and submit evidence of this dishonesty.” ‘SIR MICHAEL FALLON: Members of our armed forces were victims of a charismatic conman who exploited vulnerabilities in the legal system’, *The Daily Mail*, 10 February 2017, available at <http://www.dailymail.co.uk/news/article-4213576/Troops-victims-charismatic-conman.html#ixzz4awDFk6A5>. He also stated that “[i]t was the MoD that supplied the main evidence that got Phil Shiner struck off for making false allegations against our Armed Forces. Exposing his dishonesty means many more claims he made can now be thrown out and the beginning of the end for Ihat,” ‘Iraq abuse inquiry to shut after MPs find it has ‘directly harmed defence of our nation’, *The Telegraph*, 10 February 2017, available at <http://www.telegraph.co.uk/news/2017/02/10/iraq-abuse-inquiry-has-directly-harmed-defence-nation-andmust/>.

¹²¹ *Solicitors Regulation Authority v Philip Joseph Shiner*, 23 March 2017, *supra* note 69.

¹²² Allegation 1.19 in the proceedings.

them to leave Iraq and give their testimony.¹²³ The High Court ultimately found that there was nothing improper about such payments, noting: “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”.¹²⁴

Allegations were also levelled against both Phil Shiner and two lawyers from Leigh Day concerning fee sharing agreements entered into with respect to the Iraqi cases. Fee sharing agreements are strictly regulated in the UK and the payment of “referral fees” is not permitted. These allegations were found to be partially proven with respect to Phil Shiner,¹²⁵ who did not appear before the Tribunal, was unrepresented at the proceedings, and did not contest these allegations.¹²⁶ The corresponding allegations put forward against lawyers from Leigh Day – who did benefit from legal representation during the proceedings and who contested the allegations – were dismissed, with the Tribunal, and on appeal the High Court, finding these fee agreements to be unproblematic.¹²⁷ The Tribunal noted that a different Division of the Tribunal had found the corresponding allegations to be proven in the proceedings against Phil Shiner but noted that this was not determinative because many of the legal points on the interpretation of the relevant rules had not been brought to the Tribunal’s attention in that case¹²⁸ and that in that case the Tribunal “had not had the benefit of the evidence from the Respondents given to this Tribunal as to the underlying factual position.”¹²⁹

¹²³ See appeals judgment, *supra* note 71, at paras. 259, 260.

¹²⁴ *Ibid.*, at para. 250.

¹²⁵ *Solicitors Regulation Authority v Philip Joseph Shiner*, 23 March 2017, *supra* note 69 at paras., 80-84.9

¹²⁶ *Ibid.*, at paras. 10-31.

¹²⁷ First instance judgment, *Solicitors Regulation Authority v Day & Ors, judgment of the Solicitors Disciplinary Tribunal*, 22 September 2017 at paras. 146-146.66 (by majority). Confirmed on appeal with respect to allegations 1.12-1.4 (findings on other allegations concerning the fee agreements were not appealed), see appeals judgment, *supra* note 71 at paras. 168-237.

¹²⁸ First instance judgment, *ibid.*, at para. 146.63: “The Tribunal noted the judgment in the PS [Phil Shiner] proceedings. It also noted, however, that the points raised by the Respondents on interpretation before this Tribunal had not been brought to the PS Tribunal’s attention, even though the Applicant [the SRA] was on notice that those points would be argued in these [the Leigh Day] proceedings. The Tribunal considered that the PS Tribunal had not therefore had the opportunity to consider the matter as fully as this Tribunal and that the findings of the PS Tribunal were not determinative.” Counsel for Leigh Day noted (see para. 146.55) that the Division deciding in the Phil Shiner case “did not have the benefit of the arguments put before this Division; there were no legal submissions made in the PS [Phil Shiner] proceedings as to the construction of Rules 9.01(4) and (6), and thus that Tribunal was unaware that there was any debate about the interpretation of the Rules.

¹²⁹ *Ibid.*, at 147.44, in connection with allegations 1.12-1.14.

While the allegations against Phil Shiner and the findings of the Solicitors Disciplinary Tribunal against him were serious, none of those findings – contrary to the assertions of the Defence Secretary, IHAT and the SPLI – in any way suggest that the underlying allegations made by Iraqi claimants are not credible or that cases linked to his organization, PIL, should now be disregarded. The credibility of the allegations is demonstrated in a series of findings from UK inquiries and proceedings,¹³⁰ most recently from reports of the IFI¹³¹ and the decision of the High Court in *Alseran*.¹³² In the four test cases brought before the Court in *Alseran*, the credibility of the claimants was comprehensively tested by hearing evidence in person from the claimants and other witnesses from Iraq. The Court also considered detention records disclosed by the MoD, medical evidence, and the testimonies of military personnel and medical experts.¹³³ On consideration of this evidence, all four claimants were ultimately found to have been subjected to inhuman and degrading treatment by UK forces.¹³⁴

¹³⁰ See also ECCHR's June 2017 submission, *supra* note 1 at p. 5 ff.

¹³¹ See above at p. 8.

¹³² See above at p. 10.

¹³³ *Alseran & Ors v Ministry of Defence*, *supra* note 51 at para. 30. On the credibility of the claimants' accounts see e.g. at paras. 366-368:

First, although the claimants' allegations of mistreatment were not documented until after these proceedings were begun in 2010, I am sure that they are not bogus allegations which have simply been made up. Their evidence had the hallmarks, including minor differences between their accounts of the kind to be expected, of evidence based on recollection given many years after the occurrence of traumatic events. What, if anything, is surprising is the extent to which the claimants have described many things which match independent evidence of which they would not have been aware when making their witness statements. Another feature of their evidence consistent with its honesty is that, while complaining in strong terms about their alleged mistreatment, both claimants also referred to various small acts of kindness shown to them by some of the service personnel they encountered at various times.

Second, the mistreatment at the heart of their complaints is not mistreatment of a kind which someone in their position who was making a false claim would be likely to invent. There is substantial evidence, including the expert evidence given by Dr George on conditions in Iraq, that being a victim of any form of sexual abuse is associated in the claimants' culture with a high degree of shame and social stigma. I see no reason to suppose that MRE and KSU would have chosen to expose themselves to such stigma by falsely alleging mistreatment of a sexual nature. Nor do I see any reason to think that the distress which they each showed at times when giving their evidence in court about what happened to them on board the big ship was other than genuine. It is notable that all the many doctors who have examined them, including the psychiatrists instructed as expert witnesses by the claimants and by the MOD, have considered them to be truthful (even if not always accurate) historians.

In the case of MRE, there is (as I will indicate) reason to think that his perception of the severity of the injuries which he sustained is exaggerated. But there is also medical evidence which indicates that the injuries did occur. In the case of KSU, there is some evidence to suggest that he has, if anything, tended to understate the nature and effect of his experiences.

¹³⁴ On the credibility of the evidence, see also below at Section V.A regarding the scale of the alleged crimes.

The disingenuousness of relying on disciplinary proceedings to dismiss cases is further indicated by the case of IHAT 184. In the MoD’s published decisions on alleged human rights breaches during Operation Telic (concerning whether or not to refer a case to a public inquiry after it has been discontinued by IHAT/SPLI), the decision not to open an inquiry in the case of IHAT 184 was justified, as in hundreds of other cases, partly on the basis that “[t]he evidence submitted to the Solicitors Disciplinary Tribunal (SDT) and the SDT judgement in disciplinary proceedings brought against Mr Phil Shiner of PIL casts significant doubt upon the veracity and credibility of the allegations made by PIL.”¹³⁵ ECCHR understands, however, that the case of IHAT 184 was not one of the cases filed by PIL.

Taking all of this as a whole, the inescapable conclusion is that the MoD and the UK government and investigatory bodies are very disingenuously attempting to use these disciplinary proceedings, which were initiated by the MoD, in an effort to discredit the testimonies of Iraqis and thus to shield themselves from legal proceedings in connection with the actions of British forces in Iraq.

2.1.3. Issues attaching to discontinuing cases because of a lack of evidence

The SIWG noted that work on some cases was discontinued by IHAT/SPLI “because of a lack of evidence (including, in some cases, a failure by complainants or witnesses to provide statements)”.¹³⁶ While a lack of evidence or any prospect of securing evidence could in some cases be a legitimate basis to discontinue lines of inquiry, ECCHR understands that IHAT closed some cases based on the lack of a signed witness statement even where it would have been relatively straightforward for investigators to acquire the requisite further information. As set out in ECCHR’s submission of September 2017,¹³⁷ signed witness statements could not be provided in all cases as the claimants could not afford to pay UK lawyers to take full statements and PIL’s legal aid contract was at that time limited to just four hours of work per claimant.¹³⁸

¹³⁵ See ‘MOD decisions on Article 3 cases (updated 29 August 2018)’ available at <https://www.gov.uk/guidance/mod-decisions-on-alleged-human-rights-breaches-during-operation-telic>, at p. 61.

¹³⁶ *Supra* note 105.

¹³⁷ See ECCHR’s September 2017 submission to the OTP, *supra* note 1 at p. 5.

¹³⁸ This point was also highlighted in the report ‘The UK Military in Iraq: Efforts and Prospect for Accountability,’ *supra* note 5 at 29: “PIL, who represented the bulk of the victims, ceased its representation of Iraqi victims only a few months after the ruling [that IHAT could decline to investigate cases without a signed witness statement] in August 2016 when its offices closed. Ever since, the bulk of the victims have been unrepresented, so it would have been virtually impossible for witness statements which did not satisfy the ruling to be rectified. As noted above,

ECCHR also understands that investigative activity ground to a halt at IHAT once allegations of professional misconduct were brought against lawyers involved in the Iraq cases. After this point no attempts were made by investigators to remedy the lack of evidence in these cases by taking further investigative steps, despite the fact that it would have been feasible to do so.

These two practices of discontinuing work on cases because of a lack of evidence that could have been easily rectified by investigators suggests manifestly insufficient steps in IHAT's investigations.¹³⁹

2.2. *Other indications of an insufficient level of independence and impartiality*

Problematic issues attaching to the independence of IHAT before and after its restructuring in March 2012 were examined in the 2014 submission to the OTP.¹⁴⁰ The fact that IHAT was later shut down at the direction of Michael Fallon, then UK Defence Secretary,¹⁴¹ i.e. that he was in a position to close investigations into potential crimes committed by the UK Armed Forces in order to benefit politically from being seen to take action to prevent prosecutions, indicates that IHAT was not a truly independent institution. This is further supported by the information that MoD lawyers or senior IHAT staff blocked IHAT investigators from examining certain cases, especially cases that could point to more senior-level responsibility.¹⁴²

The fact that IHAT's work did not ultimately lead to any charges being brought should be compared with statements made by the former head of IHAT Mark Warwick, who in 2016 – before the political backlash against IHAT had reached its peak – stated publicly that he thought

as of 31 March 2016, there were 1374 cases under consideration by IHAT. In our view, steps should have been taken, such as appointing a 'duty-counsel' representative, to aid the victims to rectify their witness statements. There is no indication that any steps were taken to assist victims in this or any other way" [source footnotes omitted].

¹³⁹ See also the discussion on the requirements for robust and rigorous investigations, including the need to adequately explore all reasonable leads, set out in 'The UK Military in Iraq: Efforts and Prospect for Accountability,' *supra* note 5 at p. 29.

¹⁴⁰ 2014 Communication, *supra* note 2 at pp. 239-241.

¹⁴¹ *Supra* note 120.

¹⁴² See above at Section III.

IHAT had sufficient evidence to bring criminal charges in a range of cases involving serious allegations.¹⁴³

As set out above,¹⁴⁴ after IHAT was shut down, the remaining allegations were reintegrated into the service police system under the Service Police Legacy Investigations (SPLI), a body led by a senior Royal Navy Police Officer. UK NGO Redress commented on the implications of this change for the appearance of independence:

*For the Royal Navy Police to “reabsorb and complete the remaining investigations as normal business”, as Minister Fallon has said [...] is of concern, because it removes any semblance of an independent investigation into any remaining cases.*¹⁴⁵

While the lack of publicly available information on the work of the SPLI makes it difficult to comprehensively assess its independence in practice, the language used on its website gives the strong impression that its focus is on continuing to shut down the remaining cases rather than on genuinely engaging in investigative work. SPLI’s December 2018 report states:

*In this quarter, SPLI has closed, or is in the process of closing, 8 full investigations and 6 directed lines of enquiry. [...] In the 18 months since SPLI took on the remaining legacy cases on 1 Jul 17, it has disposed of 88% of its caseload – closing, or in the process of closing, 1127 allegations.*¹⁴⁶

¹⁴³ “There are serious allegations that we are investigating across the whole range of Ihat investigations, which incorporates homicide, where I feel there is significant evidence to be obtained to put a strong case before the Service Prosecuting Authority to prosecute and charge.” See Jonathan Owen, ‘British soldiers could face prosecution for crimes committed during Iraq conflict, investigators confirm’, *The Independent*, 1 January 2016, available at <https://www.independent.co.uk/news/uk/home-news/british-soldiers-could-face-prosecution-for-crimes-committed-during-iraq-conflict-investigators-a6793271.html>.

¹⁴⁴ See above at p. 6 ff.

¹⁴⁵ Redress, ‘IHAT closure threatens proper investigations into allegations of torture by the UK’, Press Release, 10 February 2017, available at <https://redress.org/news/ihat-closure-threatens-proper-investigations-into-allegation-of-torture-by-the-uk/>.

¹⁴⁶ SPLI Quarterly Update, September to December 2018, at paras. 1-2.1. Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/791531/20190401-SPLI_QTR_REPORT_SEPT-DEC2018_FINAL.pdf.

Thus it would appear that SPLI is continuing the target-driven approach taken by IHAT shortly before it closed,¹⁴⁷ namely to shut down as many of these politically unpopular cases as quickly as possible, in accordance with the wishes of the MoD.¹⁴⁸

2.3 *Charges that fail to reflect the seriousness of the criminal behavior*

The failure to properly characterize criminal behavior, described above in connection with the decision to discontinue investigations, is also suggested by the case of IHAT 97, which concerned the brutal beating of an Iraqi man by British forces that had been captured on film and published in the media.¹⁴⁹ The beating is reported to have been carried out as punishment for providing the army with information that led to a disastrous raid.¹⁵⁰ The video shows the Iraqi man in the back of an armored vehicle being beaten by several soldiers as he begs them to stop.¹⁵¹ At one point the man was kicked full force in the jaw, so that his jaw was “left hanging off.”¹⁵² IHAT referred the soldier responsible to his commanding officer and the soldier was fined £3,000.¹⁵³ IHAT’s decision to refer the soldier to his commanding officer, rather than to the Director of Service Prosecutions, appears to be based on Section 116 of the Armed Forces

¹⁴⁷ See Elizabeth Stubbins Bates, ‘Distorted Terminology: The UK’s Closure of Investigations into Alleged Torture and Inhumane Treatment in Iraq’, *supra* note 112, at p. 738.

¹⁴⁸ When then Defence Secretary Michael Fallon announced his decision to close IHAT, he also indicated that any remaining investigations should be completed “a year earlier than planned”, i.e. by the end of 2018. See Ministry of Defence, ‘IHAT to close at the end of June,’ 5 April 2017, *supra* note 81. On the MoD’s desire to have cases discontinued as soon as possible see also the statement of a MoD spokesperson from 6 December 2017, available at <https://modmedia.blog.gov.uk/2017/02/06/defence-in-the-media-6-february-2017/>: “The government is legally obliged to investigate criminal allegations and the courts are clear that if IHAT did not exist, British troops could be dragged through international courts. We’re committed to reducing IHAT’s caseload to a small number of credible cases as quickly as possible.”

¹⁴⁹ See IHAT Work Completed Table, updated October 2017, *supra* note 20 which states: “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”. In the absence of more details it is assumed that this Mail on Sunday video referred to here is the same one described in James Millbank, ‘Probe into shocking film of ‘revenge attack’ on Iraqi civilian by British troops after the killing of six Red Caps,’ *The Daily Mail*, 17 April 2011, available at <https://www.dailymail.co.uk/news/article-1377719/Revenge-attack-Iraqi-civilian-video-British-troops-killing-6-Red-Caps.html>.

¹⁵⁰ *Ibid.*

¹⁵¹ ‘Probe into shocking film of ‘revenge attack’ on Iraqi civilian by British troops after the killing of six Red Caps,’ *The Daily Mail*, *ibid.*

¹⁵² *Ibid.*

¹⁵³ *Supra* note 20.

Act 2006.¹⁵⁴ This in turn suggests that IHAT found this case did not point to a “Schedule 2” offence, i.e. a “serious service offence”, subject to court-martial jurisdiction. Schedule 2 offences include the domestic law crime of assault occasioning grievous bodily harm, crimes under the International Criminal Court Act 2001, the crime of torture under the Criminal Justice Act 1988, and grave breaches of the Geneva Conventions Act 1957 (as amended). IHAT decided that this case – where there is video evidence of particularly gratuitous violence and cruelty against a helpless Iraqi – does not indicate a potential war crime, or an assault occasioning grievous bodily harm. This decision seriously undermines the reliability generally of IHAT’s exercise of discretion in its interpretation of Section 116 of the Armed Forces Act 2006 and its ability to bring about charges that properly reflect the seriousness and the context of the acts in question.

Similar failures can be observed in the court-martial proceedings relating to detainee abuse at Camp Breadbasket in May 2003.¹⁵⁵ Photographs had revealed that Iraqi civilian detainees were subjected to grotesque torture as onlooking soldiers laughed and jeered. Detainees were beaten with car aerials and wooden sticks for several hours and forced to run around carrying cement blocks and a cage containing detainees in it. Detainees were bound in a net and suspended from the prongs of forklift.¹⁵⁶ Some were forced to strip and simulate oral and anal sex while giving the “thumbs up” for the camera.¹⁵⁷ One Iraqi was photographed curled up in the foetal position while a soldier stood on him.¹⁵⁸ Three soldiers were convicted of battery and conduct to the prejudice of good order and military discipline and disgraceful conduct of a cruel kind, but charges relating to the forced stripping and forced simulation of sex acts were either dropped or never brought.¹⁵⁹ No charges were brought against Major Dan Taylor, the officer in charge

¹⁵⁴ See e.g. para. 3 of IHAT’s Terms of Reference 2.0, 19 May 2014, included as Appendix C of Sir David Calvert-Smith, ‘Review of the Iraq Historic Allegations Team,’ 15 September 2016, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/553195/Flag_A_-_IHAT_Review_for_Attorney_General_final_12_September.pdf.

¹⁵⁵ See *supra* note 5.

¹⁵⁶ See e.g. Leigh Day, ‘Camp Breadbasket - five more Iraqi civilians serve claims against MoD following abuse by British soldiers,’ 8 August 2008, available at <https://www.leighday.co.uk/News/Archive/2008/August-2008/Camp-Breadbasket---five-more-Iraqi-civilians-serve>.

¹⁵⁷ Audrey Gillan, ‘Soldiers in Iraq abuse case sent to prison’, *The Guardian*, 26 February 2005, available at <https://www.theguardian.com/uk/2005/feb/26/iraq.military>.

¹⁵⁸ See Leigh Day, ‘Camp Breadbasket - five more Iraqi civilians serve claims against MoD following abuse by British soldiers,’ 8 August 2008, *supra* note 156.

¹⁵⁹ Audrey Gillan, ‘Soldiers in Iraq abuse case sent to prison’, *The Guardian*, 26 February 2005, available at <https://www.theguardian.com/uk/2005/feb/26/iraq.military>; Jenny Booth, ‘Iraq court martial drops sex charges’,

of Camp Breadbasket – who had ordered his men to round up looters and “work them hard”– despite the fact that the army’s chief of staff acknowledged that this order represented a breach of the Geneva Conventions.¹⁶⁰ It was decided that he would not face charges because he had acted with “well-meaning and sincere but misguided zeal”.¹⁶¹

Thus in those very few cases in which criminal proceedings have been initiated, there is evidence of manifest inadequacies in charging and modes of liability in relation to the gravity of the conduct alleged.

2.4 *Inadequate penalties*

As noted above,¹⁶² the work of IHAT and SPLI has not led to prosecutions for crimes against Iraqis. As described in the previous paragraph, Corporal Payne was convicted of inhumane treatment following the killing of Baha Mousa; he was sentenced to twelve months’ imprisonment.¹⁶³ In courts-martials linked to the torture and abuse photographed at Camp Breadbasket, sentences ranged from 140 days to two years. On appeal two of the sentences were reduced.¹⁶⁴ One of the soldiers had his sentence reduced from 2 years to 18 months; he had been photographed driving a forklift with an Iraqi man bound in a net and hanging from the prongs.¹⁶⁵

The Times, 3 February 2005, available at <https://www.thetimes.co.uk/article/iraq-court-martial-drops-sex-charges-8n0dz0clvzk>; Michael Smith, ‘Sex abuse case is dropped’, *Telegraph*, 4 February 2005, available at <https://www.telegraph.co.uk/news/uknews/1482724/Sex-abuse-case-is-dropped.html>. See Rachel Kerr, ‘The UK in Iraq and the ICC: Judicial Intervention, Positive Complementarity and the Politics of International Criminal Justice’, in Morten Bergsmo and Carsten Stahn (eds.), *Quality Control in Preliminary Examination: Volume 1*, *supra* note 5, at Appendix 2.

¹⁶⁰ Audrey Gillan, ‘Soldiers in Iraq abuse case sent to prison’, *The Guardian*, 26 February 2005, *ibid*.

¹⁶¹ Audrey Gillan, ‘Army cleared major who gave illegal order’, *The Guardian*, 22 January 2005, available at <https://www.theguardian.com/uk/2005/jan/22/iraq.military1>.

¹⁶² See p. 7.

¹⁶³ Charges of manslaughter and perverting the course of justice were dismissed.

¹⁶⁴ See Audrey Gillan, ‘Iraq abuse soldiers have sentences cut’, *The Guardian*, 2 June 2005, available at <https://www.theguardian.com/uk/2005/jun/02/iraq.military>. See also: ‘Soldiers’ sentences reduced’, *BusinessLive*, 2 June 2005, available at <https://www.business-live.co.uk/news/local-news/soldiers-sentences-reduced-3994636>.

¹⁶⁵ Audrey Gillan, ‘Iraq abuse soldiers have sentences cut’, *The Guardian*, 2 June 2005, *ibid*.

The case of IHAT 97, described in the previous section, shows the only penalty imposed on any member of the army as a result of IHAT's investigations was a £3,000 fine in a case concerning a brutal beating of a helpless Iraqi, an outcome that clearly points to a grossly inadequate punishment.

2.5 *Obstacles to victim participation in proceedings*

2.5.1 *Absence of oversight from victims' representatives*

Since the closure of Public Interest Lawyers in August 2016, the Iraqi individuals bringing judicial review actions in the UK as part of the ongoing *Al-Saadoon* proceedings and the victims and witnesses participating in proceedings under IHAT and SPLI no longer benefit from legal representation in these proceedings.

The lack of legal representation means that there is no way for victims to challenge issues such as the decision to close hundreds of IHAT and SPLI cases, decisions by the Service Prosecuting Authority not to prosecute, or decisions not to establish IFI proceedings in cases of deaths. It was not possible, for example, for victims to challenge IHAT's decision to close cases in which signed witness statements were not submitted to IHAT. If the claimants had continued to benefit from legal representation this issue would likely have been contested on the basis that although claimant representatives would have preferred to provide signed witness statements with supporting information, they were not in a position to do so due to the funding constraints introduced by the Legal Aid Agency.

The *Al-Saadoon* proceedings – intended to provide judicial oversight of the work of IHAT, SPLI and the IFI – now continue without the involvement of lawyers for the claimants. At the MoD's suggestion, periodic updates on the proceedings are now made in writing to the court,¹⁶⁶ rather than at a public hearing as was the case until 2017. This is a serious concern because, as set out below, there is a significant lack of transparency around the ongoing processes, particularly in regards to the SPLI, and these public hearings were the only way in which their progress was publicly discussed.

¹⁶⁶ Confirmed by the MoD in May 2019 in response to a Freedom of Information request.

2.5.2 *Difficulties facing victims in accessing information on their cases*

In addition to the problem of lack of representation, there are also barriers to victims being able to communicate or inquire with the SPLI and the SPA.

The SPLI maintains an online system of updating victims about their case. It simply hosts two documents which claimants can access online listing if their case has been closed and whether this was on the grounds of “proportionality” or “lack of evidence”.¹⁶⁷

The information further instructs:

“If you require any further information please call: +44 (0)1980 618295. You may need an interpreter as the phone will be answered in English. You can also email: SPLI-HQ-OLOSUP@mod.gov.uk. Please provide your name and unique number.”¹⁶⁸

SPLI decisions to discontinue work on individual cases following investigation are communicated by letter to claimants. Very little information is given as to the reasons behind the decision. Claimants are advised to check the MoD website to see if any further non-criminal inquiry has been initiated and are told to email the MoD if they want to be informed about this decision.¹⁶⁹

The placing of the burden upon the victim to contact the decision-maker is problematic for a variety of reasons. Some of the Iraqi victims do not have access to the internet and some are illiterate. Furthermore, only a fraction speak English and very few would have access to an interpreter as required when contacting the SPLI. Additionally this procedure requires survivors of traumatic events which occurred while in the custody of the British army to now get in contact directly with the MoD, an institution they are unlikely to have trust in.

¹⁶⁷ Table available under ‘Information for complainants’, SPLI website, *supra* note 22.

¹⁶⁸ Document available at ‘Information for complainants’, SPLI website, *ibid*. The same information was posted by IHAT, see IHAT’s information for complainants, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/618584/20170612-IHAT_website_information_for_complainants-FINAL.pdf.

¹⁶⁹ Based on letter seen by ECCHR with permission.

2.6 Failure to address systemic issues

Investigations undertaken under IHAT did not address systemic issues; their investigations have been limited to identifying the direct perpetrators of harm. As set out above,¹⁷⁰ attempts by IHAT staff to investigate those higher up the chain of command, and thereby potentially shed light on the systemic character of the crimes, were blocked by superiors. There is thus no mechanism in the UK to examine the potential criminal liability of those most responsible for the widespread and systemic abuse of detainees in Iraq.

Systemic issues arising from investigations by IHAT (and later SPLI)¹⁷¹ are supposed to be assessed by the Systemic Issues Working Group [SIWG], an MoD body set up to “review investigations into incidents of wrongdoing arising from UK military operations overseas in order to identify, and prevent the recurrence of, practices or individual conduct that breach the UK’s obligations under international humanitarian law.”¹⁷²

There are a number of serious problems with the SIWG from a complementarity perspective. First, it is not tasked with examining the question of liability under criminal law and does not have the capacity to trigger criminal investigations.¹⁷³ Secondly, it is an MoD body and has no independence from the army. Thirdly, it has no investigative powers.¹⁷⁴ Finally, it does not identify the causes of the systemic issues that lie behind the widespread abuse reported but instead merely makes a determination as to whether an issue has been “resolved”, i.e. whether the abuses examined (sexual assault, sleep deprivation, assault etc.) *currently* represent a systemic issue.

¹⁷⁰ See Section III.

¹⁷¹ ‘The UK Military in Iraq: Efforts and Prospect for Accountability for International Crimes Allegations’, *supra* note 5 at p. 45.

¹⁷² Website for the review of systemic issues arising from military operations overseas: fourth report, section on ‘details’, available at <https://www.gov.uk/government/publications/review-of-systemic-issues-arising-from-military-operations-overseas-fourth-report>.

¹⁷³ See e.g., Pre-Trial Chamber III, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi, public redacted version, 25 October 2017, ICC-01/17-X at para. 152. See also Office of the Prosecutor, Request for authorisation of an investigation pursuant to article 15, situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19, 4 July 2019, at para. 233.

¹⁷⁴ See e.g. UK Ministry of Defence, ‘Systemic Issues Identified from Service Police and Other Investigations into Military Operations Overseas: August 2018’, *supra* note 5 at para. 2.1.

In practice, the SIWG's assessments of whether an issue has been resolved are highly flawed.

For example, on the issue of assault in detention, the SIWG notes that in light of the High Court decision in *Alseran* that

*the SIWG considered that there was sufficient evidence to conclude that assaults in detention had occurred, and may have been systemic. Nevertheless, 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. The SIWG therefore recorded this issue as Noted (Resolved).*¹⁷⁵

The claim that there is “evidence of disciplinary action in appropriate cases” appears to be based on a handful of proceedings against 7 soldiers between 2003 and 2010 for the crime of assault.¹⁷⁶ Notably, it appears that the soldiers involved in the assaults on detainees in the *Alseran* case have not faced any disciplinary action; indeed under the IHAT/SPLI system adopted for dismissing cases, those assaults would be considered to fall at the “lower end or middle” of the spectrum and would thus not currently be subject to any investigation.¹⁷⁷ Furthermore, the SIWG fails to acknowledge here that the assault of detainees could represent a war crime, an egregious omission for a body which is supposed to identify and prevent the recurrence of practices in breach the UK's obligations under international humanitarian law.

The SIWG also examined the issue of hooding/blindfolding,¹⁷⁸ and in July 2015 found this issue to have been “resolved”.¹⁷⁹ In the judgment in *Alseran*, however, in December 2017, Mr Justice Leggatt found that the government had still not fully appreciated the importance of the ban on hooding:

¹⁷⁵ Ibid. at para. 7.1.7.

¹⁷⁶ Ibid. at para. 7.1.6.

¹⁷⁷ See above at Section IV.B.2.1.1.

¹⁷⁸ The two are conflated in the SIWG's report. See Systemic Issues Identified from Investigations into Military Operations Overseas: July 2015, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/450319/20150727-mod-annual-report-systemic-issues-july-2015.pdf, at Section 1.2

¹⁷⁹ Ibid.

Despite its unequivocal published policy [that hooding is prohibited], the MOD felt able to submit at the trial of MRE and KSU that the hooding of captured persons does not amount to inhuman and degrading treatment under article 3 of the European Convention where it is done for short periods of time during transit for reasons of operational security, and also to deny that the hooding of MRE and KSU for the duration of the journey from Umm Qasr port to Camp Bucca was a breach of article 3.

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 times¹⁸⁰.

This demonstrates that systemic issues are not being properly addressed. In particular there is no mechanism mandated to examine the causes of – and responsibility for – the failures in training and doctrine that led to systemic crimes. Academics have noted that the fact that the systemic issues identified by the SIWG have not led to any prosecutions

ignores the deterrent value of criminal prosecutions. This sets a troublesome precedent for the accountability within the military chain of command and ministerial oversight of the army, leading to a few junior soldiers being ‘scapegoats’ for – at least on some occasions – following orders, whereas those giving the orders and other senior commanders responsible for creating an environment where systematic abuses may occur escape liability.¹⁸¹

¹⁸⁰ *Alseran & Ors v Ministry of Defence*, *supra* note 51, at paras. 494, 495.

¹⁸¹ ‘The UK Military in Iraq: Efforts and Prospect for Accountability for International Crimes Allegations’, *supra* note 5 at p. 46, source footnotes omitted.

Furthermore, SIWG does not examine “intentional breaches” of doctrine,¹⁸² even though intentional breaches of doctrine could also represent a systemic issue e.g. where acts in breach of doctrine are tolerated by superiors.

The failure to address systemic issue is also linked with the lack of legal representation for claimants in the UK.¹⁸³ If the claimants continued to enjoy legal representation, their lawyers could scrutinize systemic issues on an ongoing basis as part of the *Al Saadoon* proceedings, but this form of oversight is now not possible.

While the Iraq Fatalities Investigations have uncovered some information about the links between the deaths that occurred and the lack of training/culture in certain military units,¹⁸⁴ no such fact-finding efforts have been established in cases of torture and ill-treatment not leading to death. Calls for a comprehensive judge-led inquiry into torture and ill-treatment in Iraq to include an assessment of command responsibility¹⁸⁵ have been recently echoed by the UN Committee against Torture.¹⁸⁶

2.7 *Political hostility to investigations*

With respect to the UK government’s unwillingness to carry out investigations and prosecutions it should be noted as a preliminary point that almost all of the domestic proceedings looking into detainee abuse and unlawful killings in Iraq were wrung from a reluctant government through legal action on behalf of Iraqis.¹⁸⁷

¹⁸² SIWG report from September 2016, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/552930/Mod_Annual_Report_on_Review_of_systemic_issues_arising_from_military_operations_overseas_2016-0160912.pdf, at note 1. See also Prof. Andrew Williams, ‘The Iraq Abuse Allegations and the Limits of UK Law’, (2018) *Public Law* 461, at 468.

¹⁸³ See above at Section IV.B.2.5.1.

¹⁸⁴ IFI reports have on occasion made incidental findings on failures in training in connection with abuse, see e.g. Iraq Fatality Investigations, Consolidated Report into the death of Tariq Sabri Mahmud, *supra* note 31 at paras. 12.2, 12.3.

¹⁸⁵ The UK’s Implementation of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Punishment, Civil society alternative report, March 2019, *supra* note 111, at 13.2.

¹⁸⁶ United Nations Committee against Torture, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, *supra* n. 110, at para. 33.

¹⁸⁷ On this see also Human Rights Watch, ‘Pressure Point: The ICC’s Impact on National Justice. Lessons from Colombia, Georgia, Guinea, and the United Kingdom,’ *supra* note 103 at p. 120: “The response of British authorities to these legal actions has been piecemeal, ad-hoc, and almost exclusively driven by the efforts of

The government’s unwillingness to acknowledge and address the crimes that occurred in Iraq is evidenced by the explicit hostility of successive UK Prime Ministers, Defence Secretaries and other government ministers towards investigations into torture and ill-treatment in Iraq, which is set out in ECCHR’s submission of June 2017. That submission describes public statements from David Cameron, when he was Prime Minister, pledging to “stamp out” litigation against the Armed Forces, describing the Iraqis’ claims as “spurious” and “totally without foundation.”¹⁸⁸ It also notes similar remarks by former Defence Secretary Michael Fallon¹⁸⁹ and by former Prime Minister Theresa May, who vowed to never again let “activist left wing human rights lawyers harangue and harass the bravest of the brave.”¹⁹⁰ In 2016, then Minister for the Armed Forces Penny Mordaunt stated 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 [...]”.¹⁹¹

This climate of hostility has intensified over the past months. Shortly after taking up the role of Defence Secretary in May 2019, Penny Mordaunt announced that she, like her predecessor Gavin Williamson, was considering introducing a statutory presumption against prosecution of members of the armed forces for alleged offences committed in the course of duty more than 10 years previously, and which have been the subject of a previous investigation. She clarified that under this proposal such prosecutions “should not be considered to be in the public interest” except in “exceptional circumstances”.¹⁹² It appears very likely that these plans will be progressed under newly-appointed Defence Secretary Ben Wallace given that Prime Minister Boris Johnson has committed to implementing legislation to end “repeated and vexatious

individual victims, their families, and legal representatives.” See also 2014 Communication, *supra* note 2 at p. 248.

¹⁸⁸ ECCHR’s June 2017 submission to the OTP, *supra* note 1, at p. 2. See also Ashley Cowburn, ‘David Cameron launches assault on lawyers filing “spurious” allegations against Iraq war veterans,’ *The Independent*, 22 January 2016, available at <https://www.independent.co.uk/news/uk/politics/david-cameron-launches-assault-on-lawyers-filing-spurious-allegations-against-iraq-war-veterans-a6826851.html>.

¹⁸⁹ ECCHR’s June 2017 submission to the OTP, *supra* note 1, at p. 3.

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² See Written Statement by Secretary of State for Defence, ‘Legal Protections and Support for Armed Forces Personnel and Veterans’, 21 May 2019, available at <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2019-05-21/HCWS1575/>. See also Dan Sabbagh, ‘Mordaunt to give veterans amnesty for battle crimes’, *The Guardian*, 15 May 2019, available at <https://www.theguardian.com/uk-news/2019/may/15/mordaunt-vows-introduce-amnesty-military-veterans>.

investigations” into historic allegations against service personnel¹⁹³ and has appointed Johnny Mercer – one of the most vociferous critics of such prosecutions – as minister in the MoD and the Cabinet Office overseeing a new Office of Veterans’ Affairs.¹⁹⁴ While a number of points have yet to be clarified,¹⁹⁵ it does appear that such a policy, if enacted, would be an example of a regime of immunity and jurisdictional privileges for perpetrators. ECCHR notes with concern media reports that the government is in talks with the ICC in an attempt to reach an “agreement” on the plans.¹⁹⁶

The recent announcements about the possible introduction of a “presumption against prosecution” is wholly in keeping with the political mood within the UK government over the past several years, which sees ministers and MPs seek to outdo each other in terms of being seen to be protecting veterans from prosecution.¹⁹⁷ In March 2019 former Defence Secretary

¹⁹³ Tom Newton Dunn, ‘Boris Johnson vows to stop witch hunt of Northern Ireland troops as he backs The Sun’s Veterans Pledge’, *The Sun*, 11 July 2019, available at <https://www.thesun.co.uk/news/9489671/boris-johnson-northern-ireland-veterans-pledge/>. The article clarifies that the pledge relates not only to claims concerning Northern Ireland. See also ‘Tory leadership candidates united on legal protection for troops’, *ITVNews*, 29 June 2019, available at <https://www.itv.com/news/2019-06-29/tory-leadership-candidates-united-on-legal-protection-for-troops/>. On Ben Wallace’s obligation to uphold this pledge see Isabel Hardman, ‘Will Ben Wallace be allowed to turn on the defence spending taps?’, *The Spectator*, 24 July 2019, available at <https://blogs.spectator.co.uk/2019/07/will-ben-wallace-be-allowed-to-turn-on-the-defence-spending-taps/>.

¹⁹⁴ ‘Johnny Mercer To Oversee New Office Of Veterans’ Affairs’, *Forces Network*, 29 July 2019, available at <https://www.forces.net/news/johnny-mercier-former-army-officer-given-ministerial-position>.

¹⁹⁵ It remains unclear if the “presumption against prosecution” would also apply in cases where prior investigations were manifestly flawed e.g. due a lack of independence or in cases where there had been prior non-criminal inquiries (e.g. the Baha Mousa Inquiry) or in cases where criminal investigations had begun but did not progress to a verdict, e.g. an IHAT investigation was opened but later discontinued. The House of Commons Defence Committee in its most recent report stresses that its proposal for a statute of limitations would not represent an amnesty because it would only apply to cases that have already been subject to investigation. The report fails to address the point raised in written evidence to the Committee that any such proposal would have to exempt “from its application genocide, crimes against humanity and war crimes, as well as human rights violations for which there is an obligation to investigate”. See House of Commons Defence Committee, ‘Drawing a line: Protecting veterans by a Statute of Limitations’, Seventeenth Report of Session 2017-19, 22 July 2019 available at <https://publications.parliament.uk/pa/cm201719/cmselect/cmdfence/1224/1224.pdf>. See paras. 145-146. See also written evidence of Dr Carla Ferstman and Dr Thomas Obel Hansen, submitted 18 July 2018, available at https://publications.parliament.uk/pa/cm201719/cmselect/cmdfence/1224/122411.htm#_idTextAnchor063.

¹⁹⁶ David Willetts, ‘Hounded Veterans Hope: Government lawyers beg Hague judges to agree ten-year limit on prosecuting hero troops’, *The Sun*, 9 May 2019, available at <https://www.thesun.co.uk/news/9042638/government-talks-10-year-limit-charging-veterans/>.

¹⁹⁷ “In an astonishing run of events, Sir Michael attempted to pre-empt the parliamentary findings [Defence Committee report: *Who guards the guardians? MoD support for former and serving personnel*] – initially due to be published on Sunday – by making his own announcement that Ihat was being closed in the summer. That in turn prompted MPs to bring forward their own report to Friday lunchtime. The Defence Secretary said that the MoD – rather than being criticised – should receive credit for forcing Mr Shiner and his firm Public Interest Lawyers out of business. Sir Michael said: “It was the MoD that supplied the main evidence that got Phil Shiner struck off for making false allegations against our Armed Forces. Exposing his dishonesty means many more

Michael Fallon published an article emphasizing once again that he shut down IHAT, and noting that he also “cut back” a similar inquiry into UK forces in Afghanistan.¹⁹⁸ That this political hostility has a real impact on investigations is most evident from the closure of IHAT at the behest of the Defence Secretary amid growing political pressure.¹⁹⁹ It has been noted that even before IHAT was shut down, the stream of hostile statements by senior government officials “would have contributed to immense pressure on investigators to expedite the closure of cases.”²⁰⁰

The Secretary of Defence and other MoD officials have explicitly stated that the only reason that the politically unpopular IHAT was kept in operation was to shield the UK from scrutiny by the ICC.²⁰¹ It seems clear that the MoD and UK government had no interest in allowing genuine IHAT investigations; IHAT was initially tolerated as a process that was necessary to avoid an ICC investigation until the domestic political pressure became too much to withstand, at which point IHAT was hastily shut down. The government hoped that the disciplinary proceedings against the lawyers involved could be used to discredit the allegations and lend legitimacy to the decision to end investigations.

claims he made can now be thrown out and the beginning of the end for Ihat.” See Robert Mendick, ‘Iraq abuse inquiry to shut after MPs find it has “directly harmed defence of our nation”’, *Telegraph*, 10 February 2017, available at <https://www.telegraph.co.uk/news/2017/02/10/iraq-abuse-inquiry-has-directly-harmed-defence-nation-andmust/>. See more recently also Mattha Busby and Nadeem Badshah, ‘I won’t support May while Ulster veterans are prosecuted – MP. Ex-army officer Johnny Mercer’s ultimatum over historical allegations’, *The Guardian*, 9 May 2019, available at <https://www.theguardian.com/politics/2019/may/09/i-wont-support-may-while-ulster-veterans-are-prosecuted-mp>.

¹⁹⁸ Michael Fallon, ‘Who’ll sign up to fight for the British Army if they face a knock on the door and investigations 40 years after they have served?’, *The Daily Mail*, 11 March 2019, available at <https://www.dailymail.co.uk/debate/article-6793559/MICHAEL-FALLON-Wholl-sign-British-Army-face-investigations-40-years-later.html>.

¹⁹⁹ *Ibid.*, and *supra* at note 120.

²⁰⁰ ‘The UK Military in Iraq: Efforts and Prospect for Accountability for International Crimes Allegations’, *supra* note 5, at p. 28.

²⁰¹ On announcing the closure of IHAT, then Defence Secretary Michael Fallon stated: “The process (IHAT) was necessary because it was required by the courts, otherwise this country would have been placed before the International Criminal Court,” see Defence Secretary announces IHAT will close this summer (video), *The Daily Mail*, *supra* note 119. An MoD official told an ITV journalist that “they couldn’t have pulled the plug on Ihat before Phil Shiner’s allegations had been discredited or else the investigations would simply have transferred to the International Criminal Court (ICC)”, Carl Dinnen, ‘The real reason the MOD pulled the plug on Iraq War probe today’, *ITV News*, 10 February 2017, available at <https://www.itv.com/news/2017-02-10/the-real-reason-the-mod-shut-probe-into-iraq-war-troops/>. In an official MoD statement an MoD spokesperson noted: “The government is legally obliged to investigate criminal allegations and the courts are clear that if IHAT did not exist, British troops could be dragged through international courts. We’re committed to reducing IHAT’s caseload to a small number of credible cases as quickly as possible,” see MoD statement from 6 December 2017, available at <https://modmedia.blog.gov.uk/2017/02/06/defence-in-the-media-6-february-2017/>.

In a previous submission, ECCHR has described the Ministry of Defence’s role in bringing about the disciplinary proceedings against the lawyers involved in the Iraq litigation.²⁰² Subsequently published correspondence²⁰³ between the Solicitors Regulatory Authority (SRA) and the MoD and the Ministry of Justice (MoJ) shows that these ministries continued to take an unusually close interest in the disciplinary proceedings after they were initiated. Overall, the documents reveal close communication between the MoJ, MoD and SRA, with the MoD seeking regular updates on the proceedings²⁰⁴ and the MoJ urging the SRA to include certain points in their investigation.²⁰⁵ Harriet Harman MP, Chair of the Joint Committee on Human Rights, has stated that the government’s pressure on the SRA to take disciplinary action against Leigh Day “undermined the rule of law” and “was designed to deter solicitors taking actions on behalf of clients claiming that the government had breached their human rights.”²⁰⁶

This hostility towards any genuine efforts to uncover the truth about the crimes can also be seen in the army and the MoD’s treatment of Nicholas Mercer, the army lawyer who repeatedly raised the issue of detainee abuse in Iraq, including as a witness in court-martial proceedings and inquiries. His career subsequently stalled, he lost out on promotion and additional pension rights, and he spent his last three years in the army “effectively suspended for raising human

²⁰² ECCHR’s September 2017 submission to the OTP, *supra* note 1 at note 6. On the MOD’s role in the proceedings against Leigh Day, see e.g. Owen Bowcott, ‘Law firm referred to disciplinary tribunal over Al-Sweady inquiry’, *The Guardian*, 5 January 2016, available at <https://www.theguardian.com/uk-news/2016/jan/05/law-firm-leigh-day-solicitors-disciplinary-tribunal-al-sweady-inquiry>.

²⁰³ The communications referenced here were released following a Freedom of Information Request. See ‘FOI201814074 Tim Bullimore redacted bundle for release’, 9 January 2019, available at https://www.whatdotheyknow.com/request/530820/response/1290523/attach/3/20190109%20FOI201814074%20Tim%20Bullimore%20redacted%20bundle%20for%20release.pdf?cookie_passthrough=1. A slightly smaller bundle of documents, including a letter from Defence Secretary Michael Fallon to the SRA, is available from the SRA website at <https://www.sra.org.uk/sra/news/leigh-day-correspondence.page>. It is unclear to what extent the documents released represented all the documents disclosed during the proceedings between the SRA and Leigh Day.

²⁰⁴ *Ibid.*, e.g. at p. 84.

²⁰⁵ See e.g. emails from 4 February 2015: “Can I ask (as it was something specifically asked of me) whether you are investigating the matters relating to the start of the cases – how the firms found their clients and investigated the authenticity of their cases? And interactions between the firms as the cases progressed?”. The SRA responds: “I don’t think that there is any problems with firms advertising or seeking clients proactively – but if anything comes up that suggests that they didn’t act with integrity or undermined rule of law then yes we will deal with it. Limits on how clients are attracted in a legal aid rule in contract rather than a regulatory requirement. I think it is too early to say the scope of the investigation covers something narrow – we have really wide look at stuff like this. Does this make sense – sorry its not more specific.” To which the MoJ responds: “To be honest, I think Ministers will want to know that you are looking at everything from start to finish.”

²⁰⁶ Letter from Harriet Harman to the Attorney General, 13 July 2017, available at https://www.harrietharman.org/ministers_must_not_attack_independent_legal_professionals_the_times.

rights concerns.”²⁰⁷ He notes that as a result of raising concerns about the treatment of prisoners, he found himself in a “constant battle” with the MoD, marked by “constant hostility”.²⁰⁸ In a similar vein, when former SAS soldier Ben Griffin began speaking publicly about detainee mistreatment by UK and US forces in Iraq and Afghanistan, the MoD obtained an injunction to prevent him from making further disclosures.²⁰⁹

This unwillingness on the part of UK government officials to acknowledge that the UK committed war crimes in Iraq and its attempts to punish or silence whistleblowers fits a long-standing pattern concerning the UK’s historical response to allegations of torture, a response which has been described as to “resist, deny, hide”,²¹⁰ and which has in previous cases indicated a desire to avoid acknowledging that torture and abuse were approved at high levels.

When allegations emerged about widespread torture, authorized at a high level, by British personnel in Kenya in the 1950s, the official response was to deny them and seek to hide or destroy any evidence of the torture²¹¹ until litigation decades later force the government to admit that there was a secret archive of files showing massacres and abuse occurred on a massive

²⁰⁷ Jonathan Miller, ‘Top army lawyer slams MoD over human rights abuses,’ *Channel 4 News*, 12 October 2011, available at <https://www.channel4.com/news/top-army-lawyer-slams-mod-over-human-rights-abuses>. On his suspension from the army see also ‘Former British Army legal chief to be Rector of the Falkland Islands’, Anglican Communion News Service, 14 November 2017, available at <https://www.anglicannews.org/news/2017/11/former-british-army-legal-chief-to-be-rector-of-the-falkland-islands.aspx>.

²⁰⁸ “The treatment Lt-Col Mercer endured from the MoD after blowing the whistle on prisoner abuse ultimately saw him leave the military in 2011. ‘My own headquarters staff were very supportive and decent. I felt my conflict was with the Ministry of Defence. It was a constant battle, there was constant hostility. It was awkward throughout, you felt you were being undermined. It was just constant attrition really,’ he said.” See Jonathan Owen, ‘Lieutenant-Colonel Nicholas Mercer says it is “beyond question” that British soldiers tortured Iraqis,’ *The Independent*, 8 January 2016, available at <https://www.independent.co.uk/news/uk/home-news/lieutenant-colonel-nicholas-mercer-says-it-is-beyond-question-that-british-soldiers-tortured-iraqis-a6803281.html>.

²⁰⁹ Nicholas Mercer, ‘The truth about British army abuses in Iraq must come out,’ *The Guardian*, 3 October 2016, available at <https://www.theguardian.com/commentisfree/2016/oct/03/british-army-abuses-iraq-compensation>. On what Ben Griffin witnessed during routine British arrest operations in Iraq see James McCarthy, ‘The former SAS soldier whose experiences in Iraq turned him into an anti-war campaigner’, *Wales Online*, 4 July 2015, available at <https://www.walesonline.co.uk/news/wales-news/former-sas-soldier-whose-experiences-9587688>; on British cooperation with US forces in detaining people who would be rendered and tortured see Richard Norton-Taylor, ‘Court gags ex-SAS man who made torture claims’, *The Guardian*, 29 February 2008, available at <https://www.theguardian.com/uk/2008/feb/29/military.law>.

²¹⁰ Prof. Andrew Williams, ‘Iraq abuse allegations: Resist, deny, hide’, *Open Democracy*, 20 November 2016, available at <https://www.opendemocracy.net/en/author/andrew-williams/>.

²¹¹ Owen Bowcott, ‘Mau Mau rebellion victims claim parliament was misled over torture’, *The Guardian*, 23 May 2016, available at <https://www.theguardian.com/world/2016/may/23/mau-mau-rebellion-kenyan-victims-compensation-claim>;

scale.²¹² Recent proceedings in the case of *Ireland v UK*²¹³ before the European Court of Human Rights show a similar pattern in regard to the use of the “five techniques” and other forms of torture and ill-treatment on prisoners in Northern Ireland in the 1970s. A request to revise the Court’s 1978 judgment in the case was issued in December 2014 on the basis of information emerging from British government archives opened between 2003 and 2008 in accordance with the “thirty years rule”.²¹⁴ The new documents, described in a judgment from March 2018, showed that when the case was heard, the British government withheld medical evidence that it had acquired indicating the severe and long-lasting effects of the use of the five techniques on prisoners while claiming that the effects were only minor and short-term. They also showed that the government had withheld documents showing that the use of the techniques had been authorized at ministerial level.²¹⁵ Civil actions brought by the 14 men subjected to the techniques were settled; documents from the archives showed that this decision was taken by the MoD because going to trial would involve disclosing documents on the “deep interrogation programme” and potentially the calling as “witnesses those responsible for authorizing and carrying out” the procedures.²¹⁶ The documents also contained notes by a government official indicating that initial investigations into the use of the techniques on the men were inadequate, and that the lack of prosecutions was due to a police cover-up. On the failure to undertake adequate criminal prosecutions into the use of the techniques, the official notes:

*there is no point talking about evidence or investigations. It would not be a week’s work to discover who was responsible if we set our minds to it. As I understand it, the decision not to prosecute was, and is, a policy decision (and no doubt an admirable one).*²¹⁷

²¹² Ian Cobain, Richard Norton-Taylor, ‘Mau Mau massacre cover-up detailed in newly-opened secret files’, *The Guardian*, 30 November 2012, available at <https://www.theguardian.com/world/2012/nov/30/maumau-massacre-secret-files>; Marc Parry, ‘Uncovering the brutal truth about the British empire,’ *The Guardian*, 18 August 2016, available at <https://www.theguardian.com/news/2016/aug/18/uncovering-truth-british-empire-caroline-elkins-mau-mau>.

²¹³ *Ireland v. the United Kingdom*, Request for Revision of the Judgment of 18 January 1978, Application no. 5310/71).

²¹⁴ *Ireland v. the United Kingdom, Judgment (Revision)*, Third Section, 20 March 2018, at para. 17.

²¹⁵ *Ibid.*, at paras. 18-20.

²¹⁶ *Ibid.*, at para. 31.

²¹⁷ *Ibid.*, at para. 32.

The information available at this stage suggests that a similar approach is being taken on the question of who was ultimately responsible for the abuse of detainees in Iraq. The opening of an investigation by the OTP would allow for more information to be recovered on this key question.

C. Complementarity: Conclusion

There have been no domestic proceedings against higher-level military and civilian officials for crimes committed against detainees in Iraq. This appears to be the result of a deliberate effort to focus investigations on low-level perpetrators by blocking investigators from looking up the chain of command and through the failure to examine who was responsible for systemic issues leading to widespread detainee abuse.

With respect to domestic proceedings against low-level perpetrators, only a tiny number of criminal prosecutions have been carried out. Courts-martial in connection with four situations saw charges brought against 22 soldiers. Only five were ultimately convicted,²¹⁸ and those convictions did not adequately reflect the seriousness of the acts that occurred.²¹⁹ The only person convicted in connection with the killing of Baha Mousa was sentenced to a year in prison for “inhumane treatment”²²⁰ – thus to date nobody has been held accountable for this death. The inadequacy of penalties is strikingly highlighted also by the case of soldiers filmed brutally beating an Iraqi man in the back of a jeep until his “jaw was left hanging off”; one soldier was given a fine while the other soldiers involved avoided punishment altogether.

Considerable resources were invested in IHAT but ultimately any potential for its investigations to lead to criminal proceedings was undermined by a lack of independence and the political decision made at the highest level of the MoD that IHAT should wind up its work early, leading to hundreds of cases being closed on spurious grounds.

²¹⁸ *Supra* note 5.

²¹⁹ On the issues attaching to the conviction of soldiers in connection with abuses at Camp Breadbasket, see above at Section IV.B.2.3.

²²⁰ The charge of manslaughter was dismissed.

Overall, domestic proceedings have been beset by a catalogue of serious problems, including the failure to properly recognize the seriousness of the criminal behavior in question and the failure to address the key question of responsibility for the underlying systemic problems. A striking aspect of the proceedings has been the overt hostility of successive high-profile members of government to efforts at genuinely carrying out investigations and prosecutions, culminating in the recent plans to introduce a statute of limitations for crimes in Iraq. Through a range of maneuvers of varying degrees of subtlety, the government has to date managed to successfully shield those responsible from criminal proceedings, resulting in an almost complete lack of accountability.

V. GRAVITY

In the 2014 Communication, ECCHR made extensive submissions on the legal requirements for gravity as a requirement for admissibility and the facts and circumstances indicating that the gravity threshold is met, addressing the scale,²²¹ nature,²²² manner of commission²²³ and impact²²⁴ of the crimes alleged. Submissions were also made therein on the assessment of gravity with respect to the group of persons likely to be the object of an investigation who bear the greatest responsibility for the crimes, including individuals at the highest level of the army and the Ministry of Defence.²²⁵ This section will be limited to four key points addressing the scale and nature of the alleged crimes, the manner in which they were committed and the long term impact on survivors.

A. The scale of the crimes

In its 2018 Report on Preliminary Examination Activities, the OTP stated:

*In its gravity assessment, the Office is giving due regard to the guidance provided in article 8(1) of the Statute, according to which the Court should focus particularly on cases of war crimes committed on a large scale as part of a plan or pursuant to a policy. In the present situation, while there is a significant body of allegations, in light of the circumstances in which some of such allegations were collected, it remains unclear whether the crimes alleged were committed on the scale alleged by communication senders.*²²⁶

As a preliminary point, Article 8(1) of the Statute states that the “Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy *or* as part of a

²²¹ 2014 Communication, *supra* note 2 at p. 209.

²²² *Ibid.*, at p. 210.

²²³ *Ibid.*

²²⁴ *Ibid.*, at p. 211.

²²⁵ *Ibid.*, at p. 209.

²²⁶ At para. 208, emphasis added.

large-scale commission of such crimes.”²²⁷ The second part of the sentence – the guidance on the particular focus – is constructed in the alternative, not as a cumulative test as suggested by the absence of this “or” in the OTP’s report. For the present purposes this distinction is in any case not decisive, as ECCHR considers that the available evidences strongly suggests that war crimes were committed on a large scale *and* as part of a policy.²²⁸

For the assessment of scale with respect to gravity, the information submitted by ECCHR and PIL in 2014 – as an exemplary rather than exhaustive account²²⁹ – indicates that detainee abuse occurred at every stage of detention²³⁰ at a range of detention facilities²³¹ in every year of UK military operations in Iraq from 2003 to 2008.²³² The broad temporal scope of the abuses was confirmed in the case of *Alseran* before the UK High Court; the four test cases span from 2003 to 2007. The Court’s findings with respect to claimant Mr Al-Waheed confirm that beating,²³³ sleep deprivation,²³⁴ and sensory deprivation as “conditioning”²³⁵ continued to occur in 2007. The abuse described in the testimonies before the OTP indicates a broad range of crimes under Article 8 of the Rome Statute, including willful killing/murder, torture, inhuman/cruel treatment, willfully causing great suffering or serious injury to body or health, rape and other forms of sexual violence, outrages upon personal dignity, particularly humiliating and degrading treatment.

Secondly, the OTP’s reference here to “the circumstances in which some of the allegations were collected” appears to be a reference to the credibility of information gathered in Iraq by PIL.²³⁶ Section IV. B. 2.1.2. above details why it was deeply problematic for IHAT and SPLI to rely on disciplinary proceedings against the lawyers involved in the cases as a way to cast doubt on the credibility of the claims themselves. It would for the same reasons be an error for the OTP, in its assessment of the scale of the alleged war crimes, to rely on these proceedings to limit the

²²⁷ Emphasis added.

²²⁸ 2014 Communication, *supra* note 2, at pp. 138-139.

²²⁹ *Ibid.*, at p. 101.

²³⁰ *Ibid.*, at p. 121.

²³¹ *Ibid.*, with reference to the tables provided.

²³² *Ibid.*

²³³ *Alseran & Ors v Ministry of Defence*, *supra* note 51, at para. 654.

²³⁴ *Ibid.*, at para. 691.

²³⁵ *Ibid.*, at para. 687-688.

²³⁶ See also OTP Report on Preliminary Examination Activities 2017, at para. 191.

number of cases it considers at this stage. The accounts of Iraqis reporting abuse in detention have been tested in two inquiries in the UK; in each case, abuse was found to have occurred.²³⁷ In the recent civil proceedings in *Alseran*,²³⁸ the claimants' testimonies were subjected to rigorous assessment alongside expert evidence of doctors and psychiatrists.²³⁹ The judge found that the claimants' accounts were in most respects credible, that they had all been mistreated in various ways, and that some inconsistencies in their accounts were "of the kind to be expected when different people recall something that happened 13 years ago."²⁴⁰ Of the accounts provided by MRE and KSU, the judge found:

I am sure that they are not bogus allegations which have simply been made up. Their evidence had the hallmarks, including minor differences between their accounts of the kind to be expected, of evidence based on recollection given many years after the occurrence of traumatic events. What, if anything, is surprising is the extent to which the claimants have described many things which match independent evidence of which they would not have been aware when making their witness statements. Another feature of their evidence consistent with its honesty is that, while complaining in strong terms about their alleged mistreatment, both claimants also referred to various small acts of kindness shown to them by some of the service personnel they encountered at various times.

Second, the mistreatment at the heart of their complaints is not mistreatment of a kind which someone in their position who was making a false claim would be likely to invent. There is substantial evidence, including the expert evidence given by Dr George on conditions in Iraq, that being a victim of any form of sexual abuse is associated in the claimants' culture with a high degree of shame and social stigma. I see no reason to suppose that MRE and KSU would have chosen to expose themselves to such stigma by falsely alleging mistreatment of a sexual nature[...]²⁴¹

²³⁷ See above at Section II.B.2.

²³⁸ *Alseran & Ors v Ministry of Defence*, *supra* note 51.

²³⁹ *Ibid.*, at para. 202, see also that paragraph in full.

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*, at paras. 366-367.

That the Iraqis' accounts are generally credible is suggested also by the MoD's payment of settlements in hundreds of cases, which in part relates to abuse in detention.²⁴² It is also echoed by a senior partner of Leigh Day,²⁴³ and by Nicholas Mercer, who personally witnessed abuse.²⁴⁴ As noted in previous ECCHR submissions,²⁴⁵ there are at least several hundred video recordings of interrogations in Iraq that could be used to corroborate at least parts of claimants' accounts and again ECCHR urges the OTP to secure and review these recordings if it has not done so.

B. The nature of the crimes

Many of the testimonies submitted with the 2014 Communication detail the sexual and religious humiliation of detainees. Testimonies describe numerous cases of the following techniques: detainees being forced to watch sexual intercourse and other sexual acts between soldiers, female soldiers/interrogators forcing detainees to watch as they exposed their breasts or genitals, masturbation by soldiers in front of detainees; detainees being forced to see or listen to pornography, forced oral sex. Testimonies also describe forced anal sex, forced simulated anal sex, forced masturbation and forced nudity. One former detainee describes how interrogators superimposed his face on pictures of the sexual abuse of children, threatened to distribute the pictures in the man's local area and tell everyone that he had raped children.²⁴⁶ Several of the accounts describe interrogators threatening to rape the detainee's wife or sister.²⁴⁷

²⁴² See ECCHR's September 2017 submission to the OTP, *supra* note 1, at p. 11.

²⁴³ "[...]one should be wary about moving from the decision about that group of nine detainees and the inquiry chair's determination that they had lied very significantly [in the Al-Sweady inquiry], as against Iraqis more widely. I am trying to say that there is no relationship between that and what we have seen. We represent 1,000 individual claimants, and we are satisfied that the great majority of those cases are genuine cases. We have been in discussions with the Ministry of Defence; we have resolved a significant number already, and we are in talks about other cases." See Evidence of Martyn Day, Defence Committee, Oral evidence: Statute of Limitations Veterans Protection, 8 January 2019, *supra* note 64, at question 239.

²⁴⁴ "I strongly suspect that those allegations made to the ICC are largely correct. And it may be that the MoD know that those allegations are correct but would prefer to play the narrative of "bent human rights lawyers" [...]. See remarks by Nicholas Mercer at a seminar on 25 January 2019 at the Bonavero Institute of Human Rights at the University of Oxford: 'The Alseran case one year on: International human rights law, international humanitarian law, and future military operations, *supra* note 79, Session 1, at 28:50.

²⁴⁵ ECCHR's September 2017 submission to the OTP, *supra* note 1, at p. 12.

²⁴⁶ 2014 Communication, *supra* note 2, at 88. This is not the only case of detainees reporting having their faces superimposed on images of child pornography, see p. 86.

²⁴⁷ *Ibid.*, at p. 90, 94, 99.

As noted by the OTP in connection with the situation in Afghanistan,²⁴⁸ these kinds of allegations are likely to have gone underreported given the societal stigma attached to being the victim of sexual violence.

Forced stripping and forcing detainees to simulate or engage in sex acts with one another came to light in the case of Camp Breadbasket, where detainees were forced into simulated oral and anal sex positions while giving the thumbs up for the camera, stood on, and suspended from the raised fork of a forklift truck. These abuses only came to light after a soldier brought graphic photographs of the abuse to a shop to be developed. While some of the soldiers involved faced courts-martial, none were convicted of sexual offences.²⁴⁹

In a separate case, a 14 year old was forced to engage in oral sex with another detainee at Camp Breadbasket.²⁵⁰ ECCHR understands that no one has been charged in connection with this crime.

The OTP has acknowledged that “sexual and gender-based crimes are amongst the gravest under the Statute”²⁵¹ and that it “will be vigilant in charging sexual and gender-based crimes as war crimes”.²⁵²

Many of the accounts also describe abuse calculated to humiliate the detainees on the basis of their religion.²⁵³ This includes the placing of hard core pornography magazines in the bathroom during Ramadan,²⁵⁴ deliberate disrespect for the Qur’an,²⁵⁵ and detainees not being permitted to be clean for prayer (including during Ramadan).²⁵⁶

²⁴⁸ Office of the Prosecutor, Public redacted version of “Request for authorisation of an investigation pursuant to article 15”, 20 November 2017, ICC-02/17-7-Conf-Exp, at para. 362.

²⁴⁹ *Supra* note 159.

²⁵⁰ Richard Norton-Taylor and Audrey Gillan, ‘MoD faces legal action after teenage Iraqi claims sexual humiliation by soldiers’, *The Guardian*, 4 July 2008, available at <https://www.theguardian.com/uk/2008/jul/14/military.defence>.

²⁵¹ The Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, at para. 45.

²⁵² *Ibid.* at para. 35.

²⁵³ 2014 Communication, *supra* note 2, Annex Table 1, at p.10.

²⁵⁴ 2014 Communication, *supra* note 2, at p. 80.

²⁵⁵ *Ibid.* at 74. See also Annex Table 1, *supra* at p. 10.

²⁵⁶ *Ibid.*, Annex Table 1, at p. 10.

The combination of sexual and religious humiliation points clearly to acts of a discriminatory nature and intended to cause maximum anguish to Muslim detainees.

C. The manner of commission

The testimonies of Iraqis indicate that in several hundreds of cases, detainees were subjected to several abusive techniques at the same time, including, variously: beatings, sensory deprivation, sleep deprivation, deprivation of food/water, stress positions, threats to family members, sexual humiliation etc. The use of such techniques in combination will in many cases reach the threshold of torture.²⁵⁷

With regards to the intent of the perpetrators,²⁵⁸ in the *Alseran* case, Mr Justice Leggatt noted that the practice of subjecting detainees to sensory deprivation

*was done as a form of deliberate ‘conditioning’, in order to maximise vulnerability and the ‘shock of capture’. It also seems to me that a practice which prevented detainees who were already defenceless from being able to see (or hear) exactly what was being done to them or by whom was not only calculated to make the detainees feel more vulnerable but also – by dehumanising them and giving their captors a cloak of invisibility – to increase the risk of physical abuse.*²⁵⁹

A further concerning aspect of the abuse of detainees in Iraq is information indicating that some detainees were taken to secret detention sites, the existence of which were not known even to

²⁵⁷ See e.g. conclusions of the Committee against Torture, eighteenth session, summary record of the public part of the 297th meeting, consideration of the report submitted by Israel, CAT/C/SR.297/Add.1, 4 September 1997:

These methods include: (1) restraining in very painful conditions, (2) hooding under special conditions, (3) sounding of loud music for prolonged periods, (4) sleep deprivation for prolonged periods, (5) threats, including death threats, (6) violent shaking, and (7) using cold air to chill; and are in the Committee’s view breaches of article 16 and also constitute torture as defined in article 1 of the Convention. This conclusion is particularly evident where such methods of interrogation are used in combination, which appears to be the standard case.

²⁵⁸ The OTP has indicated that in assessing the manner of commission of the crimes, consideration may be had of inter alia: “the means employed to execute the crime, the degree of participation and intent of the perpetrator (if discernible at this stage), the extent to which the crimes were systematic or result from a plan or organised policy or otherwise resulted from the abuse of power or official capacity, and elements of particular cruelty, including the vulnerability of the victims, any motives involving discrimination, or the use of rape and sexual violence as a means of destroying groups,” Office of the Prosecutor, *Policy Paper on Preliminary Examinations*, November 2013, *supra* note 83, at para. 64.

²⁵⁹ *Alseran & Ors v Ministry of Defence*, *supra* note 51, at para. 665.

senior army lawyers.²⁶⁰ If prisoners were deliberately being taken outside the system of known detention centers – and thus outside the oversight of army lawyers and the International Committee of the Red Cross – this raises extremely important questions as to the personal responsibility of those within the chain of command who knew about or sanctioned these operations. ECCHR is also aware of reports that a system of “ghost” prisoners operated in Iraq, and that in this context army medics were asked to take the highly unusual step of examining detainees without opening a file, i.e. without creating a paper trail for that detainee.

Finally, with regard to the extent to which the crimes were systematic or resulted from a plan or organized policy,²⁶¹ ECCHR notes the evidence that the abuse of detainees was authorized and tolerated at the highest levels, along with the indications that some interrogations were taking place outside of the normal chain of command and instead directly overseen by “London”. ECCHR notes also that the use of the “five techniques” by UK officials in Iraq is an example of a practice with a long historical tradition. Some or all of such techniques were used by UK personnel in past decades in Palestine, Malaya, Kenya, Cyprus, the UK Cameroons, Brunei, UK Guiana, Aden, Borneo/Malaysia, the Persian Gulf and Northern Ireland.²⁶² When the techniques re-emerged in Iraq, so too did a number of methods historically used by UK officials to dismiss allegations of abuse, including blanket denials, lying about detainees’ cause of death, obstructing access to files and seeking to discredit the complainants.²⁶³ This suggests

²⁶⁰ 2014 Communication, *supra* note 2 at p. 171. See also Ian Cobain, ‘RAF helicopter death revelation leads to secret Iraq detention camp’, *The Guardian*, 7 February 2012, available at <https://www.theguardian.com/world/2012/feb/07/iraq-death-secret-detention-camp>.

²⁶¹ See *supra* note 258.

²⁶² See 2014 Communication, *supra* note 2, at p. 12, citing Lord Parker of Waddington, report of the Committee of Privy Counsellors appointed to consider authorised procedures for the interrogation of persons suspected of terrorism, March 1972. See generally the 2014 Communication at pp. 12-18 as well as Ian Cobain, *Cruel Britannia, A Secret History of Torture*, (London, 2012).

²⁶³ On blanket denials of torture in Kenya see Ian Cobain *Cruel Britannia, A Secret History of Torture*, *ibid.*, at pp. 84-85. On obstructing access to files see the same text at pp. 88-89: “During the court proceedings, it emerged that the British government had secretly spirited sixty-three boxes of documents out of Nairobi on the eve of Kenya’s independence”. On the destruction of archives relating to torture in Kenya see Marc Parry, ‘Uncovering the brutal truth about the British empire’, *The Guardian*, 18 August 2016, available at <https://www.theguardian.com/news/2016/aug/18/uncovering-truth-british-empire-caroline-elkins-mau-mau>. On historical attempts to discredit those who complained of torture see Ian Cobain, *ibid.*, at pp. 94-95: “The Foreign Office wrote to its embassy in Athens, instructing staff to find a means of discrediting the Greek complaints by presenting them as part of a smear campaign against a British police and troops in Athens. Unearth ‘reckless and irresponsible’ Greek media reports, London urged, ‘The more extravagant they are the better.’” Concerning the use of these techniques in the present case, attempts to discredit the complainants are set out e.g. at p. 39, concerning blanket denials see the rhetoric on “spurious” claims at the same section. Concerning the obstruction of access to files see e.g. the High Court’s criticism of the Ministry of Defence for failing to disclose relevant army documents, ‘Baha Mousa inquiry reveals uncomfortable truths’, *BBC*, 8 September 2011, available at

a policy deeply rooted in the corporate memory of the British government and one which, if not properly addressed, may reoccur in a future conflict situation.²⁶⁴

D. Long term impact on survivors

As set out in the 2014 Communication, many of the survivors of abuse in detention in Iraq suffered lasting physical and psychological effects, including many of those symptoms commonly experienced by survivors of torture such as self-harm, thoughts and plans of suicide, despair and hopelessness, guilt and shame, extreme bouts of anxiety and/or anger and hyperarousal.²⁶⁵ Information subsequently submitted to the OTP²⁶⁶ provided more details of the mental health impact on former detainees who have been examined by IHAT psychologists, confirming that many of those who were abused during detention subsequently suffered from post-traumatic stress disorder and depressive disorder along with flashbacks, nightmares and ongoing feelings of shame or humiliation. Several survivors reported past suicide attempts and suicidal feelings. In many cases, survivors suffered from bouts of extreme anger and displayed violence towards their children and family. In some cases, these symptoms subsided a number

<https://www.bbc.com/news/uk-14790271>, on other disclosure failures see also ‘The UK Military in Iraq: Efforts and Prospect for Accountability for International Crimes Allegations’, *supra* note 5 at p. 37. On lying about detainee’s cause of death see the Iraq Fatality Investigations, Consolidated Report into the death of Tariq Sabri Mahmud, *supra* note 31, e.g. at para. 11.30.

²⁶⁴ While not specifically related to torture by means of the “five techniques,” with respect to the failure to learn lessons about the absolute illegality of torture ECCHR notes that recent revelations about internal MoD guidelines indicates that it is currently UK policy to tolerate the risk of torture by other states in intelligence operations. See Lucy Fisher, ‘Torture: Britain breaks law in Ministry of Defence secret policy’, *The Times*, 20 May 2019, available at <https://www.thetimes.co.uk/article/torture-britain-breaks-law-in-ministry-of-defence-secret-policy-2rl5dn2kd>. See also Reprieve, ‘MoD’s secret torture policy revealed’, 20 May 2019, available at <https://reprieve.org.uk/press/mods-secret-torture-policy-revealed/>. Updated policy guidelines published by the government on 18 July 2019 and intended to take effect in January 2020 do not expressly prohibit ministers from authorizing action that could lead to torture, see Reprieve, ‘Government torture inquiry refusal a ‘broken promise’ to torture survivors’, 18 July 2019, available at https://reprieve.org.uk/press/government-torture-inquiry-refusal-a-broken-promise-to-torture-survivors/?utm_content=buffer90476&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer. Amnesty and Liberty noted that the new guidelines “made the UK’s involvement in torture and other abuse more likely, or does nothing to prevent it”, see Liberty, ‘UK U-turn on torture inquiry “disgraceful”’, 18 July 2019, available at <https://www.libertyhumanrights.org.uk/news/blog/uk-u-turn-torture-inquiry-%E2%80%98disgraceful%E2%80%99>.

²⁶⁵ 2014 Communication, *supra* note 2, at pp. 211-212.

²⁶⁶ See PIL’s Second Communication to the Office of the Prosecutor of the International Criminal Court, submitted on 15 June 2015, Table K. See also, accompanying bundle at Tab 13, witness statement submitted in Ali Zaki Mousa proceedings, at pp. 18-40.

of months or a year after being released from detention. In other cases, the symptoms persisted for several years.

The findings in the *Alseran* case are also instructive as to the impact of abuse on Iraqi survivors. In the case of claimant Mr Al-Waheed, the judge found that beyond the physical injuries sustained directly after his beating,²⁶⁷ it was clear that

Mr Al-Waheed's detention and the events which flowed from it have had a significant psychological effect on him. Both Mr Al-Waheed and his wife gave evidence that he is nervous, morose and has problems controlling his anger. He says that he also has difficulties concentrating and with his memory, which have caused him to make a lot of mistakes at work. As well as his psychological symptoms, Mr Al-Waheed has many medical complaints which he attributes to his detention. These include constant lower back pain, pain in most joints and particularly his left knee, severe problems with haemorrhoids which developed while he was in detention and he says have never gone away, type 2 diabetes and a heart condition. He has episodes of feeling weak, dizzy and short of breath, which sometimes lead him to faint. He says that he can only walk about 500 metres and then only if he stops every 50 metres to rest.

The expert psychiatrists instructed respectively by the claimants and the MOD, Professor Katona and Professor Sir Simon Wessley, agreed that, when they examined Mr Al-Waheed in April 2016, he was suffering from post-traumatic stress disorder and depression with significant anxiety symptoms, described by Professor Katona as panic attacks. The experts agreed that Mr Al-Waheed's mental health problems and his multiple physical symptoms cause him significant impairment. They also agreed that his mental and physical conditions are inter-related and affect each other.²⁶⁸

In the case of complainant Mr Alseran, the judge notes that the Mr Alseran's feelings of humiliation at the way in which he was treated (being forced to lie on the ground while soldiers

²⁶⁷ *Alseran & Ors v Ministry of Defence*, *supra* note 51 at paras. 618-619.

²⁶⁸ *Ibid.*, at paras. 618-619.

ran over his back) affected him more than the physical pain and led to lasting distress and hurt.²⁶⁹

The judge notes that for claimant MRE, the experience of being hooded during transport made him feel like he was going to die.²⁷⁰ The judge notes that this had a particularly traumatic effect on MRE, who suffers from post-traumatic stress disorder and continues to get periodic flashbacks and panic attacks.²⁷¹

Also indicative of the long-term effects, over several decades, of being subjected to the “five techniques” is the testimony of Francie McGuigan, one of the 14 “hooded men” subjected to those techniques, as well as beating, while detained in Northern Ireland in 1971. He has described how the application of those techniques in combination made him feel like he would die and brought him to the verge of a health and mental breakdown.²⁷² He continues to suffer from serious post-traumatic stress disorder and doctors have told him this disorder will remain with him for the rest of his life.²⁷³ He recounts that on being released from detention, four of those detained with him were so badly affected by what they had been through that they had to be admitted directly to a psychiatric hospital.²⁷⁴ Given that the five techniques used on the “hooded men” in Northern Ireland in the 1970s were among those used on detainees in Iraq from 2003,²⁷⁵ Mr McGuigan’s account gives some insight into the severe, enduring and potentially permanent trauma of Iraqi detainees subjected to torture and inhuman treatment in detention. ECCHR notes in this context the extreme paucity of psychiatric services available in

²⁶⁹ Ibid., at para. 202 (iv).

²⁷⁰ This was one of three occasions during his arrest and detention when MRE felt he was going to die, *ibid.*, at para. 497.

²⁷¹ Ibid., at p. 498.

²⁷² Redress, Frontline Club Discussion: Breaking the Legacy of Torture: From Northern Ireland to the Age of Trump, video available at https://www.youtube.com/watch?v=rd-XLK1_rXM, see from 20:52.

²⁷³ Ibid. He recounts that like many of the other men detained with him, there are nights, 48 years after his detention, when he is still afraid to go to bed. This occurs after watching something on TV or reading something which reminds him of his own experiences, later that night he will often wake up screaming. He still suffers from flashbacks in which he believes he is back in detention. Occasionally he still wakes up with a pain in his stomach, in the same place where he had been woken with a hit from a rifle butt before his arrest. Some days he still struggles to leave the house or answer the door, and will hide in an attic space or wardrobe.

²⁷⁴ Ibid.

²⁷⁵ Here the techniques were sometimes referred to as “interrogation in depth”. See 2014 Communication, *supra* note 2 at p. 14.

Iraq, where there is only one psychiatrist for every 300,000 people and a single psychiatric hospital for a population of 38 million people.²⁷⁶

The impact is compounded by the fact that survivors have with very few exceptions been denied justice in the UK.²⁷⁷ Recent scholarship reiterates that the failure to provide redress to victims of torture or ill-treatment can prolong the impact of the abuse.²⁷⁸ The Committee against Torture notes that “for many victims [of torture], passage of time does not attenuate the harm and in some cases the harm may increase as a result of post-traumatic stress that requires medical, psychological and social support, which is often inaccessible to those who have not received redress”.²⁷⁹

Iraqis who have gone through the difficult process of recording their testimonies to be considered by the authorities in the UK have yet to receive anything approaching redress. As a further injury to their dignity, they have been branded liars in a smear campaign by senior government members in the UK, who imply that any Iraqi alleging wrongdoing by British soldiers is bringing “spurious claims”.²⁸⁰

E. Gravity: Conclusion

The available information indicates that Iraqis were subjected to torture, beating, inhuman/cruel treatment, sexual violence, outrages upon personal dignity and other abuses on a large scale and while in a situation of inherent vulnerability, namely while detained by or otherwise under the control of UK forces. This sense of helplessness at the hands of abusers is likely to have contributed to the long lasting psychological effects on survivors. ECCHR stresses the

²⁷⁶ BBC Arabic documentary, ‘Iraq: A State of Mind’, available at <https://www.bbc.com/news/av/world-middle-east-47962615/iraq-a-state-of-mind-maryam-s-story> See also <https://www.bbc.com/news/av/world-middle-east-47962615/iraq-a-state-of-mind-maryam-s-story>.

²⁷⁷ See also 2014 Communication, *supra* note 2, at p. 213.

²⁷⁸ Maeve O’Rourke, ‘Prolonged Impunity as a Continuing Situation of Torture or Ill-Treatment? Applying a Dignity Lens to So-Called ‘Historical’ Cases’, (2019) 66 *Netherlands International Law Review* 101.

²⁷⁹ UN CAT General Comment no. 3, 2012, CAT/C/GC/3 at para. 40.

²⁸⁰ See above at p. 43.

particular gravity of breaches of the peremptory norm of the prohibition on torture,²⁸¹ as well as the gravity of sexual and gender-based crimes. Of particular gravity are crimes committed calculated to offend cultural and religious taboos, and the testimonies of many Iraqis point unmistakably to a practice of humiliating detainees for their Muslim beliefs and practices. Furthermore, there is extensive evidence indicating that that responsibility for the widescale, systemic abuses is borne by military commanders and other military superiors as well as potentially by civilian superiors within the Ministry of Defence. In light of these considerations ECCHR submits that the criminal conduct in question is undoubtedly of sufficient gravity to justify further action.

VI. INTERESTS OF JUSTICE

In accordance with Article 53(1)(c), the Prosecutor shall initiate an investigation where there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed and the case is admissible under Article 17 *unless*, taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

Cognizant of the important legal questions on which the OTP has sought leave to appeal in the context of the Afghanistan situation,²⁸² ECCHR will not in this submission engage in a substantial analysis of the appropriate legal standards to be applied in this regard. ECCHR reserves the right to make submissions on this topic at a future time. From the OTP's reports on preliminary activities, ECCHR understand that this issue is not the focus on the OTP's assessments in the Iraq/UK situation however ECCHR asks the OTP to indicate if and when such submissions would be of particular relevance for the OTP's analysis.

²⁸¹ As noted by the Office of the Prosecutor in Situation in the Islamic Republic of Afghanistan, Prosecution's Request seeking authorisation of an investigation pursuant to article 15 (public redacted version), *supra* note 85, at para. 354.

²⁸² Office of the Prosecutor, Request for Leave to Appeal the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan", 7 June 2019, ICC-02/17-34.

Observations in this section are thus limited to two brief points. First, ECCHR reiterates in this regard the gravity of the crimes before the OTP in this situation. ECCHR notes again the discriminatory and Islamophobic nature of many of the acts of degradation and humiliation described by Iraqi survivors, the high number of allegations of torture, including in many cases through the use of specific “interrogation techniques”, and the historical pattern of the recurrent use of such techniques in coercive interrogations in British army and intelligence operations. In light of the importance of the prohibition of torture ECCHR recalls that the objects and purposes of the Rome Statute include: ensuring that the most serious crimes of concern to the international community do not go unpunished, ending impunity for the perpetrators and contributing to the prevention of such crimes.

Secondly ECCHR notes that Iraqi war crimes survivors are still waiting for justice, 16 years after the start of the invasion of Iraq by coalition forces and the beginning of the abuse of detainees.²⁸³ Many of those who went through the difficult and often traumatic process of giving testimonies describing their abuse in detention have heard nothing from UK authorities, others have received a letter informing them their case has been closed or are left to check a website for cursory confirmation that no investigation was opened. ECCHR has been able to confirm that with few exceptions survivors remain actively interested in their cases, and given the lack of any prospects for accountability at a national level, an investigation by the OTP appears to be the only way to acknowledge what happened to them and establish who was responsible. ECCHR urges the OTP to reach out to and consult with survivors who are eager for the chance to finally be heard.

ECCHR finds, as submitted in its 2014 Communication,²⁸⁴ that there are no reasons to believe that an investigation would not serve the interests of justice.

²⁸³ See e.g. Nazli Tarzi, ‘Still no justice for Iraqi war victims’, *Arab Weekly*, 15 July 2018, available at <https://the arabweekly.com/still-no-justice-iraqi-war-victims>.

²⁸⁴ 2014 Communication, *supra* note 2, at p. 249.

VII. CONCLUSION

The UK has failed to investigate those most responsible for torture, inhuman treatment and other war crimes in Iraq. The UK government has for political reasons intervened to ensure that IHAT's investigations were ultimately fruitless and that the process served as a mere smokescreen to buy time and stave off ICC action. For the Iraqis who were subjected to torture, inhuman treatment and other war crimes at the hands of UK forces, it is clear that the ICC is now the only forum in which they might find the long-denied acknowledgement that they were the victims of grave injustice. ECCHR submits that the conditions for admissibility with respect to complementarity and gravity as well as those regarding the interests of justice are clearly met. More than sixteen years since the beginning of the war in Iraq and over five years since the opening of the preliminary examination in this situation, ECCHR urges the OTP to finally take the next step and request the authorization of an investigation.