

# EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS



Berlin, 1 July 2021

To the Office of the Prosecutor  
International Criminal Court  
The Hague, the Netherlands  
By e-mail to: [rod.rastan@icc-cpi.int](mailto:rod.rastan@icc-cpi.int)

## **RE: Situation in Iraq/UK - Request for review of the Prosecutor's decision not to open an investigation**

The European Center for Constitutional and Human Rights respectfully submits the present request to the Office of the Prosecutor of the International Criminal Court to seek a review of the Prosecutor's final decision of December 2020 not to pursue an investigation with respect to the Situation in Iraq/UK. The request is submitted also on behalf of Mr. Sabah Noori Salih Al-Sadoon and is supported by UpRights.

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## Introduction

1. The European Center for Constitutional and Human Rights (“ECCHR”) respectfully submits the present request before the Office of the Prosecutor (“OTP”) of the International Criminal Court (“ICC”) to seek a review of the Prosecutor’s decision not to pursue an investigation with respect to the Situation in Iraq/UK (“Request”). The Request is presented also on behalf of Mr. Sabah Noori Salih Al-Sadoon, whose Power of Attorney is attached. UpRights supported ECCHR during the whole drafting process of this submission.<sup>1</sup>
2. The Petitioners are mindful and appreciative of the commitment and efforts of the OTP in examining the allegations concerning the war crimes committed by the UK armed forces in Iraq during the preliminary examination. The fact that the OTP reopened the preliminary examination in 2014 following the communication by ECCHR and Public Interest Lawyers (“PIL”) reflects the seriousness and integrity with which the OTP confronted the complex legal and factual issues arising from the present situation. Petitioners also fully appreciate the efforts taken by the Prosecutor in providing her full reasoning and analysis underlying the decision. This approach is in line with the Prosecutor’s commitment towards a greater transparency in the management of preliminary examinations. It also reveals the willingness of the OTP to be open to a public scrutiny of their analysis with regards to crucial decisions, such as the opening of investigations and the *proprio motu* powers under Article 15 of the Statute.
3. Because of such important efforts and commitment, the Final Report<sup>2</sup> reached some crucial conclusions and observations which are material to shed a light on the crimes suffered by the victims and on the inadequate response of the UK authorities thereto. This certainly includes the findings that there is a reasonable basis to believe that members of the UK Armed Forces committed war crimes in Iraq,<sup>3</sup> as well as the concerns raised with respect to the decision-making progress of the Iraq Historic Allegations Team (“IHAT”), Service Police Legacy Investigations (“SPLI”), and Service Prosecuting Authority (“SPA”) decision-making process and the Overseas Operations Service Personnel and Veterans Bill (“Overseas Operations Bill”, now “Overseas Operations Act”).<sup>4</sup>

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<sup>1</sup> UpRights is a non-profit initiative assisting civil society organizations in investigations and legal proceedings concerning human rights violations and international crimes.

<sup>2</sup> Situation in Iraq/UK, Final Report, 9 December 2020 (“Final Report”), available at: <https://www.icc-cpi.int/Pages/item.aspx?name=201209-otp-final-report-iraq-uk>.

<sup>3</sup> OTP, Final Report, paras. 2, 493.

<sup>4</sup> OTP, Final Report, paras. 4-7, 460-479, 482, 499.

4. Nonetheless, the Petitioners express their deep concern at the decision of the Prosecutor to close the preliminary examination without seeking an investigation into the alleged crimes on the basis that the potential cases are or would be inadmissible. The Prosecutor’s analysis of complementarity, and in particular the conclusion on the UK authorities’ willingness to genuinely conduct proceedings, is inconsistent with: (1) the very factual findings reached within the Final Report; and (2) the legal parameters designed to assess the admissibility of a case pursuant to Articles 17 and 53 of the Rome Statute (“Statute”). Overall, the Prosecutor’s conclusion that the UK was neither inactive nor unwilling genuinely to carry out investigations or prosecutions with respect to the alleged crimes committed by the British forces in Iraq stands in blatant contrast with the crucial finding that: “The outcome of the more than ten year long domestic examination of thousands of allegations has resulted in not one single case of prosecution: a result that has deprived the victims of justice.”<sup>5</sup>
5. The complementarity analysis reflected in the OTP’s Final Report is premised on a series of factual and legal errors that vitiate the conclusion that the potential cases arising from the situation would be inadmissible. Such errors, if not corrected, will irreparably undermine access to justice for the victims of the alleged crimes committed by UK forces in Iraq — justice already precluded by the UK domestic authorities.
6. In light of the above, and considering the complexity and novelty of the issues addressed in the OTP’s Final Report with respect to the complementarity assessment,<sup>6</sup> the Petitioners respectfully request the new ICC Prosecutor Karim Khan to either: (1) reconsider the decision not to seek authorization to initiate an investigation on the basis of a revised complementarity assessment pursuant to Article 15(3) of the Statute and/or on the basis of new facts or evidence pursuant to Article 15(6) of the Statute; or (2) seek a ruling from the Pre-Trial Chamber on the question of admissibility of the potential cases arising from the present situation pursuant to Article 19(3) of the Statute.
7. Although aware of the lack of statutory provisions giving victims representatives and civil society organisations (including information providers such as ECCHR) a direct remedy against the Prosecutor’s decision not to pursue a *proprio motu* investigation, the Petitioners respectfully submit that the length and level of detail of the OTP’s Final Report in this situation is consistent with an intent to trigger public scrutiny of the ICC’s work and broader engagement of civil society organisations in the interest of victims and justice. In particular, the strong and reiterated findings throughout the OTP’s Final Report – that there are

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<sup>5</sup> OTP, Final Report, para. 6.

<sup>6</sup> See OTP, Final Report, paras. 31, 302.

reasonable grounds to believe that grave crimes falling under the jurisdiction of the Court have been committed by UK forces in Iraq, coupled with the description of allegations of cover-up arising from the UK investigators – indicate the cruciality of the Prosecutor’s interpretation and final determination of the UK’s lack of willingness or ability to conduct proper investigations and proceedings.

8. Against this background, ECCHR submits that it would defeat the very purpose of the OTP’s intense, commendable, public engagement on the situation not to give the opportunity to the victims (and their representatives and organisations acting on their behalf) to ask for a review of the Prosecutor’s decision, thereby precluding any remedy to victims and other participants that have been in close exchange with the OTP over the years of preliminary examination.
9. Certainly, the importance of the issue at stake cannot be overestimated. For the first time the OTP is interpreting in such detail elements of the complementarity principle, the pillar around which the entire ICC system is designed. The OTP’s Final Report transparently acknowledges the gaps of the ICC practice in relation to the complementarity assessment and the challenges this entails in the concrete application of Article 17(2) of the Statute. In particular, the interpretation of “unwillingness” under Article 17(2), including the assessment of whether the domestic investigation and proceeding were undertaken “for the purpose of shielding the person concerned from criminal responsibility”, under letter (a) of the same provision, is setting an important precedent that should not be considered final until judicial review.
10. In light of the above, and as further elaborated in Section IV, the Petitioners submit that the Request is not only consistent with the principles of public scrutiny of the ICC prosecutorial activity and coherent with the public and detailed nature of the OTP’s Final Report, but also required in view of the dramatic impact of the adopted complementarity assessment, on the present situation and beyond it. In fact, the overly restrictive approach adopted by the Prosecutor in this situation may have grave consequences for other preliminary examinations and investigations.
11. All considered, the Petitioners respectfully request that the OTP’s decision in the Final Report of December 2020 to close the preliminary examination in the Situation Iraq/UK shall be revised by the new Prosecutor, Mr. Karim Khan, and/or brought to the attention of the Pre-Trial Chamber for judicial review. The Petitioners submit that reconsidering the decision at stake and/or letting the Pre-Trial Chamber review the interpretation of the

complementarity assessment in the present situation will only reinforce the Court and enhance confidence in the Prosecutor's independence.<sup>7</sup>

12. The Request is articulated according to the following structure:

**Section I. Identification of the Petitioners** - This section provides relevant information about the Petitioners and their interests underlying the present request.

**Section II. Errors of the Final Report** - This section lays out eight legal and factual errors, namely that the Prosecutor erred in: (1) applying the incorrect standard of proof in assessing the UK's unwillingness; (2) failing to consider to principles of due process under Article 17(2) of the Statute; (3) concluding that UK proceedings were not undertaken "for the purpose of shielding the person concerned from criminal responsibility"; (4) concluding that UK proceedings were not affected by "an unjustified delay" within the meaning of Article 17(2)(b) of the Statute; (5) concluding that the UK proceedings were conducted independently or impartially within the meaning of Article 17(2)(c) of the Statute; (6) failing to consider the totality of factors and circumstances in assessing the UK's unwillingness; (7) conducting a complementarity assessment in the abstract; and (8) disregarding specific potential cases relating to superior/command responsibility.

**Section III. New Facts and Evidence** - This section provides relevant information and new facts regarding the situation underlying the present request that warrant the reopening of the preliminary examination.

**Section IV. Request** - The Petitioners request that the Prosecutor reconsider the decision to close the preliminary examination in the Situation of Iraq/UK under Article 15, or to seek a ruling from the Court under Article 19(3) of the Statute on the basis of eight errors in the Final Report and new facts. Individually, and as a whole, these errors demonstrate that the Prosecutor's complementarity assessment in the present Situation is vitiated by legal and factual errors that require reconsideration or judicial review.

**Section V. Conclusion**

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<sup>7</sup> Agnès Callamard, "Open Letter on the Commencement of Your Term of Office as ICC Prosecutor", 16 June 2021, available at <https://hrij.amnesty.nl/content/uploads/2021/06/Open-Letter-Amnesty-International-ICC-Prosecutor-Khan-16-June-21-1.pdf>.

## Section I - Identification of the Petitioners

13. The European Center for Constitutional and Human Rights is an independent, non-profit legal and educational organization dedicated to enforcing civil and human rights worldwide, based in Berlin, Germany.
14. In 2014, ECCHR, together with PIL, submitted an extensive communication under Article 15 of the Statute to the OTP presenting a dossier of evidence of the widespread and systematic abuse of hundreds of detainees by UK armed forces in Iraq between 2003 and 2008.<sup>8</sup> Following this submission, the Prosecutor on 13 May 2014 reopened the preliminary examination of the Situation in Iraq/UK.
15. In 2017, after two other ECCHR submissions, the OTP confirmed that there was a reasonable basis to believe that members of the UK forces committed war crimes in Iraq – including willful killing, torture, inhuman/cruel treatment, outrages upon personal dignity, and rape and/or other forms of sexual violence. ECCHR filed a follow-up submission in 2019, focusing on the failures by the UK authorities to prosecute torture cases domestically.
16. The present Request is also filed on behalf of Sabah Noori Salih Al-Sadoon. Sabah Noori Salih Al-Sadoon is an Iraqi national who was arrested by Black Watch soldiers in Basra on 22 June 2003. He was subjected to gruesome torture as a result of which he endured multiple injuries, including broken bones and bleeding in his kidney. Following his torture, Mr. Al-Sadoon was taken to Camp Bucca where he was held for approximately thirty-six days. The tortuous acts against him can amount to a war crime of torture and inhuman/cruel treatment within the meaning of Article 8(2)(a)(ii) or Article 8(2)(c)(i) of the Statute, and qualify as a war crime of attempted wilful killing/murder within the meaning of Article 8(2)(a)(i) or Article 8(2)(c)(i) of the Statute. The case of Mr. Al-Sadoon is not included in the “sample pool of incidents” that formed part of the Prosecutor’s subject matter assessment.<sup>9</sup>
17. The case of Mr. Al-Sadoon (IHAT Official number 1230) is not listed among the cases marked as completed by IHAT in the Final Report. The present submission provides information on Mr. Al-Sadoon’s case, both under Section II (Errors) and Section III (New Facts and Evidence).

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<sup>8</sup> 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, 10 January 2014, p. 143, 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](https://www.ecchr.eu/fileadmin/Juristische_Dokumente/January_2014_Communication_by_ECCHR_and_PIL_to_ICC_OTP_re_Iraq_UK_public_version_.pdf)

<sup>9</sup> OTP, Final Report, paras. 75-100, 113-114.



## Section II - Errors of the Final Report

18. The Petitioners request that the Prosecutor proceed either with a *proprio motu* reconsideration of the decision to close the preliminary examination, based on new facts and/or legal and factual errors, or seek a ruling from the Pre-Trial Chamber pursuant to Article 19(3) of the Statute. Below, the Petitioners analyse in detail the errors affecting the Final Report. Subsequently, in Section III, the Petitioners set out new facts.

### **Error 1: The Prosecutor erred in adopting a standard of proof that is both too high and inconsistent with the requirements for the opening of an investigation under Articles 15 and 53 of the Statute and Rule 48 RPE.**

19. In assessing the circumstances surrounding the “unwillingness” of the UK, the Prosecutor erred in law by adopting a too high and incorrect evidentiary threshold instead of relying on the “reasonable basis to believe” standard required in analysing “unwillingness” in Preliminary Examinations under Article 53(1) of the Statute.

20. The Rome Statute assigns different standards of proof to each stage of proceedings. These are calibrated according to the specific nature of the corresponding phase. The Prosecutor altering or anticipating the application of standards of proof to stages in which the Statute requires the application of a different evidentiary threshold is not a mere exercise of discretion. It is a legal error that defeats the purpose of the relevant phase of the proceedings.

21. Petitioners respectfully submit that there are both inconsistencies and errors concerning the standards of proof adopted by the Prosecutor with respect to the complementarity assessment in the Situation in Iraq/UK. In the introductory section titled “Examination of the Information Available”, the OTP states that it adopted a “reasonable basis to believe” standard with respect all the information analysed,<sup>10</sup> thus implying that such standard was applied throughout all the components of the analysis, including underlying acts, gravity and the complementarity elements. The “reasonable basis to believe” standard was explicitly recalled in relation to the underlying acts<sup>11</sup> and, by implication, with respect to gravity (the first of the admissibility prong).<sup>12</sup>

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<sup>10</sup> OTP, Final Report, para. 23.

<sup>11</sup> OTP, Final Report, paras. 71, 75-76, 78, 81-82, 95, 98, 101-102, 105, 111-114. See also *ibid.*, paras. 1-2, 7, 28.

<sup>12</sup> OTP, Final Report, paras. 126, 128-129, 133-135, 148.

22. However, when it comes to the second admissibility prong, complementarity, several passages of the OTP Final Report reveal that the OTP instead applied an exceptionally higher standard of proof than is required under Article 53(1) of the Statute. For instance, in the introduction to the complementarity section, the Prosecutor observed that the approach to admissibility must be capable of application to “other stages of proceedings including those under articles 18 and 19”.<sup>13</sup> Likewise, in dealing with the element of unwillingness, the OTP referred to a broad notion of a “high threshold” derived from the Appeals Chamber Admissibility Judgment in the *Al-Senussi*.<sup>14</sup> In another part of the analysis, the OTP concluded that it was not able to substantiate the allegations of cover-up “with evidence that it could rely upon in court”,<sup>15</sup> despite the fact that requests under Article 15(3) do not require the OTP to present any evidence before the PTC concerning admissibility.<sup>16</sup>
23. These passages, together with the fact that no mention is made to the “reasonable basis to believe” standard, reveal that the OTP erroneously conducted the complementarity assessment under a higher, unprecise standard of proof that is inconsistent with what is required under Article 53 of the Statute.
24. Based on these considerations, in the following sections the Petitioners will argue that: (a) at the preliminary examination stage, the “reasonable basis to believe” standard applies to the complementarity assessment pursuant to Article 53(1)(b) of the Statute; (b) the Prosecutor relied on incorrect evidentiary standards in conducting her complementarity analysis; and (c) the adoption of the “reasonable basis to believe” standard would and should have prompted the OTP to conclude that the UK authorities were in fact “unwilling” for the purposes of Article 17 of the Statute.

**a) The “reasonable basis to believe” standard applies to the complementarity assessment pursuant to Article 53(1)(b) of the Statute.**

25. According to Article 53(1)(b) of the Statute, in deciding whether to initiate an investigation, the Prosecutor shall consider whether “[t]he case is or would be admissible under Article 17”. Different from Article 53(1)(a) of the Statute, this provision does not incorporate an explicit reference to the “reasonable basis to believe” standard. Jurisprudence has never

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<sup>13</sup> OTP, Final Report, para. 150.

<sup>14</sup> OTP, Final Report, para. 283.

<sup>15</sup> OTP, Final Report, para. 409.

<sup>16</sup> ICC, Appeals Chamber, *Situation in the Islamic Republic of Afghanistan*, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, 5 March 2020, ICC-02/17 OA4 (“*Afghanistan Appeal Judgement*”), para. 40.

addressed the different wording of the two provisions in terms of evidentiary standards, but commentators note that at the preliminary examination stage, the “reasonable basis to believe” is applicable to the assessment of the admissibility, and thus complementarity assessment, of a (potential) case.<sup>17</sup>

26. As an example, authoritative commentators identified “four cogent reasons” in support of the conclusion that Articles 53(1)(a)-(b) are equally governed by the same standard of proof.<sup>18</sup> Specifically, Matthew Cross argues:

First, both provisions are equally subject to the chapeau of Article 53(1), which refers to the requirement of a “reasonable basis to proceed”. Second, notwithstanding their different wording, both Article 53(1)(a) and (b) have a similar purpose: requiring an assessment of certain facts based on the available information – which is different from Article 53(1)(c). Third, the text of Article 53(1)(b), by referring to a conditional assessment of admissibility (“would be”) manifestly does not require an absolute assessment. Fourth, if Article 53(1)(b) does not apply a “reasonable basis” standard, it is very hard to discern what alternative standard would be applied for the factual assessments which are no less inherent in determinations of complementarity and gravity than of jurisdiction.

27. Indeed, Article 53(1)(b) refers to both components of admissibility, namely gravity and complementarity, without making any differentiation in the standard of proof applicable. Thus, when gravity is assessed under the “reasonable basis to believe” standard in reference to the same circumstances underpinning the factual assessment of the alleged crimes under Article 53(1)(a),<sup>19</sup> the same standard applies to complementarity.

**b) The Prosecutor relied on incorrect and too high standards of proof in the analysis of complementarity related to proceedings under Articles 18 and 19 of the Statute.**

28. In the introduction to the complementary section of the OTP Final Report, the Prosecutor observes that “the Office’s approach to admissibility must be capable of application to other

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<sup>17</sup> Kevin Jon Heller, “The Nine Words that (Wrongly) Doomed the Iraq Investigation”, *Opinio Juris*, 10 December 2020 at <http://opiniojuris.org/2020/12/10/the-nine-words-that-wrongly-doomed-the-iraq-investigation/>; Matthew E. Cross, “The Standard of Proof in Preliminary Examinations”, in Morten Bergsmo and Carsten Stahn (editors), *Quality Control in Preliminary Examination: Volume 2*, Torkel Opsahl Academic EPublisher, Brussels, 2018 (“M.Cross Article”), p. 218.

<sup>18</sup> M.Cross Article, pp. 218-219.

<sup>19</sup> ICC, *Situation on The Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation, 16 July 2015 (“*Comoros First Decision on Judicial Review*”), para.13. See also OTP, Final Report, paras. 126, 128-129, 133-135, 148.

situations and other stages of proceedings including those under articles 18 and 19.”<sup>20</sup> The Petitioners respectfully submit that by following such an approach, the Prosecutor erroneously: (1) elevated the standard of proof at the preliminary examination stage to a standard for determining admissibility during the investigation stage; and (2) took into account factors that do not pertain to the criteria listed under Article 53(1) of the Statute.

29. The only evidentiary standard applicable at the preliminary examination stage is the “reasonable basis to believe” standard. The statutory framework for preliminary examinations does not confer the Prosecutor with the discretionary power to adopt a different evidentiary threshold,<sup>21</sup> nor to anticipate possible factual and legal challenges that may emerge later at the investigation stage. The criteria the Prosecutor must adopt when deciding to proceed with an investigation are those provided by Articles 15(3) and 53(1) of the Statute and related Rules of Procedure and Evidence (RPE).

30. Article 15(3) states that “[i]f the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she *shall* submit to the Pre-Trial Chamber a request for authorization of an investigation”. According to Rule 48, such determination is confined to the criteria listed in Article 53(1)(a)-(c) of the Statute. Thus, pursuant to the Statute and the RPE, the Prosecutor has no discretion in the standard applicable to the assessment of elements and *shall* submit a request for authorization of a *proprio motu* investigation as soon as the criteria under Articles 15(3) and 53(1) are satisfied pursuant to the “reasonable basis to believe” standard.

31. As held by the Pre-Trial Chamber in the Bangladesh/Myanmar Situation:

If the Prosecutor reaches a positive determination according to the “reasonable basis” standard under articles 15(3) and 53(1) of the Statute, she “shall submit” to the Chamber a request for authorization of the investigation. As held by this Chamber in a previous composition, “the presumption of article 53(1) of the Statute, as reflected by the use of the word ‘shall’ in the chapeau of that article, and of common sense, is that the Prosecutor investigates in order to be able to properly assess the relevant facts”.<sup>22</sup>

32. Thus, the presumption of the Statute is that, when the circumstances are fulfilled, the Prosecutor shall open an investigation in order to properly assess the relevant facts.<sup>23</sup> As it

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<sup>20</sup> OTP, Final Report, para. 150.

<sup>21</sup> M. Cross Article, p. 238 (“To be clear, the application of the standard of proof in Articles 53(1)(a) and (b) allows no discretion in the legal sense at all”). See also Philippa Webb, “The ICC Prosecutor’s discretion not to proceed in the ‘interests of justice’”, in *Criminal Law Quarterly*, 2005, vol. 50, p. 305, at p. 319.

<sup>22</sup> ICC, Pre Trial Chamber, *Situation in the People’s Republic of Bangladesh/ Republic of the Union of Myanmar*, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute” ICC-RoC46(3)-01/18-37, 06 September 2018 (“*Myanmar* PTC Decision”), para. 84.

<sup>23</sup> *Myanmar* PTC Decision, para. 84.

has been convincingly argued, this is a binding obligation on the Prosecutor, as indicated by the language of Article 15(3) (“shall”).<sup>24</sup> The Petitioners respectfully submit that the Prosecutor erred in attempting to anticipate the outcome of a potential deferral request under Article 18 (and consequent admissibility determinations under Article 19). This led the OTP to apply an evidentiary standard to an analysis of complementarity that is not required at the preliminary examination stage and, as it is here argued, cannot be met without an investigation.

33. The mistake is particularly evident when the Prosecutor refers to a “high threshold” as the standard of proof applicable to assess “unwillingness” of the UK.<sup>25</sup> This evidentiary standard has been elaborated on when determining the admissibility of a case at advanced stages of the investigation, namely following the issuance of an arrest warrant for a suspect.<sup>26</sup> A similar standard cannot apply at the preliminary examination stage, when the Prosecutor has yet to decide whether to open an investigation and cannot exercise full investigative prerogatives.<sup>27</sup>
34. Moreover, such an approach seems to be a misinterpretation of the *Al-Senussi* Admissibility Appeal Judgement. Notably, in the *Al-Senussi* case, the Appeals Chamber considered whether the violation of the accused’s fair trial rights at the domestic level could give rise to State “unwillingness” under Article 17(2)(c) of the Statute. In that case, the notion of a “high threshold” was not articulated as a general evidentiary test to assess “unwillingness”, but only for the specific purpose of assessing scenarios of infringement of the due process rights of a suspect in the context of Article 17(2)(a).<sup>28</sup> There, the “high threshold” was confined to “violations of the rights of the suspect [that] are so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of

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<sup>24</sup> Morten Bergsmo, Jelena Pejic, Dan Zhu, “Article 15 Prosecutor” in O. Triffterer and K. Ambos (eds.) *The Rome Statute of the International Criminal Court. A Commentary*, 3rd Edition, 2016, p.734. A similar approach adopted by the OTP was already found incorrect in a number of situations. See for instance, *Situation on The Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Decision on the ‘Application for Judicial Review by the Government of the Comoros’, 16 September 2020, (“Comoros Second Decision on Judicial Review”), paras. 43-45; *Situation in the Republic of Burundi*, Pre-Trial Chamber, Public Redacted Version of ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi’, 9 November 2017, ICC-01/17-9-Red (“Burundi Article 15 Decision”), paras. 138-141; *Situation in Georgia*, Pre-Trial Chamber, Decision on the Prosecutor’s request for authorization of an investigation, 27 January 2016, ICC01/15-12, (“Georgia Article 15 Decision”) paras 34-35.

<sup>25</sup> OTP, Final Report, para. 283, referring to *The Prosecutor v. Gaddafi and Al-Senussi*, Judgment on the appeal of Mr. Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled “Decision on the admissibility of the case against Abdullah Al-Senussi”, 24 July 2014, ICC-OI/II-OI/IIOA6 (“*Al-Senussi* Admissibility Appeal Judgement”), para. 217. See also OTP, Final Report, para. 484.

<sup>26</sup> *Al-Senussi* Admissibility Appeal Judgement, paras. 6-13.

<sup>27</sup> Heller, The Nine Words.

<sup>28</sup> *Al-Senussi* Admissibility Appeal Judgement, para. 230.

justice to the suspect so that they should be deemed, in those circumstances, to be ‘inconsistent with an intent to bring that person to justice’<sup>29</sup>.

35. Further, by considering future, hypothetical proceedings under Articles 18 and 19 of the Statute in the admissibility assessment at the preliminary examinations level, the Prosecutor went beyond the very scope of the preliminary examination. The goal of a preliminary examination should be limited to filtering unreasonable allegations outside the jurisdiction of the Court from serious allegations that must be taken into consideration when conducting an investigation.
36. Three considerations support the conclusion that any concerns regarding a possible deferral request, eventually triggering proceedings under Article 18 of the Statute, should not have prevented the Prosecutor from requesting the authorization to open an investigation into the Situation in Iraq/UK.
37. First, the assumption of a possible deferral request from UK authorities was merely speculative and should not have been used by the Prosecutor as a way to inhibit the investigative initiative.
38. Second, the evidentiary threshold of Article 18 proceedings is arguably a “reasonable basis to believe” test and therefore applies in any proceedings regarding admissibility triggered by a deferral request.<sup>30</sup> Some commentators suggest that a similar ruling should be subject to a higher standard of proof, namely “preponderance of evidence”.<sup>31</sup> However, such an interpretation has been superseded by the Appeals Chamber’s interpretation of Article 15(4) of the Statute, which found that the judicial review of complementarity can remain outside the scope of the decision on the authorisation to open a *proprio motu* investigation and be carried out in the context of the proceedings following a deferral request at the initial stage of the investigation.<sup>32</sup> The postponement of a judicial review of any question of

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<sup>29</sup> *Al-Senussi* Admissibility Appeal Judgement, paras. 190-191, 230(3). Indeed, the reference to “high threshold” in paragraph 191 needs to be read in context of the last sentence of paragraph 190 which is a direct quote of paragraph 230 of the same judgement. An alternative reading of the *Al-Senussi* Admissibility Appeal Judgement suggests instead that notion of a “high threshold” was not developed as an evidentiary standard to assess unwillingness, but only to identify/describe the circumstances required to prove unwillingness in the specific scenario of infringement of the due process rights of the suspect. The fact that the notion of high threshold has never been relied on in any other decision concerning admissibility in relation to the evidentiary standard confirms such conclusion. In any event, a part from claims as the ones developed in the *Al-Senussi* case, the notion of “high threshold” should not be applicable.

<sup>30</sup> See Kevin Jon Heller, “Article 18 and the Iraq Declination”, *Opinio Juris* at <http://opiniojuris.org/2020/12/12/article-18-and-the-iraq-declination> (“A strong argument can be made that the Art. 15/Art. 53 “reasonable basis” standard applies, given that a state invokes Art. 18 precisely to challenge the OTP’s conclusion that a reasonable basis exists concerning complementarity.”).

<sup>31</sup> Daniel D. Ntanda Nsereko, “Article 18 Preliminary rulings regarding admissibility”, in O. Triffterer and K. Ambos (eds.) *The Rome Statute of the International Criminal Court. A Commentary*, 3rd Edition, 2016, p.845.

<sup>32</sup> *Afghanistan* Appeal Judgement, para. 42.

admissibility to a phase “immediately following upon the authorisation of an investigation”<sup>33</sup> determines that the “reasonable basis to believe” standard applies here.

39. Third, and most importantly, in the instance a deferral request under Article 18(2) had been submitted by the UK, the Prosecutor would have retained a series of prerogatives: (i) The deferral can be reviewed every six months or when there has been a significant change of circumstances pursuant to Article 18(3) of the Statute; (ii) Likewise, the Prosecutor is entitled to periodically request the progress of the domestic investigations/prosecutions pursuant to Article 18(5); (iii) And, the Prosecutor may continue to pursue a limited investigative activity for the purpose of preserving evidence pursuant to Article 18(6). None of these prerogatives can be exercised if the Prosecutor does not initiate an investigation. If the Prosecutor closes a preliminary examination without pursuing an investigation in anticipation of a hypothetical deferral, the prerogatives become moot.
40. In addition, any attempt to anticipate possible admissibility challenges under Article 19 of the Statute, and the relevant legal standard, during a preliminary examination is impracticable and irreconcilable with the specific features of the preliminary examination stage. It requires speculation impossible to engage in at the preliminary examination stage. In concrete terms, the Prosecutor has to enter in a series of conjectures concerning possible investigative steps undertaken at the national level to each hypothetical case that could have been investigated by the OTP, and to every possible incident – and the related cases – that could arise during an investigation.
41. Such anticipation is even more irreconcilable with the preliminary examination stage because of the limited investigative prerogatives afforded to the Prosecutor at this stage, which do not allow the Prosecutor to have a “full picture of the relevant facts, their potential legal characterisation as specific crimes under the jurisdiction of the Court, and the responsibility of the various actors that may be involved”.<sup>34</sup> Only upon investigation, when “the full range of investigative powers under the Statute are available to the Prosecutor”<sup>35</sup> can an informed decision concerning the potential outcome of possible Article 19 challenges be made. In case of a negative assessment, the Prosecutor is always entitled to close the investigation.

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<sup>33</sup> *Afghanistan Appeal Judgement*, para. 42.

<sup>34</sup> *Afghanistan Appeal Judgement*, para. 60.

<sup>35</sup> *Afghanistan Appeal Judgement*, para. 60.

**c) The adoption of the “reasonable basis to believe” standard would and should have prompted the OTP to conclude that the UK authorities were in fact *unwilling*, pursuant to Article 17 of the Statute.**

42. The Petitioners contend that the application of the correct “reasonable basis to believe” standard to the assessment of the UK authorities’ “unwillingness” to investigate and prosecute the alleged crimes should and would have prompted the Prosecutor to reach a positive determination concerning admissibility under the complementarity assessment.
43. The “reasonable basis to believe” standard is the lowest evidentiary threshold provided in the Statute.<sup>36</sup> The relevant principles concerning this standard have been elaborated on by the Pre-Trial Chambers in several decisions pursuant to Article 15(4). This jurisprudence shows that as an evidentiary threshold, the “reasonable basis to believe” standard coincides with a sensible or reasonable justification for a belief that a certain factual allegation occurred.<sup>37</sup> The Prosecutor, during preliminary examination, must accept as true allegations that are not “manifestly false”.<sup>38</sup>
44. In terms of inferential reasoning, the “reasonable basis to believe” test operates in the opposite direction of the “beyond reasonable doubts” standard. For instance, “[w]hen reviewed against this standard, the relevant material is required neither to point towards one conclusion nor to be conclusive”.<sup>39</sup> This means that such a standard is satisfied when several plausible explanations or reasonable competing inferences are available on the record.<sup>40</sup> Specifically, “if the information available to the Prosecutor at the pre-investigative stage allows for reasonable inferences that at least one crime within the jurisdiction of the Court has been committed *and that the case would be admissible*, the Prosecutor shall open an

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<sup>36</sup> *Comoros* Second Decision on Judicial Review, para. 16; *Burundi* Article 15 Decision, para. 30; *Situation in the Republic of Côte d’Ivoire*, Pre-Trial Chamber, Decision pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire, 3 October 2011, ICC-02/11-14 (“*Côte d’Ivoire* Article 15 Decision”), para. 24; *Situation in the Republic of Kenya*, Pre-Trial Chamber, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19 (“*Kenya* Article 15 Decision”), paras. 33-34.

<sup>37</sup> *Comoros* Second Decision on Judicial Review, para. 16; *Burundi* Article 15 Decision, para. 30; *Georgia* Article 15 Decision, para. 25; *Kenya* Article 15 Decision, para. 34. See also M. Cross Article, pp. 222-223 (“The Prosecutor need to be assured that there was at least some factual foundation for those allegations, consistent with the general practice of the Pre-Trial Chamber under Article 15(4)”).

<sup>38</sup> *Georgia* Article 15 Decision, para. 25; *Comoros* First Decision on Judicial Review, para. 35.

<sup>39</sup> *Comoros* Second Decision on Judicial Review, para.16; *Burundi* Article 15 Decision, para. 30; *Kenya* Article 15 Decision, para. 34.

<sup>40</sup> *Comoros* Second Decision on Judicial Review, para.16; *Comoros* First Decision on Judicial Review, para.13 (emphasis added) referred to in *Situation in the People’s Republic of Bangladesh/ Republic of the Union of Myanmar*, Motion to Set Aside, 29 October 2019, para. 18/fn.36.



investigation.”<sup>41</sup> Only the inferences that appear manifestly unreasonable would fall short of the “reasonable basis to believe” standard.<sup>42</sup>

45. The Pre-Trial Chamber repeatedly asserted that it does not follow that an investigation should not be opened where facts or accounts are difficult to establish, unclear, or conflicting. In fact, such circumstances call for an investigation to be opened, provided that the relevant requirements have been met.<sup>43</sup>

46. In the context of the admissibility assessment in the present situation, the Prosecutor departed from these principles. As it is shown in the illustrative examples below, this error severely impacted the decision to close the preliminary examination without pursuing an investigation.

#### **(i) Proportionality Criteria/Passage of time**

47. In the section titled “Proportionality Criteria”, the Prosecutor noted with concern the IHAT/SPLI practice to discontinue investigations based on the application of proportionality (passage of time) criteria.<sup>44</sup> Most of the Prosecutor’s concerns relate to the lack of clarity and information from the UK authorities concerning: (1) the rationale of such criteria; and (2) the possibility that allegations of war crimes were closed on this ground.<sup>45</sup>

48. In concluding that the circumstances in which such criteria was used to discontinue investigations nevertheless did not meet the threshold to show the “intent to shield”, the Prosecutor observed that:

[T]his issue raises the question of how the Office should treat assessments made by domestic investigative and prosecutorial bodies, in this case with respect to their discretion in prioritising the most serious criminal allegations. [...] The Office accepts that States are entitled to a certain degree of discretion in view of how they seek to manage their workload and prioritise the most serious allegations. *The Office also observes that the concerns it has noted largely stem from the overall paucity of the information available and the different possible inferences that might be drawn therefrom.*<sup>46</sup>

49. The existence of a reasonable inference available from the records – as acknowledged by the Prosecutor in the passage above – would be sufficient to meet the reasonable basis

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<sup>41</sup> *Comoros* First Decision on Judicial Review, para. 13.

<sup>42</sup> *Burundi* Article 15 Decision, para. 138.

<sup>43</sup> *Comoros* Second Decision on Judicial Review, para.16; *Burundi* Article 15 Decision, para. 30; *Comoros* First Decision on Judicial Review, para. 13.

<sup>44</sup> OTP, Final Report, paras. 351-363.

<sup>45</sup> OTP, Final Report, paras. 358-363.

<sup>46</sup> OTP, Final Report, para. 362-363 (emphasis added).

standard.<sup>47</sup> Only manifestly unreasonable inference would fall short of such an evidentiary threshold.<sup>48</sup> To the extent that the Prosecutor acknowledges that “*different possible inferences*” may be drawn from the approach adopted by UK authorities in applying the proportionality criteria to discontinue the investigations – including that they were made for the purpose of shielding within the meaning of Article 17(2)(a) of the Statute – the reasonable basis to believe standard shall be considered met. On this basis, the UK should have been found “unwilling” under Article 17(1)(b) of the Statute.

50. Moreover, the UK’s “unwillingness” should have been found in light of the paucity of information available to the Prosecutor as a result of the UK authorities’ limited cooperation.<sup>49</sup> Even at the preliminary examination stage, the burden of proof to show that a case is inadmissible lies with the State.<sup>50</sup> The absence of information related to the application of such filtering criterion should have been enough to support the finding that UK was “unwilling”.<sup>51</sup> Lastly, the UK authorities’ reluctance to cooperate<sup>52</sup> with the Court should have been considered an indicator of “unwillingness” according to the Policy Paper on Preliminary Examinations.<sup>53</sup>

## **(ii) Allegations of Cover-Up**

51. Similarly, in relation to the allegations of cover-up by the UK’s officials, the Prosecutor concluded:

More specifically, after exhausting relevant lines of inquiry, the Office has not been able to substantiate, *with evidence that it could rely upon in court*, the allegation that decisions were taken within IHAT or the SPA to block certain lines of inquiry or that viable cases with a realistic prospect of conviction were inappropriately abandoned. *While the Office cannot categorically rule out such a hypothesis*, the evidence available to it at this stage does not allow it to conclude that there was intent on the part of the UK authorities to shield persons under investigation from criminal responsibility.<sup>54</sup>

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<sup>47</sup> *Comoros* Second Decision on Judicial Review, para.16; *Comoros* First Decision on Judicial Review, para. 13 (emphasis added) referred to in *Situation in the People’s Republic of Bangladesh/ Republic of the Union of Myanmar*, Motion to Set Aside, 29 October 2019, para. 18/fn.36.

<sup>48</sup> *Burundi* Article 15 Decision, para. 138.

<sup>49</sup> OTP, Final Report, paras. 358-362.

<sup>50</sup> *Situation in the Islamic Republic of Aghanistan*, Public redacted version of “Request for authorisation of an investigation pursuant to article 15”, 20 November 2017, ICC-02/17-7-Conf-Exp, 20 November 2017, ICC-02/17 (“*Afghanistan* Article 15 Request”), para. 295.

<sup>51</sup> *Afghanistan* Article 15 Request, para. 296.

<sup>52</sup> OTP, Final Report, para. 359.

<sup>53</sup> OTP, Policy Paper on Preliminary Examinations, November 2013, para. 55. See also Informal Expert Paper: The principle of complementarity in practice (ICC-OTP 2003), p. 31.

<sup>54</sup> OTP, Final Report, para. 409 (emphasis added).

That the Prosecutor cannot rule out the possibility that “decisions were taken within IHAT or the SPA to block certain lines of inquiry or that viable cases with a realistic prospect of conviction were inappropriately abandoned” is a strong indication that, based on the gathered evidence, the UK authorities attempted to hinder the investigations over the conducts of members of the UK armed forces deployed in Iraq. In applying the correct “reasonable basis” standard, this indication should have prompted the conclusion that the UK was “unwilling”, pursuant to Article 17 of the Statute. Furthermore, the OTP’s statement that the allegations of cover up could not be substantiated “with evidence that it could rely upon in court” clearly shows that the Prosecutor adopted a higher standard of proof than what required at the preliminary examination stage, by inappropriately anticipating speculations related to hypothetical proceedings under Articles 18 and 19 of the Statute that, as noted above, should not form part of the assessment at this early stage of the proceedings.

**Error 2: The Prosecutor failed to give principles of due process full consideration when interpreting “unwillingness” under Article 17(2) of the Statute.**

52. The Prosecutor erred in concluding that the principles of due process have a mere interpretative function with respect to the terms contained in Article 17(2)(a)-(c) of the Statute<sup>55</sup> and cannot be “mechanically imported” for the determination of the State’s “unwillingness”.<sup>56</sup>

53. The chapeau of Article 17(2) requires that: “In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable (...)”. However, in the assessment of the UK authorities’ “unwillingness”, based on the criteria in the subparagraphs of Article 17(2), the Prosecutor adopted the view that the principles of due process do not play a determinative role for the interpretation of “unwillingness”. It is respectfully submitted that this approach is incorrect for the following reasons.

54. In order to conclude that principles of due process contained in Article 17(2) of the Statute serve as a mere interpretative tool, as opposed to a set of determinative factors, the OTP referred to the findings of the Appeals Chamber in *Al-Senussi*:

The Office emphasises in this respect, as the Appeals Chamber has done, that in doing so the ICC is not acting as a human rights court nor directly applying human

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<sup>55</sup> OTP, Final Report, paras. 286, 291, 416, 436.

<sup>56</sup> OTP, Final Report, paras. 291, 416, 436.

rights standards. For example, the ICC is not being asked to assess whether the State has complied with its procedural obligations under those standards. Instead, the approach is one of examining the relevance and utility of human rights standards and accompanying jurisprudence as an aid to interpreting the various terms used in article 17, given the chapeau requirement in article 17(2) that the Court when applying the criteria for unwillingness have “regard to the principles of due process recognized by international law.”<sup>57</sup>

55. However, it is essential to clarify the circumstances in which the Appeals Chamber came to this conclusion in the *Al-Senussi* Judgement of 24 July 2014, and to distinguish that from the present situation.

56. The main scope of the Appeals Chamber’s decision was confined to whether the violation of the accused’s fair trial rights at the domestic level could give rise to “unwillingness” on the part of the State. The Appeals Chamber stated that violations of rights of the suspect cannot *per se* be sufficient to amount to “unwillingness” within the meaning of Article 17(2) of the Statute. It was in this context that the Appeals Chamber stated that “the Court passing judgment generally on the internal functioning of the domestic legal systems of States in relation to individual guarantees of due process” would make the Court “come close to becoming an international court of human rights”.<sup>58</sup> The Chamber therefore made clear that the provision “having regard to principles of due process” should not be, in principle, stretched to cover the rights of the suspect in light of Article 17(2), but should instead serve as guidance for examining the quality of proceedings with regard to potential intent of the authorities to shield the perpetrators:

Taking into account the text, context, object and purpose of the provision, this determination is not one that involves an assessment of whether the due process rights of a suspect have been breached *per se*. In particular, the concept of proceedings “being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice” should generally be understood as referring to proceedings which will lead to an (sic) suspect evading justice, in the sense of not appropriately being tried genuinely to establish his or her criminal responsibility, in the equivalent of sham proceedings that are concerned with that person’s protection.<sup>59</sup>

57. Outside such framework, the *Al-Senussi* case cannot be used, or relied on, to support a general assertion that the principles of due process under Article 17(2) of the Statute have a mere interpretative function by “assist[ing] in defining the contours of certain terms set

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<sup>57</sup> OTP, Final Report, para. 287.

<sup>58</sup> *Al-Senussi* Admissibility Appeal Judgement, para. 219.

<sup>59</sup> *Al-Senussi* Admissibility Appeal Judgement, para. 230(2).

out in article 17.”<sup>60</sup> To the contrary, a careful reading of the *Al-Senussi* Judgement confirms that due process principles and/or the relevant violations must be used as objective parameters to assess and determine a State’s unwillingness,<sup>61</sup> rather than to assist in textual interpretation of Article 17(2)(a)-(c) of the Statute.

58. Ultimately, the Appeals Chamber confirmed the conclusion of the Pre-Trial Chamber that ““only those irregularities that may constitute relevant indicators of one or more of the scenarios described in article 17(2) or (3) of the Statute, and that are sufficiently substantiated by the evidence and information placed before the Chamber’ could form a ground for a finding of unwillingness or inability”.”<sup>62</sup>
59. Therefore, this decision did not narrow down the role of the “principles of due process” and therefore cannot be used as a reason for not applying or downplaying principles of due process in the complementarity determination of this situation, as prescribed by the *chapeau* of Article 17(2).
60. Instead, the principles of due process should be used as determinative parameters for assessing the UK’s “unwillingness” under all three limbs of Article 17(2). The reference to the principles of due process was incorporated in Article 17(2) of the Statute to enhance the objectivity of the determination of genuineness.<sup>63</sup> Accordingly, such principles, drawn from human rights law jurisprudence, should be used as factors to determine a State’s “unwillingness”. Treating the reference to the principles of due process under Article 17(2) of the Statute as an optional source for interpretation<sup>64</sup> makes this provision redundant, as Article 21(3) of the Statute already provides that the interpretation of the Statute should be consistent with internationally recognized human rights.
61. This interpretation supports the conclusion that regarding Rule 51 RPE, in the context of Article 17(2) proceedings, the Court may consider information submitted by a State “showing that its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct”. That Rule 51 RPE specifically provides for the Court to consider information concerning the consistency of domestic

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<sup>60</sup> OTP, Final Report, para. 285.

<sup>61</sup> *Al-Senussi* Admissibility Appeal Judgement, para. 230(3).

<sup>62</sup> *Al-Senussi* Admissibility Appeal Judgement, para. 231.

<sup>63</sup> OTP, Final Report, para. 281, referring to William Schabas and Mohamed El Zeidy, “Article 17, Issues of admissibility” in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court. A Commentary*, 3rd edition, 2016, pp. 791-192 (“Schabas and El Zeidy, Article 17”).

<sup>64</sup> OTP, Final Report, para. 285

proceedings with internationally recognized norms and standards confirms the centrality of the principles of due process for the determination of the State's "unwillingness".<sup>65</sup>

62. The determinative nature of the principles of due process is supported by a number of authorities that the Prosecutor refers to in the Report.<sup>66</sup> Contrary to the Prosecutor's contention,<sup>67</sup> these sources do not confirm that the principles of due process retain an interpretative character. Schabas and El Zeidy consider that the reference to having regard to the principles of due process "requires that the Court's assessment of the quality of justice [...] takes into consideration both procedural and substantive rights (covering the entirety of the domestic process) embodied in human rights instruments and the jurisprudence of regional and international judicial bodies".<sup>68</sup> They note the consistency of this interpretation with Article 21(3) of the Statute, which requires that the "application and interpretation" of the Statute "must be consistent with internationally recognized human rights". When it comes to interpretation of "shielding the person" under Article 17(2)(a), Schabas and El Zeidy refer extensively to the case-law of regional human rights courts on the deficiency of domestic proceedings and lack of due process as a reason to determine the States' intent to shield.<sup>69</sup>
63. This position is further supported by other experts, such as Kleffner, Rojo and Gioia.<sup>70</sup> Gioia states that "the Statute also provides that 'the principles of due process recognized by international law' are the paramount standard against which the ICC has to carry out its discretionary judgement concerning the 'unwillingness' of a state".<sup>71</sup>
64. Similarly, the Informal Expert Paper on the Principle of Complementarity explicitly affirms that, "in interpreting Article 17, the Prosecutor *must* [emphasis added] also 'have regard to principles of due process recognized under international law'".<sup>72</sup> Significantly, the "List of indicia of unwillingness or inability to genuinely carry out proceedings" contained in the

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<sup>65</sup> Noteworthy the RPE were adopted after the Statute and are relevant to interpret its provisions. *Cf. Afghanistan Appeal Judgement*, para. 35.

<sup>66</sup> OTP, Final Report, fn. 498.

<sup>67</sup> OTP, Final Report, para. 287, fn. 498.

<sup>68</sup> Schabas and El Zeidy, Article 17, p. 817 (emphasis added).

<sup>69</sup> Schabas and El Zeidy, Article 17, pp. 819-821.

<sup>70</sup> Jann K. Kleffner, "Complementarity as a Legal Principle and as Criteria for Admissibility", *Complementarity in the Rome Statute and National Criminal Jurisdictions*, OUP Oxford, 2008, pp. 144, 127-134; Enrique Carnero Rojo, "The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court: From 'No Peace without Justice' to 'No Peace with Victor's Justice'?", *Leiden Journal of International Law* 18, no. 4 (December 2005): 829-870, p. 839; Federica Gioia, "State Sovereignty, Jurisdiction, and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court", *Leiden Journal of International Law* 19, no. 4 (December 2006): 1095-1124; p. 1110.

<sup>71</sup> Gioia, State Sovereignty, p. 1110.

<sup>72</sup> OTP, Informal Expert Paper: The Principle of Complementarity in Practice, 2003, p. 8, fn. 9.

Informal Expert Paper includes as indicators to determine the State's unwillingness the identification of due process violations.<sup>73</sup>

65. In this light, due process principles must be taken into full consideration by the Prosecutor, as they are *determinative* for the assessment of “unwillingness” under Article 17(2) of the Statute. Using due process principles to guide the interpretation of “unwillingness” does not mean that the Prosecutor would reinforce the procedural obligation of the respondent State and assess its responsibility for an inadequate investigation, as a human rights court would do. Therefore, the Prosecutor should not consider the principles of due process “as standards for the Court to protect the individual against possible abuses by the state, but as standards for the Court to prevent state authorities from shielding an individual from justice”.<sup>74</sup> Here, the insertion “having regard to the principles of due process” would follow its purpose, namely to render more objective the assessment of “unwillingness” of the State to bring perpetrators to justice.
66. As elaborated under Error 3, the downgrading of the principles of due process as simple interpretative guidance of the terms contained in Article 17(2)(a)-(c) of the Statute vitiated the entire complementarity assess in relation to the UK domestic proceedings.

**Error 3: The Prosecutor erred in not concluding that the proceedings were undertaken “for the purpose of shielding the person concerned from criminal responsibility” within the meaning of Article 17(2)(a).**

67. By not giving the principles of due process full consideration, as described under Error 2, and by incorrectly introducing an extraneous requirement for interpretation of Article 17(2)(a) (as will be presented under the following section a)) the Prosecutor came to the conclusion that no “intent of shielding” within the meaning of Article 17(2)(a) could be established. However, a correct interpretation of Article 17(2)(a) would have led the Prosecutor to establish that proceedings were undertaken “for the purpose of shielding the person concerned from criminal responsibility” (as further demonstrated in section b)).

**a) The Prosecutor erred in concluding that Article 17(2)(a) requires evidence of an “intent to shield” with regard to specific agents involved in the domestic proceedings.**

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<sup>73</sup> OTP, Informal Expert Paper, Annex 4 referring to, *inter alia*, “[l]egal regime of due process standards”.

<sup>74</sup> Carnero Rojo, *The Role of Fair Trial Considerations*, p. 839.

68. Instead of relying on the principles of due process for the assessment of an “intent to shield” under Article 17(2)(a), the Prosecutor mistakenly adopted the view that Article 17(2)(a) requires evidence of an “intent to shield” with regard to specific agents involved in the domestic proceedings:

The factors [the Office] has identified must be capable of demonstrating that the authorities acted in bad faith, i.e. that the relevant domestic proceedings were not conducted genuinely which, in the circumstances, demonstrates an intent to shield persons from criminal responsibility. As the Appeals Chamber has observed, this is a high threshold.<sup>75</sup>

In other words, the Prosecutor explained that “intent to shield” must be demonstrated in a way that would prove that the authorities acted in bad faith.

69. Additionally, the Prosecutor affirmed that:

Finally, it should be observed that while article 17 directs the Court’s analysis to the unwillingness or inability of the ‘State’, different national institutions may demonstrate varying and inconsistent degrees of willingness/unwillingness. As such, when analysing the response of a given domestic body in a specific case, the Court will need to also consider the activities of any other component or components of the national system that have a bearing on the proceedings at hand.<sup>76</sup>

70. The Prosecutor thus observed there would be a necessity to demonstrate the “intent to shield” with regard to all agents involved in the domestic proceedings. This interpretation, however, is inconsistent with the requirements of Article 17(2) of the Statute. As it was convincingly observed: “Article 17(2)(a) is a test for discerning the bad faith of a State by way of checking the effectiveness of national proceedings. In fact, any intentional deficiency or serious negligence in conducting national proceedings that lead to negative results, through certain acts or omissions, might reflect a State’s intention to ‘shield [the] person from criminal responsibility’”.<sup>77</sup> Therefore, the assessment of any “intent to shield” should be properly conducted by examining a State’s implementation of due process principles, and not by introducing a subjective requirement similar to criminal *mens rea* (“intent”) to all individuals involved.

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<sup>75</sup> OTP, Final Report, para. 484.

<sup>76</sup> OTP, Final Report, para. 292.

<sup>77</sup> Schabas and El Zeidy, Article 17, p. 819.



**b) The Prosecutor failed to apply principles of due process as indicators for the determination of the “intent to shield”.**

71. As already noted under Error 2, by departing from the interpretation of principles of due process, the Prosecutor deprived the “unwillingness” analysis of any concrete guidance that would enhance the objectivity of the assessment.<sup>78</sup> Such guidance arises from the principles of due process (recognised by international law as elaborated in customary international law<sup>79</sup> and relevant international instruments), guidelines, basic principles and relevant case law of international and regional human rights courts and supervisory bodies.<sup>80</sup>
72. The OTP’s Policy Paper on Preliminary Examinations lists the indicators for “intent to shield” in paragraph 51 as follows:

Intent to shield a person from criminal responsibility may be assessed in light of such indicators as, manifestly insufficient steps in the investigation or prosecution; deviations from established practices and procedures; ignoring evidence or giving it insufficient weight; intimidation of victims, witnesses or judicial personnel; irreconcilability of findings with evidence tendered; manifest inadequacies in charging and modes of liability in relation to the gravity of the alleged conduct and the purported role of the accused; mistaken judicial findings arising from mistaken identification, flawed forensic examination, failures of disclosure, fabricated evidence, manipulated or coerced statements, and/or undue admission or non-admission of evidence; lack of resources allocated to the proceedings at hand as compared with overall capacities; and refusal to provide information or to cooperate with the ICC.<sup>81</sup>

These indicators have been formaluted in a way as to reflect failures to respect the principles of due process as identified in human rights jurisprudence. Although the Prosecutor takes note of these indicators in para. 295 of the Final Report, they do not find any concrete application in the final determination pursuant to Article 17(2)(a) of the Statute.

73. Similarly, the Prosecutor takes note of relevant case law of international and regional human rights courts.<sup>82</sup> However, the guidance regarding due process principles and “intent to shield” that is provided by those judgments was entirely disregarded in the final determination of the Prosecutor. Notably, the European Court of Human Rights (“ECtHR”) and Inter-American Court of Human Rights (“IACtHR”) elaborated explicitly on the connection between not meeting standards of due process and States’ “intent to shield”

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<sup>78</sup> See supra, Error 2.

<sup>79</sup> OTP, Policy Paper on Preliminary Examinations, para. 55.

<sup>80</sup> OTP, Policy Paper on Preliminary Examinations, paras. 50-58.

<sup>81</sup> OTP, Policy Paper on Preliminary Examinations, para. 51.

<sup>82</sup> OTP, Final Report, paras. 297-300.

persons from criminal responsibility, in particular when it comes to violation of the right to life and the prohibition of torture.

74. In *Nachova and others v. Bulgaria*, the Grand Chamber of the ECtHR established an “intent to shield” the perpetrator by examining the effectiveness of the domestic proceedings. The Court established three criteria to rule on the effectiveness of criminal proceedings:

- 1) The national authorities must have taken all reasonable steps available to secure the evidence concerning the incident;
- 2) The conclusions of the investigation must be based on thorough, objective and impartial analysis of all the relevant elements; and
- 3) Any deficiency in the investigation which undermines its ability to establish the circumstances of the case or the person responsible is liable to fall foul of the required measure of effectiveness.<sup>83</sup>

75. By examining the facts of the case, the Court came to the conclusion that the State’s agents shielded the perpetrator based on the following findings:

- 1) The investigating authorities disregarded some relevant facts including highly technical ones;
- 2) There was a lack of strict examination of all the material circumstances; and
- 3) The national authorities conducted the investigation in an excessively narrow legal framework, ignoring indispensable and obvious investigative steps.<sup>84</sup>

76. According to the Court, these deficiencies, accompanied by a lack of “any proper explanation”, indicate that the State is acting in bad faith for the purpose of shielding the person concerned.<sup>85</sup> Similarly, in *Myrna Mack Chang v. Guatemala*, the IACtHR found that “altering or hiding” of evidence, under orders from a State’s authority, and the manipulation of evidence by the Ministry of National Defence demonstrated “that there was an attempt to cover-up those responsible [...] and this constitute[d] an obstruction of justice and an inducement for those responsible of the facts to remain in situation of impunity”.<sup>86</sup> In *Velásquez-Rodríguez v. Honduras*, the IACtHR stated that for an investigation to be effective, the State must “use the means at its disposal [...] to identify those responsible, [and] to impose the appropriate punishment”.<sup>87</sup>

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<sup>83</sup> ECtHR, *Nachova and others v. Bulgaria*, Applications Nos. 43577/98 and 43579/98, Judgment, 6 July 2005, para. 113.

<sup>84</sup> *Ibid*, paras. 114-117.

<sup>85</sup> Schabas and El Zeidy, Article 17, p. 820.

<sup>86</sup> IACtHR, *Myrna Mack Chang v. Guatemala*, Judgment 25 November 2003, (Ser. C) No. 101 (2003), paras. 166-172.

<sup>87</sup> IACtHR, *Velásquez-Rodríguez v. Honduras*, Judgment 29 July 1998, para. 177.

77. The failure to concretely apply the principles of due process consistently with these relevant sources in the interpretation of “shielding” has ultimately led to the Prosecutor adopting an inappropriate and subjective standard of “reasonableness”<sup>88</sup> that has no legal basis under the Statute and is too permissive or conducive to impunity,<sup>89</sup> as will be shown in concrete examples in the following.

**c) Specific impact of the errors under a) and b):**

**(i) Failure to properly assess the filtering criteria adopted by the UK.**

78. With regard to the filtering criteria set out by the High Court and applied by IHAT, the Prosecutor came to the conclusion that the filtering criteria “appear[s] reasonable in the circumstances and do not, in and of themselves, support a finding of a lack of willingness”.<sup>90</sup> The Petitioners respectfully submit that both the reasoning as well as the conclusion itself are erroneous for the following reasons.

79. The standard of “reasonableness” does not constitute the appropriate standard for assessment of “unwillingness”. Instead of applying an abstract standard, the Prosecutor should have conducted the assessment of filtering criteria in accordance with the requirement of Article 17(2) – “having regard to principles of due process” – by applying the indicators identified in the Policy Paper on Preliminary Examinations and relevant human rights case law.

80. In fact, when analysed while “having regard to the principles of due process recognized by international law”, the findings of the OTP with regard to the filtering system indicate that principles of due process have been disrespected by the UK authorities in a way that clearly reflects the “intent to shield”, as outlined by the Paper Policy Paper on Preliminary Examinations, including “manifestly insufficient steps in the investigation or prosecution”; “ignoring evidence or giving it insufficient weight”; and “manifest inadequacies in charging and modes of liability in relation to the gravity of the alleged conduct and the purported role of the accused”.<sup>91</sup>

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<sup>88</sup> OTP, Final Report, paras. 349-350, 361, 363.

<sup>89</sup> OTP, Informal Expert Paper, p. 8, fn. 9.

<sup>90</sup> OTP, Final Report, para. 312.

<sup>91</sup> OTP, Policy Paper on Preliminary Examinations, para. 51.

81. The application of the filtering criteria by IHAT/SPLI led to seventy percent of 3,400 claims<sup>92</sup> being sifted out before reaching the stage of full investigation (para. 305). The so-called “evidential sufficiency test” ought to determine whether and how far it was necessary for IHAT to investigate an allegation that a person has or may have committed an offence, so that “where a judgment is reasonably made that there is no realistic prospect of obtaining sufficient evidence to satisfy the evidential sufficiency test, there is no duty on IHAT under the Act or at common law to conduct any further investigation”.<sup>93</sup> With the judgment of 13 April 2016, Justice Leggatt enabled IHAT to “properly decline to investigate an allegation” unless it is supported by a signed witness statement giving the claimant's own recollection, identifies any other relevant witness(es) known to the claimant and the crux of the claimant's evidence, and explains any past steps or attempts to bring the allegation to the attention of the British authorities.<sup>94</sup>
82. These requirements allowed IHAT to entirely dismiss steps to remedy the lack of evidence by taking further investigative steps, such as acquiring a signed witness statement, despite the fact that this was feasible in order to establish minimum standards of evidential support. Practically, this filtering system allowed the UK investigators to speculate on the prospects of investigation without undertaking *any* feasible investigatory step, and to dismiss the claims in bulk. This procedure is clearly in violation of principles of due process and corresponds with the indicators of “intent to shield”, namely “manifestly insufficient steps in the investigation or prosecution” and “deviation from established practices and procedures”.<sup>95</sup>
83. Troubling also is that the burden to submit a signed witness statement and supporting evidence was put on the claimants, which is in clear contradiction with internationally established principles of due process. Given that the claimants received no assistance or

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<sup>92</sup> IHAT, Work completed, undated, available at: <https://www.gov.uk/government/groups/iraq-historic-allegations-team-ihat>.

<sup>93</sup> UK EWHC, *Al-Saadoon & Ors v Secretary of State for Defence (Rev 1)* [2016] EWHC 773 (Admin) 07 April 2016, paras. 280-283.

<sup>94</sup> UK EWHC, *Al-Saadoon & Ors v Secretary of State for Defence (Rev 1)* [2016] EWHC 773 (Admin) 07 April 2016, paras. 280-283, para. 289.

<sup>95</sup> The Prosecutor's findings on the substance and application of filtering criteria correspond with the reasons in *Nachova*, where the ECtHR established that ‘shielding’ arose *inter alia* from the national authorities conducting the investigation in an “excessively narrow legal framework”, ignoring “indispensable and obvious investigative steps”. Similar to the Investigation Commission's failure to ‘carry out a full and timely investigation’ in *Ignacio Ellacuria*, IHAT's failure to undertake any feasible investigatory steps meant that the majority of allegations were dismissed before effective investigation into every case was carried out, and/or any pattern of abuse was found. See ECtHR, *Nachova and others v. Bulgaria*, Applications Nos. 43577/98 and 43579/98, Judgment, 6 July 2005, paras. 114-117; and *Ignacio Ellacuria*, Report No. 136/99, Case 10.488, paras. 81-142.

investigatory resources from IHAT, the standard of proof required of claimants in the “evidential sufficiency test” was unreasonably high.<sup>96</sup>

**(ii) Failure to properly assess the impact of the Solicitors Disciplinary Tribunal’s findings in the UK.**

84. The findings of the OTP with regard to the impact of Solicitors Disciplinary Tribunal (“SDT”),<sup>97</sup> when analysed while “having regard to the principles of due process recognized by international law”, as required by Article 17(2) of the Statute, clearly indicate that principles of due process have been disrespected in a way that reflects “intent to shield”, as outlined by the same indicators in the Policy Paper on Preliminary Examinations, including “manifestly insufficient steps in the investigation or prosecution” and “deviations from established practices and procedures”.
85. In particular, SDT findings against Phil Shiner/PIL were used by the authorities in a way that caused serious negative implications for (1) other cases originating from PIL, (2) cases not originating from PIL, and (3) the overall conduct of investigative authorities.
86. As for the cases originating from PIL as a result of the SDT judgment, a new, elevated threshold was introduced and applied by IHAT to any claims originating from PIL, although the SDT findings only concerned the conduct of Phil Shiner and did not cast *any* doubt on the veracity of claimants’ statement. By not seeking to distinguish those claims that could have been affected by the findings of the SDT and those that were not (such as all PIL cases involving intermediary Abu Jamal),<sup>98</sup> IHAT and SPA enabled themselves to dismiss complaints from PIL in bulk without undertaking further lines of inquiry.
87. Furthermore, the DSP advised in relation to allegations of ill-treatment not amounting to homicide or rape that “it would be reasonable to adopt a general policy not to investigate such allegations where they originate from PIL and none of the exceptions<sup>99</sup> suggested by the Director of IHAT apply.”<sup>100</sup> This test enabled IHAT and SPA to drop ill-treatment cases

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<sup>96</sup> IACtHR, *Velásquez Rodríguez v. Honduras*, Judgment, 29 July 1988, para. 180; *Godínez-Cruz v. Honduras*, Judgment, 20 January 1989, para. 190. In both cases, the families of claimants were required to provide conclusive proof of their allegations.

<sup>97</sup> OTP, Final Report, paras. 313 *et seq.*

<sup>98</sup> For the sake of clarity, Abu Jamal has not been implicated in any of the SDT findings. OTP, Final Report, paras. 328, 329.

<sup>99</sup> These exceptions are: The allegation concerned had been made to the UK authorities before or independently of PIL’s involvement, whether contemporaneously or after the alleged incident; The IHAT has already identified contemporaneous video or photographic evidence of ill-treatment; The IHAT has already identified compelling evidence of the alleged incident independent of the claimant or other PIL identified witnesses; There was a prior direction by Provost-Marshal (Army) or Ministers that the incident or allegation should be investigated.

<sup>100</sup> OTP, Final Report, para. 335.

unless (a) the allegations did not originate from PIL, (b) there is visual evidence, identified by IHAT, supporting the claim, (c) there is compelling evidence of the claim identified by IHAT independently of the claim originating from PIL, and (d) Provost-Marshal (Army) or Ministers requested an investigation regarding the claim prior to SDT judgment.<sup>101</sup>

88. Given that most claims needed additional investigative steps to be evidentially substantiated, this disproportionate approach enabled IHAT to easily sift out a significant amount of claims of ill-treatment that could potentially amount to war crimes. Notably, this approach was introduced and applied by IHAT and DSP despite the fact that they appear to have acknowledged that the credibility of the underlying allegations of claimants originating from PIL had not been affected *per se* by the findings of the SDT.<sup>102</sup> This leaves no doubt that the elevation of the threshold was a deliberate step to reduce the number of allegations that ultimately enabled potential suspects to escape prosecution.
89. Since 2018, the reasoning explicitly referring to the SDT proceedings has been used to dismiss 762 cases in the Ministry of Defence's ("MoD") decision on Article 3 cases and 3 cases in MoD's decision on Article 2 cases (updated 29 August 2018).<sup>103</sup> This clearly shows that despite the acknowledgement that the findings cannot be used to question or dismiss the validity of the claims, the MoD continued to erroneously and illegitimately use the findings to dismiss 765 claims.
90. As for the cases not originating from PIL, following the SDT judgment, at least one case not originating from PIL has been dismissed for a reason referring to the SDT findings. As was already presented in ECCHR's submission of 2019,<sup>104</sup> in the MoD's published decisions on alleged human rights breaches during Operation Telic, the decision not to open an inquiry in the case of IHAT 184 (not filed by PIL) was justified on the basis that "[t]he evidence submitted to the Solicitors Disciplinary Tribunal (SDT) and the SDT judgment in disciplinary proceedings brought against Mr. Phil Shiner of PIL casts significant doubt upon the veracity and credibility of the allegations made by PIL."<sup>105</sup> This shows that the SDT findings were used to dismiss at least one case that had no connection to PIL. This information has been unfortunately entirely disregarded in the Prosecutor's Final Report.

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<sup>101</sup> OTP, Final Report, para. 332.

<sup>102</sup> OTP, Final Report, para. 338.

<sup>103</sup> See 'MOD decisions on Article 3 cases (updated 29 August 2018)', fn. 305, available at <https://www.gov.uk/guidance/mod-decisions-on-alleged-human-rights-breaches-during-operation-telic>.

<sup>104</sup> ECCHR's submission to the OTP, July 2019, p. 36, available at: [https://www.ecchr.eu/fileadmin/Juristische\\_Dokumente/ECCHR\\_Follow\\_Up\\_Communication\\_to\\_OTP\\_War\\_crimes\\_by\\_UK\\_forces\\_in\\_Iraq\\_July\\_2019.pdf](https://www.ecchr.eu/fileadmin/Juristische_Dokumente/ECCHR_Follow_Up_Communication_to_OTP_War_crimes_by_UK_forces_in_Iraq_July_2019.pdf).

<sup>105</sup> See 'MOD decisions on Article 3 cases (updated 29 August 2018)', fn. 93, available at <https://www.gov.uk/guidance/mod-decisions-on-alleged-human-rights-breaches-during-operation-telic>.

91. As to the impact of the SDT judgment on the overall conduct of investigations in the UK, the domestic authorities adopted an approach of doubting the veracity of all allegations of crimes by UK forces in Iraq. This enabled the authorities to ultimately question the necessity of investigations altogether and eventually close down the main investigative body, IHAT. In 2017 the then-Defence Secretary stated that the MoD 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.”<sup>106</sup> As confirmed by the Prosecutor, the SDT findings ultimately precipitated both the early closure of IHAT as well as the introduction of draft legislation aimed at creating a presumption against prosecution to combat the perceived problem of “vexatious litigation”.<sup>107</sup>
92. The steps undertaken by the UK authorities with regard to the SDT findings and their impact on the proceedings constitute clear violations of the principles of due process that match the indicators of “intent to shield” outlined above. The Prosecutor’s findings on the negative and overly excessive impact of the SDT findings correspond with the findings in *Nachova*<sup>108</sup>, *Velásquez Rodríguez* and *Godínez-Cruz v. Honduras*<sup>109</sup>, as well as in *Isayeva*<sup>110</sup> on violations of standards of due process.

**(iii) Failure to properly assess the proportionality criteria adopted by the UK.**

93. With regard to the proportionality criteria, the Prosecutor found that “the criteria developed by IHAT and SPLI do not appear unreasonable at face value”.<sup>111</sup> Here again, the standard

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<sup>106</sup> See ECCHR’s September 2017 submission, referring to ‘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], para. 12.

<sup>107</sup> OTP, Final Report, para. 322.

<sup>108</sup> In *Nachova*, ECtHR established that ‘shielding’ arose *inter alia* from the national authorities conducting the investigation in an “excessively narrow legal framework”, ignoring “indispensable and obvious investigative steps.” ECtHR, *Nachova and others v. Bulgaria*, Applications Nos. 43577/98 and 43579/98, Judgment, 6 July 2005, para. 115.

<sup>109</sup> Additionally, similar to the requirement to produce conclusive proof of their allegations facing the family members of victims in *Velásquez Rodríguez* and *Godínez-Cruz v. Honduras*, the IHAT applied a disproportionate threshold to the admission of cases by failing to distinguish those claims that could have been affected by the findings of the SDT and those that were not. See IAtHR, *Velásquez Rodríguez v. Honduras*, Judgment, 29 July 1988, para. 180; IACtHR, *Godínez-Cruz v. Honduras*, Judgment, 20 January 1989, para. 190.

<sup>110</sup> The decision to dismiss a case that did not originate from PIL and closing IHAT prematurely, failed to address serious and well-founded allegations, and amounts to ignoring evidence or giving it insufficient weight in *Isayeva v. Russia*. See ECtHR, *Isayeva v. Russia*, no. 57950/00, Judgment, 24 February 2005, paras. 215-224.

<sup>111</sup> OTP, Final Report, para. 361.

of “reasonableness” is inappropriate, and misguided the evaluation of the criteria with regard to “intent to shield”.<sup>112</sup>

94. IHAT and SPLI’s closure of investigations of allegations of ill-treatment (without full investigation) on the basis of “proportionality” resulted in 457 of the 1,667 cases being closed.<sup>113</sup> The “proportionality criteria” applied by IHAT and SPLI meant that “even taking the allegation of criminal offending its highest, it would not be proportionate to investigate given the length of time that has passed and the severity of the alleged offence”.<sup>114</sup>
95. The Prosecutor accepted the proportionality criteria “at face value” given the need of prioritization. At the same time, the Prosecutor admitted that it was not provided with sufficient information to conduct substantial analysis of the application of the criteria.<sup>115</sup> For the purposes of such analysis, the Prosecutor “must be provided with examples and indicators sufficient to demonstrate how relevant criteria were actually applied in practice”<sup>116</sup>, which the UK authorities failed to do. In the absence of this essential information, the conclusion of the Prosecutor that the proportionality criteria and their application do not reflect “intent to shield” is clearly unsubstantiated.
96. As further elaborated below, the UK domestic authorities used proportionality criteria to discontinue allegations concerning war crimes committed by the UK armed forces.<sup>117</sup> Against this background, even in the absence of further information on how the criteria were actually applied in practice, following the indicators contained in the Policy Paper on Preliminary Examinations, the OTP should have concluded that principles of due process have been violated in a way that reflects “intent to shield”.
97. “Passage of time” is the first criterion in the proportionality criteria and constitutes an illegitimate criterion for dismissal, given that the investigations focused on “the historical allegations”, as it can practically serve as a justification for dismissal of any case investigated by IHAT and SPLI. As the Prosecutor notes, this approach “appears particularly problematic given that this factor is within the control of the UK authorities and has typically resulted from their own past failings” and deficiencies in investigating allegations of detainee abuse.<sup>118</sup>

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<sup>112</sup> OTP, Final Report, para. 361.

<sup>113</sup> OTP, Final Report, para. 351.

<sup>114</sup> OTP, Final Report, para. 353.

<sup>115</sup> OTP, Final Report, paras. 358-359, 362.

<sup>116</sup> OTP, Final Report, para. 362.

<sup>117</sup> OTP, Final Report, para. 358.

<sup>118</sup> OTP, Final Report, para. 360.



98. Regardless of what weight this criterion is being given when assessed together with the “lack of severity”, “passage of time” may not be applied to war crimes, as established by customary international law,<sup>119</sup> the Rome Statute,<sup>120</sup> the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, and by the 1974 European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes. Nevertheless, this criterion has been repeatedly applied by the investigative authorities, which clearly constitutes a “deviation from established practices and procedures”.<sup>121</sup>
99. “Lack of severity” is the second criterion within the proportionality test and is equally in violation of principles of due process. 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”.<sup>122</sup> The UN Committee against Torture has acknowledged the flaws of this approach<sup>123</sup> in response to a NGO shadow report<sup>124</sup> submitted on behalf of seventy-four NGOs to the Committee, based on the research of Dr. Elizabeth Stubbins Bates.<sup>125</sup> Her analysis showed that IHAT/SPLI’s classification of alleged ill-treatment as lower level and the use of the proportionality criterion led alleged 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 – to be dismissed without further investigation.<sup>126</sup>
100. The proportionality criteria served as a reason for dismissal of the complaint of Mr. Sabah Al-Sadoon, who was allegedly subject to torture, cruel treatment and attempted wilfull killing/murder, as further presented under Section III. As he was informed by the

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<sup>119</sup> Rule 160, *IHL Database, Customary IHL*, available at [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule160](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule160).

<sup>120</sup> See Article 29 of the Rome Statute.

<sup>121</sup> OTP, Policy Paper on Preliminary Examinations, para. 51.

<sup>122</sup> Systemic Issues Working Group Report August 2018, fn. 3 (quoting the definition used by the SPLI).

<sup>123</sup> United Nations Committee against Torture, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, Adopted by the Committee at its sixty-sixth session, CAT/C/GBR/CO/6, para. 32: “[t]he Committee is concerned about reports indicating that cases transferred for investigation under this framework might have been closed ‘based on an arbitrary and conceptually underinclusive ranking of their severity’”.

<sup>124</sup> The UK’s Implementation of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Punishment, Civil Society Alternative Report, March 2019, pp. 73-74, available at [https://redress.org/wp-content/uploads/2019/05/UK-Implementation-of-UNCAT\\_REDRESS\\_March2019\\_Web.pdf](https://redress.org/wp-content/uploads/2019/05/UK-Implementation-of-UNCAT_REDRESS_March2019_Web.pdf).

<sup>125</sup> 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*, p. 719.

<sup>126</sup> *Ibid.*, pp. 728-729, 730, 735-736, 738.

SPLI, “after conducting enquiries it has been determined that there is no realistic prospect of any criminal charges being brought against any member of the UK Armed Forces and that it would not be proportionate to conduct further enquiries”.<sup>127</sup> This case illustrates the kind of cases that were sifted out by IHAT and SPLI based on proportionality criteria “lack of severity” and “passage of time”. As the Prosecutor accepted the proportionality criteria “at face value”, she failed to consider that such criterion served to dismiss investigations concerning war crimes, as was done in Mr. Sabah Al-Sadoon’s case.

101. Mr. Al-Sadoon endured a ten-hour long torture session with the use of different torture methods, including by being beaten and kicked in the side of his body and his stomach, being jumped up and down on, hit with the butts of rifles, being forced to lie on his stomach while being kicked and stamped on, enduring his head being hit against the wall, and soldiers screaming in his ears. These acts clearly qualify as a war crime of torture and inhuman/cruel treatment within the meaning of Article 8(2)(a)(ii) or Article 8(2)(c)(i) and may amount to attempted wilful killing within the meaning of Article 8(2)(a)(i) of the Statute. Therefore, the “lack of severity” criterion should find no application. The “passage of time” criterion should not apply either, as its application to war crimes would be in violation with international law, as presented above. Therefore, the dismissal of the Mr. Al-Sadoon’s case makes apparent that the application of the proportionality criteria gives rise to an impunity gap inconsistent with the rationale of the complementarity principle.

102. The combination of “passage of time” and “lack of severity” served as a reason to dismiss two cases of alleged outrages upon personal dignity against minors that the Prosecutor included in the Final Report: W3<sup>128</sup> and W18.<sup>129</sup> An analysis of these cases would have allowed the Prosecutor to identify the manner in which the proportionality

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<sup>127</sup> Letter from the SPLI to Mr. Sabah Al-Sadoon on 3 September 2020 (attached in confidential Annex).

<sup>128</sup> OTP, Final Report, para. 229(xi) (“IHAT 8 (Whiskey 3): The case of W3 (IHAT 8: alleged abuse of Iraqi youths in Al Almarah Riot in April 2004) was referred on 30 September 2019. In the case of W3 a decision was made that it was not in the public and service interest to direct charges. This case was referred for a crime of minor violence under UK law, it was not referred for a war crime. There was no evidence of injury and the victims in the case gave contradictory and unreliable evidence. There were significant evidentiary problems with the case. The SPA sought external counsel’s opinion. The DSP decided it was not in the public and service interest to direct charges on such a minor case that was so old.”).

<sup>129</sup> OTP, Final Report, para. 229(xii) (“IHAT 167 (Whiskey 18): In the case of W18 or IHAT 167, the SPLI initially took the decision not to refer the case to the SPA on any charge since the Evidential Sufficiency Test had not been met for the war crime of outrage upon personal dignity. The victim exercised their right of review. The case was then sent to the RAF Police (RAFP) who agreed that there was no evidence of a war crime, but decided that an offence under the Protection of Children Act (possession of indecent images of children) should be referred to the SPA, because a soldier had in his possession an indecent image of a child which he produced during an interrogation. The DSP decided not to proceed with the case following the RAFP referral on the basis of public and service interest given the passage of time and the non-custodial sentence that would have applied.”).

criteria were applied and in how far this process reflects “the intent to shield”, as described by indicators of the Policy Paper on Preliminary Examinations.

103. Both cases concern abuse of minors by inflicting a physical injury (W3) and by forcibly taking an “indecent image” of a child during an interrogation (W18). In W3, the UK authorities explain that “it was not in the public and service interest to direct charges on such a minor case that was so old”. In W18, the authorities justify the dismissal of the case by referring to “the passage of time and the non-custodial sentence that would have applied”. Both justifications are clearly incompatible with the context of historical investigations and due process principles when it comes to ill-treatment that could amount to war crimes. Even more appalling, however, is that in case of W18, the investigators did not consider the act of a soldier taking an “indecent image” of a child during an interrogation as amounting to a war crime of outrage upon personal dignity for evidentiary reasons, and referred to “lack of severity” of the conduct. There is no doubt that the investigators were in possession of the main evidence (the image), as they still considered the case to have potential to be prosecuted under the Protection of Children Act (possession of indecent images of children). This means that they did not consider a situation in which a child is exposed to an interrogation and forcibly photographed in an indecent way severe enough, although it appears to *prima facie* meet the requirements of the notion of “outrages upon personal dignity” as defined by the Common Article 3 of the Geneva Conventions and the Elements of Crimes for the ICC.

104. Practically, as a direct consequence of the deficient “proportionality” reasons introduced and applied by the UK authorities, the dismissal of the W3 and W18 cases means that the perpetrators of war crimes against minors escaped prosecution and still enjoy impunity. This illustrates how both the substance of the proportionality criteria as well as the manner in which they were applied constitute grave violations of due process principles and meet indicators for “intent to shield”, in particular “manifestly insufficient steps in the investigation or prosecution”; “deviations from established practices and procedures”; “ignoring evidence or giving it insufficient weight”; and “manifest inadequacies in charging and modes of liability in relation to the gravity of the alleged conduct and the purported role of the accused”.

105. Ultimately, the Prosecutor’s conclusion set a dangerous precedent for a situation where a State can avoid being found “unwilling” by failing at the initial investigation of an international crime and by applying the “passage of time” criterion in later (historical) investigations. The OTP has recognised that there were “critical failings” in the initial

investigations by the UK into allegations of detainee abuse, including deliberate destruction of records, which ultimately resulted in the dismissal of investigations.<sup>130</sup> These unjustified delays have been found to amount to a violation of the State's positive obligation under Art. 3 ECHR in *S.Z. v. Bulgaria*, as the excessive delays in investigation incurred the risk of criminal proceedings becoming time-barred.<sup>131</sup> In addition, the ECtHR found that in *Al-Skeini v. U.K.*, a case arising out of allegations concerning the conduct of UK forces in Iraq, "the delay seriously undermined the effectiveness of the investigation" and that "the narrow focus of the criminal proceedings against the accused soldiers was inadequate to satisfy the requirements of Article 2 in the particular circumstances of this case".<sup>132</sup>

106. In this sense, the Prosecutor's conclusion practically allows the UK authorities to dismiss further investigation by referring to their own failings, which clearly invalidates the purpose and correct interpretation of Article 17 (2)(a) of the Statute.

**(iv) Failure to properly assess the allegations of cover up.**

107. It is respectfully submitted that the Prosecutor erred in assessing the relevant evidence and information on the cover up allegations presented by the BBC's Panorama programme and the Sunday Times ("BBC/Times") and confirmed by the witnesses interviewed by the OTP.<sup>133</sup> The Prosecutor acknowledged that the "verification of these allegations could have established a basis to seek the opening of an investigation by the ICC since the relevant domestic proceedings would have been vitiated by an unwillingness of the State concerned to carry them out genuinely".<sup>134</sup> Nonetheless, the Prosecutor found that explanations offered by the former and current leadership of IHAT, SPLI and SPA on each of these allegations "appeared generally reasonable".<sup>135</sup> Specifically, the Prosecutor concluded, "the Office has not been able to substantiate, *with evidence that it could rely upon in court*, the allegation that decisions were taken within IHAT or the SPA to block certain lines of inquiry or that viable cases with a realistic prospect of conviction were inappropriately abandoned."<sup>136</sup>

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<sup>130</sup> OTP, Final Report, para. 360.

<sup>131</sup> ECtHR, *S.Z. v. Bulgaria*, Application no. 29263/12, Judgment, 3 March 2015, para. 49.

<sup>132</sup> ECtHR, *Al-Skeini and Others v. the United Kingdom*, Application no. 18984/91, Judgement, 27 September 2005, para. 174. In this respect, the Grand Chamber's findings are also relevant to Error 5, that there was an unjustified delay in the proceedings within the meaning of article 17(2)(b) of the Rome Statute.

<sup>133</sup> OTP, Final Report, para. 408.

<sup>134</sup> OTP, Final Report, para. 407.

<sup>135</sup> OTP, Final Report, para. 409.

<sup>136</sup> OTP, Final Report, para. 409 (emphasis added).

108. As argued under Error 1, the OTP’s Final Report’s overall conclusion is a consequence of the adoption of an inappropriate standard of proof. As noted above, the fact that the Prosecutor *cannot rule out* the possibility that IHAT or the SPA blocked certain lines of inquiry or abandoned cases with a realistic prospect of conviction reflects a reasonable inference that the UK is “unwillingness” within the meaning of Article 17(2).<sup>137</sup> According to the “reasonable basis to believe” standard, this consideration alone justifies the opening an investigation in the present situation. Furthermore, the Prosecutor’s conclusion that she could not substantiate the allegations of cover up “with evidence that it could rely on *in court*” betrays feasibility considerations concerning any future investigation, which interfere with the analysis under Article 53(1)(a)-(c) of the Statute.<sup>138</sup>
109. Moreover, the Prosecutor did not properly consider and erroneously dismissed the evidence concerning the allegations of cover-up provided by the BBC/Times and former IHAT personnel based on the reasonableness of the responses of UK authorities. Such evidence, when correctly analysed in accordance with principles of due process and the Policy Paper’s indicators, would have been sufficient to conclude the existence of an “intent to shield” from the UK authorities.
110. Notably, the Prosecutor’s findings are based not just on the allegations published in November 2019 by the BBC/Times, but are substantiated by a thorough investigation and witness interviews conducted by the Prosecutor.<sup>139</sup> Multiple former IHAT members reported in interviews with the OTP the significant irregularities within domestic proceedings, such as intentional disregarding, falsification and/or destruction of evidence, as well as the impeding or prevention of certain investigative inquiries and the premature termination of cases.<sup>140</sup> Some former investigators reported “how the investigation teams built cases which they considered were evidentially strong and ready to proceed, but the SPA refused to lay charges”.<sup>141</sup> Former investigators described multiple occasions “on which their requests to interview important witnesses were blocked for either unexplained reasons or for administrative ones, such as ‘expenses not allowing’”, “how witness interviews were hampered by IHAT refusing to reimburse witnesses for travel, travel details being changed at the last minute and in one case a potential witness being arrested before meeting with investigators”.<sup>142</sup> By accepting questionable and diffuse responses of

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<sup>137</sup> See *supra*, Error 1.

<sup>138</sup> See *supra*, Error 1. See also Heller, *The Nine Words*.

<sup>139</sup> OTP, Final Report, paras. 380-385, 407.

<sup>140</sup> OTP, Final Report, para. 380-385.

<sup>141</sup> OTP, Final Report, para. 385.

<sup>142</sup> OTP, Final Report, para. 384.

the former and current leadership of IHAT, SPLI and SPA, who might have been implicated in the named allegations, the Prosecutor dismissed the multiple corroborating testimonies that in fact verified the allegations presented by BBC/Times.

111. Most importantly, the allegations of cover-up are fully in line with a number of circumstances considered in the OTP Final Report such as the overly restrictive application of filtering criteria,<sup>143</sup> and the paucity of cases concerning command responsibility that have resulted in referrals for prosecution.<sup>144</sup>

112. In addition, contrary to the Prosecutor's contention,<sup>145</sup> a number of lines of inquiry were possible to further substantiate the allegations of cover-up. Rather than accepting the explanations of former and current leadership of IHAT, SPLI and SPA at face value, there were several investigative actions that could have been undertaken to verify the allegations of BBC/Times and the testimonies of the former IHAT Staff. For example, the SPA's refusal to lay charges<sup>146</sup> could have been corroborated by requesting the relevant case file to assess whether the SPA approach was inconsistent with the indicators for shielding listed in the ICC Informal Expert Paper. In addition, testimonies given by former IHAT members about the intentional disregarding of evidence and premature termination of cases could have been substantiated by seeking IHAT internal documents that may have reflected such an approach. Former IHAT staff could have been summoned following the information the OTP received from current and former IHAT, SPLI and SPA leadership. None of these steps were apparently taken.

113. Even regarding the infamous case "Camp Stephen", concerning the deaths of two Iraqi civilians, the Prosecutor accepted that the investigation did not result in anything without questioning the quality of these activities undertaken by SPLI and SPA. The BBC/Times findings, based on witness testimonies, revealed that the investigators: failed to link the two deaths despite existing evidence; disregarded evidence of widespread and systematic abuse of detainees; disregarded evidence that commanders had knowledge about the mistreatment of detainees and did not undertake measures that could have prevented the two deaths; and disregarded IHAT internal recommendations to prosecute senior officers in this regard.<sup>147</sup> These irregularities created a "vacuum of evidence" in the first place which now serves as a justification of the leadership of IHAT, SPLI and SPA. The

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<sup>143</sup> OTP, Final Report, paras. 305-362.

<sup>144</sup> OTP, Final Report, para. 371.

<sup>145</sup> OTP, Final Report, para. 409.

<sup>146</sup> OTP, Final Report, para. 385.

<sup>147</sup> OTP, Final Report, paras. 374-375.

Prosecutor could have verified such accounts by requesting from IHAT/SPLI the relevant investigative file, or collecting from the BBC a copy of the evidence they had obtained on the deaths of Rhadi Nama and Abdul Jabbar Mossa Ali at Camp Stephen. Instead, the Prosecutor accepted the explanations given by SPLI and SPA for dismissing these cases as “generally reasonable”.

114. In terms of political pressure, the BBC/Times findings denounced the disregard of credible evidence of war crimes for political reasons; pressure from the MoD to close cases as quickly as possible; appointment of a senior civil servant as an IHAT official by the UK Government in order to exert pressure on investigators conducting investigations beyond low-level perpetrators; closure of cases against the will of senior investigating officers; and IHAT investigators’ request to interview senior officers at Camp Stephen being blocked by the MoD.<sup>148</sup> These circumstances are consistent with the political pressure from the UK political authorities to close IHAT and terminate investigations over alleged crimes committed by the UK armed forces in Iraq.<sup>149</sup>

115. These irregularities constitute grave violations of due process principles and meet indicators for “intent to shield”, including “ignoring evidence or giving it insufficient weight”; “intimidation of personnel”; “non-admission of evidence, fabricating or manipulating evidence” as well as corresponds to human rights jurisprudence regarding attempts to cover-up crimes.<sup>150</sup> The Prosecutor’s findings of prevention of certain investigative inquiries corresponds with the IACtHR’s reasons in *Genie-Lacayo v. Nicaragua* that “certain military authorities either obstructed or refused to collaborate adequately in the investigations by the Office of the Attorney-General and with the judge of first instance”.<sup>151</sup> In addition, the Prosecutor’s findings fall squarely within the factual matrix of *Ignacio Ellacuria v. El Salvador*, where former prosecutors alleged that the “Public Prosecutor had consistently placed obstacles in their efforts to undertake a serious and full investigation of the extra-judicial executions”,<sup>152</sup> and the Investigation Commission had failed to carry out a full and timely investigation, thus allowing the

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<sup>148</sup> OTP, Final Report, paras. 376-377.

<sup>149</sup> OTP, Final Report, paras. 460-479.

<sup>150</sup> The Prosecutor’s findings further correspond with the reasons in *Myrna Mack Chang v. Guatemala*, where the IACtHR found that ‘altering or hiding’ of evidence, under orders from a State’s authority, and the manipulation of evidence by the Ministry of National Defence demonstrated ‘that there was an attempt to cover-up those responsible [...] and this constitute[d] an obstruction of justice and an inducement for those responsible of the facts to remain in situation of impunity’; *Myrna Mack Chang v. Guatemala*, Judgment of 25 November 2003, IACtHR (Ser. C) No. 101 (2003), paras. 166-172.

<sup>151</sup> *Genie-Lacayo v. Nicaragua*, Judgment, 29 January 1997, paras. 68 and 79.

<sup>152</sup> *Ignacio Ellacuria*, Report No. 136/99, Case 10.488, para. 87.

military to organize a cover-up operation.<sup>153</sup> These precedents are very relevant for the interpretation of “shielding”<sup>154</sup> and provide incontrovertible support for a finding that the indicators for “intent to shield” by the UK authorities were satisfied.

**(v) Other findings that correspond to the indicators of “intent to shield”.**

116. Finally, some findings of the OTP’s Final Report clearly indicate that principles of due process have been disrespected by (1) “manifest inadequacies in charging and modes of liability in relation to the gravity of the alleged conduct and the purported role of the accused” and (2) “non-cooperation with the ICC”, which indicates “intent to shield”, as outlined in the Policy Paper on Preliminary Examinations.

**(1) Manifest inadequacies in charging and modes of liability in relation to the gravity of the alleged conduct and the purported role of the accused**

117. The OTP’s Final Report confirms that there is a reasonable basis to believe that members of the UK armed forces committed war crimes of torture/cruel treatment, outrages upon personal dignity, in particular humiliating and degrading treatment, and other forms of sexual violence at a minimum, against seven detainees at Camp Breadbasket in May 2003, and furthermore subjected one of those detainees to rape.<sup>155</sup> Two court martials conducted in January and February 2005 regarding these allegations resulted in the conviction of four soldiers for service disciplinary offences, and custodial sentences between four months and eighteen months.<sup>156</sup> No charges were brought against the officer in charge of Camp Breadbasket, Major Dan Taylor, who had ordered his subordinates 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. It was decided that Major Dan Taylor would not face charges because he had acted with “well-meaning and sincere but misguided zeal”.<sup>157</sup>

118. The killing of Baha Mousa is another case reflecting deeply inadequate penalty. Corporal Payne was convicted by court martial of “inhumane treatment” following the killing of Baha Mousa. Despite striking evidence of the severity of the crime,<sup>158</sup> he was sentenced to

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<sup>153</sup> *Ibid.*, paras. 93-118.

<sup>154</sup> OTP, Informal Expert Paper, p. 36.

<sup>155</sup> OTP, Final Report, paras. 88, 102.

<sup>156</sup> OTP, Final Report, para. 227.

<sup>157</sup> OTP, Final Report, para. 92.

<sup>158</sup> Concerning a video showing Corporal Donald Payne applying the “ski position” to six hooded detainees, including Baha Mousa, see Communication to the Office of the Prosecutor of the International Criminal Court,



twelve months of imprisonment, while charges of manslaughter and perverting the course of justice were dismissed.<sup>159</sup> During the Baha Mousa Inquiry, Payne told the inquiry that all members of the unit guarding the detainees had kicked and punched Mousa, not just him.<sup>160</sup> However, this did not result in any further investigative or prosecutorial steps.<sup>161</sup>

119. These findings, both mentioned in the OTP Final Report, clearly evidence manifest inadequacies in charging and modes of liability in relation to the gravity of the alleged conduct and the purported role of the accused, both by the perpetrators and the superior who gave the order.

## **(2) Non-cooperation with the ICC**

120. The way the UK authorities responded to inquiries of the Prosecutor to provide additional information for the assessment under Article 17(1)(b) in conjunction with Article 17(2) reflects non-cooperation with the ICC.

121. The Prosecutor rightly pointed at the fact that in order to conduct the assessment, the Office must be provided with examples and indicators sufficient to demonstrate how relevant criteria were actually applied in practice.<sup>162</sup> The request for additional information in order to examine the application of the “proportionality test” was rejected by the UK authorities, asserting that under the complementarity test, it was “clearly inappropriate for the Prosecutor to second-guess each and every one of the specific allegations being investigated” as part of its assessment of unwillingness/inability.<sup>163</sup> By doing so, the UK authorities deliberately prevented the Prosecutor from undertaking the investigatory steps necessary for a thorough analysis of “unwillingness” based on facts, rather than vague explanations by the UK authorities unsupported by any substantial evidence.

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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 ECCHR and PIL, p. 143, 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](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.

<sup>159</sup> ECCHR’s submission to the OTP, July 2019, p. 36, available at: [https://www.ecchr.eu/fileadmin/Juristische\\_Dokumente/ECCHR\\_Follow\\_Up\\_Communication\\_to\\_OTP\\_War\\_crimes\\_by\\_UK\\_forces\\_in\\_Iraq\\_July\\_2019.pdf](https://www.ecchr.eu/fileadmin/Juristische_Dokumente/ECCHR_Follow_Up_Communication_to_OTP_War_crimes_by_UK_forces_in_Iraq_July_2019.pdf)

<sup>160</sup> Baha Mousa Inquiry, Report: Volume I, 8 September 2011, para. 2.452, available at: [The Baha Mousa Public Inquiry Report HC 1452-I \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/145211/The_Baha_Mousa_Public_Inquiry_Report_HC_1452-I.pdf)

<sup>161</sup> Lancashire Telegraph, QLR officers cleared of charges, 13 March 2007, available at: <https://www.lancashiretelegraph.co.uk/news/1256045.qlr-officers-cleared-charges/>.

<sup>162</sup> OTP, Final Report, para. 362.

<sup>163</sup> OTP, Final Report, para. 359.

**Error 4: The Prosecutor erred in not concluding that “there has been an unjustified delay in the proceedings” within the meaning of Article 17(2)(b) of the Statute.**

122. With respect to the determination pursuant to Article 17(2)(b) of the Statute, namely that “there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice”, the Prosecutor concluded that “the reasons for delay on the part of IHAT or SPLI in reaching determinations on certain allegations does [sic] not appear unjustified, nor commensurate with an intent to shield persons from criminal responsibility”.<sup>164</sup>

123. The Petitioners respectfully submit that in reaching this conclusion, the Prosecutor erred by failing to take into account the delays that affected the the British Royal Military Police (“RMP”) investigations. Furthermore, the Prosecutor erred in concluding that the IHAT/SPLI proceedings were not affected by an “unjustified delay” within the meaning of Article 17(2)(b) of the Statute.<sup>165</sup>

**a) The Prosecutor failed to take into account structural delays in the initial investigations by the RMP, which affected the entire following process.**

124. In assessing whether the UK investigations were affected by “an unjustified delay” within the meaning of Article 17(2)(b) of the Statute, the Prosecutor did not properly take into account the structural delays caused by the RMP during its initial investigations. The OTP’s Final Report appears to focus only on the last segment of the IHAT/SPLI investigations. This is a grave mistake, as the structural delays in the initial investigations by the RMP irremediably affected the entire following process conducted by IHAT, and then by SPLI.

125. Indeed, the OTP’s Final Report reflects that, through the years, different organs and authorities have investigated the crimes allegedly committed by members of the UK armed forces, including by the RMP, from 2010 by the IHAT, and from 2017 by the SPLI.<sup>166</sup> A sequence of delays affected the work of all of these organs. The RMP investigations were delayed due to “lack of resources and access to suitably qualified and experienced investigators, poor record keeping due to negligence or even deliberate destruction of records, and other serious deficiencies in evidence collection and analyses”.<sup>167</sup> Additional

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<sup>164</sup> OTP, Final Report, para. 432.

<sup>165</sup> OTP, Final Report, para. 432.

<sup>166</sup> OTP, Final Report, paras. 159-165, 182, 425-432.

<sup>167</sup> OTP, Final Report, para. 432. See also *ibid*, paras. 425, 427.

delays also affected the initial work of IHAT due its lack of independence and deficiency of resources.<sup>168</sup> While more recently the IHAT/SPLI and SPA took several steps to expedite their pace, IHAT/SPLI and SPA investigations were nevertheless affected by the past failings of the RMP.<sup>169</sup>

126. Against this background, the Prosecutor concluded that “the reasons for delay on the part of IHAT or SPLI in reaching determinations on certain allegations does not appear unjustified, nor commensurate with an intent to shield persons from criminal responsibility”.<sup>170</sup> No explanation is provided on why the delays that occurred during the initial investigations of the RMP were not part of such assessment, despite the consideration that delays by the RMP irremediably impacted the later investigations of IHAT/SPLI.<sup>171</sup> According to the Prosecutor:

[I]t is difficult to ignore the prejudice that past failings during Op TELIC have caused to the ability of IHAT and SPLI to subsequently carry out effective investigations. [...] [T]he frequency of recourse to the ‘passage of time’ criteria, discussed earlier, shows how determinative a factor this became in shaping IHAT/SPLI’s practical ability to progress many allegations of past detainee abuse.<sup>172</sup>

127. Article 17(2)(b) of the Statute establishes that a State is “unwilling” when there has been an unjustified delay in the proceedings, which is inconsistent with an intent to bring the person(s) concerned to justice. Nothing in this provision indicates that the Court’s assessment should be limited or confined only to a part or stage of the proceedings. Any delay that compromises the course or progression of cases and is inconsistent with intent to bring the accused to justice should be taken into account to assess the admissibility of a case. This is true regardless of the phase of the proceedings in which such delay occurs.<sup>173</sup>

128. The practice of the IACtHR and the ECtHR supports this line of reasoning.<sup>174</sup> First, their case law reflects that the determination of the legitimacy of the delay is to be conducted in light of an overall assessment of the proceedings in question, rather than on a selective

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<sup>168</sup> OTP, Final Report, paras. 425, 431, referring to *ibid.*, paras. 194-196, 305-311.

<sup>169</sup> OTP, Final Report, para. 432.

<sup>170</sup> OTP, Final Report, para. 432.

<sup>171</sup> OTP, Final Report, para. 432.

<sup>172</sup> OTP, Final Report, para. 432.

<sup>173</sup> It would be, for instance, inconsistent with the very spirit of complementarity to consider inadmissible an acquittal due to an ineffective domestic investigation, simply because the trial phase was not affected by delays. The same applies when multiple investigations are carried out over the same crime. If the failings (or delays) of the original investigation cannot be remedied the elements of Article 17(2)(b) of the Statute should be considered met.

<sup>174</sup> H Van Der Wilt, “States’ obligations to investigate and prosecute perpetrators of international crimes: The perspective of the European Court of Human Rights”, in Carsten Stahn & Mohamed El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* (2011), at pp.697-699.

basis.<sup>175</sup> Most importantly, according to IACtHR (*Anzualdo Castro* case, *Pueblo Bello Massacre* case, *Mapiripán Massacre* case, *Ituango Massacre* case), belated investigations that cannot remedy the shortcomings of previous investigative failings/delays fall short of the standards required for a prompt investigation.<sup>176</sup> Likewise, in cases concerning undue delay of the proceedings, the ECtHR found that a subsequent inadequate response to tackle past delays could not absolve States from a violation of Article 6 of the Statute.<sup>177</sup>

129. The case law cited above reflects the principles of due process recognized by international law (Article 17(2) of the Statute) and should guide the application of Article 17(2)(b), as already noted with regard to Article 17(2)(a) of the Statute. Any different interpretation of this provision creates an impunity gap, preventing the Court from investigating and prosecuting cases in which initial investigative delays jeopardise the entirety of the following domestic proceedings carried out by other organs or authorities.

130. This is exactly the result of the Prosecutor's selective approach *vis-à-vis* the determination of the unjustified delay. By focusing only on the IHAT/SPLI proceedings, the Prosecutor accepted that cases concerning alleged war crimes committed by members of the UK armed forces could go unpunished due to the prior delays of the RMP investigations.<sup>178</sup> This is clearly inconsistent with the very purpose and rationale of the principle of complementarity.

131. In the Petitioner's view, the delays affecting the first investigations by the RMP should have been considered "unjustified delays", inconsistent with an intent to bring the person concerned to justice. As the Prosecutor acknowledged, they were due to lack of independence, lack of resources and access to experienced investigators, negligence, deliberate destruction of records, and other serious deficiencies in evidence collection and analyses.<sup>179</sup> To the extent such delays impacted any future investigations, such unjustified delays should have been factored in the assessment pursuant to Article 17(2)(b) of the Statute.

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<sup>175</sup> See e.g., IACtHR, *Genie-Lacayo v. Nicaragua*, Judgment, 29 January 1997, para. 81.

<sup>176</sup> IACtHR, *Anzualdo Castro v. Peru*, Judgment, 22 September 2009, para. 157 referred to in OTP's Final Report, para. 420; IACtHR, *Pueblo Bello Massacre v. Colombia*, Judgment 31 January 2006, para. 178, referred to in the OTP's Final Report, para. 417. See also IACtHR, *Mapiripán Massacre v. Colombia*, Judgment, 15 September 2005, para. 228 referred to in the OTP's Final Report, para. 418; IACtHR, *Ituango Massacre v. Colombia*, Judgment, 1 July 2006, paras. 317-317, referred to in the OTP's Final Report, paras. 414, 418.

<sup>177</sup> ECtHR, *Zimmermann and Steiner v. Switzerland*, no. 8737/79, Judgment, 13 July 1983, paras. 29-31 referred to in the OTP's Final Report, paras. 421-422; *Guincho v. Portugal*, no. 8990/80, Judgment, 10 July 1984, paras. 37-41, referred to in OTP's Final Report, para. 422.

<sup>178</sup> OTP, Final Report, para. 432.

<sup>179</sup> OTP, Final Report, para. 432.

**b) The Prosecutor erred in concluding that the IHAT/SPLI proceedings were not affected by an “unjustified delay” within the meaning of Article 17(2)(b) of the Statute**

132. In concluding that “the reasons for delay on the part of IHAT or SPLI in reaching determinations on certain allegations does [sic] not appear unjustified, nor commensurate with an intent to shield persons from criminal responsibility”,<sup>180</sup> the Prosecutor imposed a “requirement of intentionality” to Article 17(2)(b) of the Statute that is inconsistent with the plain text of the provision.<sup>181</sup> This provision, different from Article 17(2)(a) of the Statute, requires that the unjustified delay is inconsistent with “intent to bring the person concerned to justice”. According to commentators, such reference, together with the notion of “unjustified delay”, requires a more “objective test” that confronts the delay with the intent *to bring* the person to justice (and not *to shield* pursuant to Article 17(2)(a) of the Statute).<sup>182</sup>

133. Moreover, the Prosecutor erred in evaluating the delays in IHAT/SPLI proceedings under standards of promptness, which are different from the requirements that would apply to contemporaneous<sup>183</sup> investigations,<sup>184</sup> for the following reasons.

134. First, the Prosecutor misinterpreted Justice Leggatt considerations in the *Al-Saadoon* case.<sup>185</sup> Justice Leggatt did not conclude “the occurrence of past delay makes yet further delay more legitimate”.<sup>186</sup> Rather the Judge stated “*I do not consider that the occurrence of past delay makes yet further delay more legitimate.*”<sup>187</sup> To the extent the Prosecutor relied on such consideration to determine the State’s “unwillingness” pursuant to Article 17(2)(b), a new assessment of the unjustified delay is required.

135. Second, any suggestion that historical investigations may not follow the same standards of contemporaneous investigations appears to be misplaced in the present circumstances.<sup>188</sup>

In *Brecknell v. The United Kingdom*, the ECtHR found that procedural obligations to

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<sup>180</sup> OTP, Final Report, para. 423.

<sup>181</sup> OTP, Final Report, para. 414.

<sup>182</sup> Schabas and El Zeidy, Article 17, p. 68.

<sup>183</sup> Contemporaneous investigations, as opposed to historical investigations, foresee investigative measures being undertaken at the time or shortly after an alleged crime occurs.

<sup>184</sup> OTP, Final Report, para. 432.

<sup>185</sup> OTP, Final Report, para. 432: “the Office concurs with Justice Leggatt’s observation that “the occurrence of past delay makes yet further delay more legitimate”.

<sup>186</sup> OTP, Final Report, para. 432, referring to *Al-Saadoon & Ors v Secretary of State for Defence* (Rev 1) [2016] EWHC 773 (Admin) (07 April 2016) (*Al-Saadoon & Ors v Secretary of State for Defence*), para. 33.

<sup>187</sup> *Al-Saadoon & Ors v Secretary of State for Defence*, para. 33 (emphasis added).

<sup>188</sup> OTP, Final Report, para. 423, referring to ECtHR, *Brecknell v. The United Kingdom*, no. 32457/04, Judgment, 27 November 2007, paras. 69-72.

investigate were revived based on new information received by the UK authorities.<sup>189</sup> In contrast, in the present case, the creation of IHAT was also triggered by the UK government's own failure to carry out independent and prompt investigations.<sup>190</sup> Accordingly, the correct standard of promptness should apply to the IHAT/SPLI investigations.

136. Accepting that historical investigations may not have the same requirements of promptness of contemporaneous investigations, delays due to economic and administrative constraints or due to lack of independence cannot be discounted as justified within the meaning of Article 17(2)(b) of the Statute.<sup>191</sup> Indeed, similar delays have no bearing on the evidentiary constraints due to the late start of an historical investigation. In any event, “the decision cannot be taken *in abstracto* but only on a case by case basis taking due account of the circumstances of the respective case.”<sup>192</sup>

137. A new assessment of the State's “unwillingness” pursuant to Article 17(2)(b) of the Statute is required in the present case in accordance with the principles of due process. Such assessment should include the delays affecting the RMP investigations. In addition, the Petitioners argue that a new assessment is required to determine the delays that occurred during the IHAT/SPLI investigations. This will lead the Prosecutor to completely opposite conclusions to the current complementarity assessment.

**Error 5: The Prosecutor erred in not concluding that the proceedings were not conducted independently or impartially within the meaning of Article 17(2)(c) of the Statute.**

138. The OTP's Final Report does not contain any comprehensive conclusion on whether the UK was “unwilling” pursuant to Article 17(2)(c) of the Statute, namely that “the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice”. However, the Petitioners respectfully submit that the determinations concerning the investigations carried out by the RMP, the

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<sup>189</sup> ECtHR, *Brecknell v. The United Kingdom*, para. 66. See also *ibid.* 78-81 (holding that the original investigation was effectively carried out without undue delay).

<sup>190</sup> OTP, Final Report, paras. 159-162. Even if applicable, such standards would not justify the delays of the RMP investigations. Cf. ECtHR, *Brecknell v. The United Kingdom*, paras. 76, 78.

<sup>191</sup> OTP, Final Report, paras. 425, 431, referring to *ibid.*, paras. 194-196, 305-311.

<sup>192</sup> Kai Ambos, *The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court*, (Berlin/Heidelberg, Springer, 2010), p. 69.

IHAT/SPLI and SPA, and the UK Government, reflect an inadequate and erroneous assessment of their lack of independence and impartiality.<sup>193</sup>

139. First, in determining the UK's "unwillingness", the Prosecutor failed to take into account the impact of RMP investigations. Second, as to the IHAT/SPLI and SPA investigations, the Prosecutor misapplied Article 17(2) of the Statute, departing from the due process principles and from indicators set out in the Policy Paper on Preliminary Examinations to determine their lack of independence and impartiality. Lastly, the section concerning the UK Government does not provide any concrete analysis with regard to the lack of independence and impartiality of the domestic proceedings.

**a) Failure to properly consider the RMP Investigations in order to assess the UK's unwillingness pursuant to Article 17(2)(c) of the Statute.**

140. The Prosecutor concluded that the RMP investigations "have been marred by lack of independence and impartiality inconsistent with the intent to bring the persons concerned to justice",<sup>194</sup> and that such "failings appear to have had a detrimental impact on the ability [of IHAT/SPLI] to establish relevant facts to the necessary standard."<sup>195</sup> These findings alone are sufficient to establish the State's unwillingness pursuant to Article 17(2)(c) of the Statute to those incidents that the IHAT/SPLI or SPA could not investigate due to the lack of genuineness of the RMP proceedings. However, the Prosecutor did not take into account these conclusions to assess the UK's "unwillingness" pursuant to Article 17(2)(c).

141. Similar to what already noted with regard to Article 17(2)(b) of the Statute, nothing in Article 17(2)(c) indicates that such an assessment should be limited or confined only to a part or stage of the proceedings. This applies also when subsequent investigations may be carried out in relation to the same crime at different times. The conclusion of the Prosecutor seems to be premised on the (implicit) understanding that if the domestic authorities engage in a new investigation (historical investigation), the latter should be the only focus of her determination concerning the State's "unwillingness". This, regardless of the failings of the past investigations (due to lack of independence/impartiality), irremediably thwarted the possibility to investigate and prosecute the person responsible for a crime.

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<sup>193</sup> OTP, Final Report, para. 446.

<sup>194</sup> OTP, Final Report, para. 446.

<sup>195</sup> OTP, Final Report, para. 447.

142. As noted above, the practice of human rights bodies, and especially of the IACtHR, clearly established that belated investigations that cannot remedy the shortcomings of previous investigative failings/delays fall short of the standards required for an effective investigation.<sup>196</sup> These principles should also apply to cases in which previous investigations have been marred by a lack of independence and impartiality, inconsistent with the intent to bring the persons concerned to justice.<sup>197</sup>
143. Regarding “unjustified delay”,<sup>198</sup> the Prosecutor’s reasoning is not only inconsistent with the practice of human rights bodies reflecting, to a large degree, “the principles of due process recognized by international law” (Article 17(2)(b) of the Statute) and “the internationally recognized human rights” (Article 21(3) of the Statute), but also in contrast with the basic principles of complementarity. Such an approach creates an impunity gap, preventing the Court from investigating and prosecuting cases in which failings due to lack of independence and impartiality of the domestic authorities jeopardise the entirety of the following domestic proceedings carried out by other organs or authorities.
144. By focusing only on the IHAT/SPLI proceedings, the Prosecutor accepted that alleged war crimes committed by members of the UK armed forces could go unpunished due to the lack of independence and impartiality – a lack of independence and impartiality which affected the previous RMP investigations.<sup>199</sup>
145. It is precisely the lack of independence and impartiality of RMP that led to the closure of investigations of alleged war crimes committed by members of the UK armed forces in Iraq. The cases underpinning such investigations should be considered admissible.

**b) Failure to properly analyse the IHAT/SPLI and SPA investigations in order to assess UK “unwillingness” pursuant to Article 17(2)(c) of the Statute.**

146. A number of legal and logical errors vitiate the OTP’s final assessment on the IHAT/SPLI investigations. In this regard, the Prosecutor failed to: (1) correctly apply due process principles to the analysis of the IHAT/SPLI independence; and (2) consider the UK

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<sup>196</sup> See *supra*, Error 4. See also IACtHR, *Anzualdo Castro v. Peru*, Judgment, 22 September 2009, para. 157; IACtHR, *Pueblo Bello Massacre v. Colombia*, Judgment 31 January 2006, para. 178; IACtHR, *Mapiripán Massacre v. Colombia*, Judgment, 15 September 2005, para. 228; IACtHR, *Ituango Massacre v. Colombia*, Judgment, 1 July 2006, paras. 317-317.

<sup>197</sup> OTP, Final Report, para. 446.

<sup>198</sup> See *supra*, Error 4.

<sup>199</sup> OTP, Final Report, para. 432.



Government's interference in assessing the lack of independence and impartiality under Article 17(2)(c) of the Statute.

**(i) The Prosecutor failed to correctly apply due process principles to the analysis of the IHAT/SPLI independence.**

147. Notably, the OTP Final Report contains over two pages of analysis of the practice of the human rights treaty bodies concerning the principles of independence and impartiality.<sup>200</sup> However, none of these principles have been relied on to assess the independent character of the UK investigations and proceedings concerning the alleged war crimes committed by members of the UK armed forces in Iraq.<sup>201</sup>
148. Specifically, in the analysis concerning the practice of the human rights treaty bodies, the Prosecutor recalled that with respect to personnel involved in all stages of criminal proceedings, the requirement of independence refers, *inter alia*, to the procedure and qualifications of their appointment and expiry of their term of office.<sup>202</sup>
149. However, the OTP's Final Report did not assess in full the question of IHAT hierarchical independence from the UK Government. Specifically, the Prosecutor failed to give due consideration to the circumstances of the closure of the IHAT in 2017, ahead of its scheduled timeline, due to criticism in the UK Parliament.<sup>203</sup> In announcing the closure of IHAT ahead of schedule, the then-Secretary of State for Defence made reference to the "false allegation" made by Phil Shiner that the reputation of the UK armed forces could not be attacked "in this dishonest way again".<sup>204</sup> The fact that the UK Government was free to dispose of IHAT's mandate extemporaneously and without any statutory restrictions shows the lack of adequate protections *vis-à-vis* its term of office and activity from external interference by the executive (or legislative) branch. This circumstance alone satisfies the requirements of Article 17(2)(c) of the Statute. The decision of the UK Government to dissolve IHAT without respecting its scheduled timeline is a factor that indicates its lack of independence.<sup>205</sup> The reason underlying that decision, reflected in the then-Secretary of

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<sup>200</sup> OTP, Final Report, para. 437-442.

<sup>201</sup> OTP, Final Report, para. 443-480.

<sup>202</sup> OTP, Final Report, para. 439. See also paras. 452, 457, 461.

<sup>203</sup> OTP, Final Report, para.182.

<sup>204</sup> UK Government, News Story: 'IHAT to close at the end of June: Defence Secretary Sir Michael Fallon has confirmed the date that IHAT will close', 5 April 2017 referred to in OTP, Final Report, para.182.

<sup>205</sup> According to ECtHR practice, several factors have to be taken into account in order to determine whether a body can be considered as independent, including the manner of appointment of its members, the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an

State for Defence's utterances, shows instead the lack of intent to bring the person(s) concerned to justice.

150. In this regard, the Prosecutor seems to downplay the relevance of this circumstance, arguing that while “different national institutions may demonstrate varying and inconsistent degrees of willingness/unwillingness, primary consideration should be given to the conduct of the competent authorities responsible for carrying out the proceedings in question.”<sup>206</sup> The Petitioners respectfully submit that such a conclusion is incorrect from several perspectives.

151. First, logically, if an investigative or judicial organ is structurally dependent on the executive/legislative authority (or exposed to its political pressure), its “intention” to conduct genuine proceedings is immaterial. Any assessment of “unwillingness” should be conducted in relation to the executive/legislative authority, which can dominate and orient the decisions of an investigative or judicial organ. Second, Article 17 of the Statute refers to the “unwillingness” of the State without making any priority to its relevant authorities. Third, the jurisprudence of the IACtHR and ECtHR suggests that in cases where different domestic authorities demonstrate different degrees of “unwillingness” in carrying out investigations/prosecutions, primary considerations should be given to the conduct of the authorities which obstructed the outcome of the case,<sup>207</sup> irrespective of whether these authorities were those “responsible for carrying out the proceedings in question”.

152. Likewise, the OTP's Final Report does not contain any consideration of whether the SPLI was structurally independent from the executive power or from any political pressure, or the fact that the Royal Navy Police was in charge of the investigation. As noted by the UK NGO Redress:

For the Royal Navy Police to “reabsorb and complete the remaining investigations as normal business”, as Minister Fallon has said, will happen following the closure

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appearance of independence (*see*, among others: *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, § 49, ECHR 2013 (extracts); and *Brudnicka and Others v. Poland*, no. 54723/00, § 38, ECHR 2005-II). In addition, the Court highlighted that ‘the irremovability of judges by the executive during their term of office must in general be considered as a corollary of their independence’ (*Campbell and Fell v. the United Kingdom*, 28 June 1984, § 80, Series A no. 80).

<sup>206</sup> OTP, Final Report, para. 457.

<sup>207</sup> IACtHR, *García Prieto et al. v. El Salvador*, Judgment, 20 November 2007, paras. 112 (“The State’s obligation to carry out investigations with due diligence includes the obligation of all state authorities to collaborate in the gathering of evidence so that the objectives of an investigation may be achieved. The authority in charge of the investigation must ensure that all necessary investigative steps are undertaken and must take appropriate action, in accordance with domestic legislation, when this does not occur. At the same time, all other state authorities must collaborate with the examining judge and abstain from acts that obstruct the investigative process.”). *See also ibid.*, paras. 113,115-116. *See also* IACtHR, *Gudiel Álvarez et al. (Diario Militar) v. Guatemala*, Judgment, 20 November 2012, paras. 248-252 (holding that the failure of the Ministry of Defense to collaborate with the investigative authorities was in violation of the right to have an effective investigation); ECtHR, *Nasr and Ghali v. Italy* (Abu Omar case), no. 44883/09, 23 February 2016, paras. 272-274.

of IHAT as a separate investigative body by this summer, this is of concern, because it removes any semblance of an independent investigation into any remaining cases.<sup>208</sup>

153. Significantly, referring to the practice of the human rights treaty bodies, the Prosecutor recalled that:

[T]he adequacy of the degree of independence must be assessed in the light of all the circumstances, which are necessarily specific to each case. This calls for a concrete examination of the independence of the investigation in its entirety, rather than an abstract assessment.<sup>209</sup> [...] A lack of independence might also be indicated by specific actions or omissions of the national authorities, such as the failure to carry out certain measures which would shed light on the circumstances of the case; giving excessive weight to the statements of the suspects; failure to undertake apparently obvious and necessary lines of inquiry; and inertia.<sup>210</sup>

154. However, contrary to these correct premises, the Prosecutor's determination concerning the lack of independence of IHAT/SPLI was conducted fully in the abstract. The broad analysis of the OTP's Final Report does not contain any information or evidence concerning the specific investigations carried out by the IHAT/SPLI. There is no indication that the Prosecutor conducted a specific assessment of the concrete actions or omissions of the domestic authorities; whether they gave proper weight to the evidence; the failure to undertake apparently obvious and necessary lines of inquiry; or whether there was inertia in their investigative steps. Accordingly, the analysis of the IHAT/SPLI independence is to be considered partial and inadequate for the purpose of the Article 17(2)(b) assessment.

**(ii) The Prosecutor failed to consider the UK Government's interference in assessing the lack of independence and impartiality under Article 17(2)(c) of the Statute, including the Overseas Operations Bill/Act.**

155. The analysis contained in the OTP's Final Report in the section titled "UK Government" departs entirely from the question underlying Article 17(2)(c) of the Statute.<sup>211</sup> The Prosecutor does not focus on whether the actions or omissions by the UK Government had an impact on the independence and impartiality of the proceedings in relation to alleged war crimes committed by members of the UK armed forces in Iraq. This section, instead,

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<sup>208</sup> 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/>.

<sup>209</sup> OTP, Final Report, para. 438.

<sup>210</sup> OTP, Final Report, para. 440.

<sup>211</sup> OTP, Final Report, paras. 460-479.

mentions a series of circumstances reflecting the present and future “unwillingness” of the UK Government, including those related to the disciplinary complaint against PIL and Leigh Day;<sup>212</sup> the possible introduction of statutes of limitations concerning the prosecution of service personnel;<sup>213</sup> and the introduction of the Overseas Operation Bill and its consequences.<sup>214</sup>

156. These circumstances clearly indicate the unwillingness of the UK Government to carry out genuine (independent and impartial) proceedings and the lack of willingness to bring the person(s) concerned to justice. However, in no part of the OTP’s Final Report does the Prosecutor try to address this question. On the contrary, the analysis does not provide any indication of the Prosecutor’s conclusion *vis-à-vis* the impact of the UK Government action on the independence and impartiality of the domestic proceedings carried out by the IHAT/SPLI.

157. In this regard, very relevant are the continued efforts of the UK authorities, in particular the MoD, to shield perpetrators from prosecution by introducing a special legislation called “Overseas Operations Bill” (now “Overseas Operations Act”). In this regard, the Prosecutor, even while expressing strong concerns about the rhetoric surrounding the passing of this legislation in the UK, ultimately failed to consider its impact – both on the independence of the judiciary, and on the overall willingness, or rather unwillingness, of the UK authorities to bring the alleged perpetrators to justice. The original draft by the MoD introduced illegitimate obstacles for investigations of allegations of torture and war crimes, facilitating a fast-track dismissal of such cases. Even though the final wording of the Act, as passed by the Parliament in April 2021, does not include the originally foreseen limitation for prosecution of war crimes and torture committed by UK soldiers, what remains significant is the broader debate and ultimate goal of the legislation at stake, which clearly shows the intention of the MoD to shield UK soldiers engaging in war theaters abroad from criminal accountability.

158. The rhetoric during the debates on the Bill revealed the intentions of the UK Government to protect members of the UK armed forces from “unfounded” and “fabricated” claims, as stated by UK Defence Secretary Ben Wallace, the then-Minister for Defence People and Veterans Johnny Mercer, and Minister of State for Defence Baroness Goldie.<sup>215</sup> In their

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<sup>212</sup> OTP, Final Report, paras. 461-463, 474.

<sup>213</sup> OTP, Final Report, para. 464.

<sup>214</sup> OTP, Final Report, paras. 465-479.

<sup>215</sup> Baroness Goldie, Minister of State for Defence, stated: “It seems to me that with prosecutions that may not be founded soundly on evidence or raised timeously, and as a consequence memories may have faded and recollections may be vague and at worst may be founded on completely misconceived beliefs or on fabricated

statements, they openly referred to claims as “vexatious”, the “product of deliberate lies, reckless speculation and ingrained hostility” and “wholly without foundation”, which was rightly identified by the Prosecutor as contradicting the findings of national inquiries, SDT, the ECtHR as well as the Prosecutor’s own findings.<sup>216</sup> This rhetoric, along with efforts to deny any wrongdoings by UK armed forces, should be seen as a continuation of interference from the UK Government, resulting in lack of impartiality and independence. The position of the UK Government contributed to the fact that out of *thousands* of allegations submitted in the past twenty years against UK forces for alleged crimes in Iraq and Afghanistan, not one has resulted in criminal prosecution.<sup>217</sup>

**Error 6: When assessing “unwillingness” under Article 17(2) of the Statute, the Prosecutor failed to consider holistically the totality of factors stemming from actions of UK authorities.**

159. In concluding that domestic proceedings were not made for the purpose of shielding the perpetrators, and thereby concluding that UK authorities were not “unwilling” pursuant to Article 17(2), the Prosecutor failed to consider holistically the totality of relevant factors when determining whether there was “intent to shield”. While the Prosecutor claimed to apply this approach, the OTP came to the conclusion that it “cannot infer that the individual factors constitute a larger pattern of shielding”.<sup>218</sup> However, as will be shown below, this conclusion contradicts various findings of the OTP’s Final Report.

160. Instead of adopting a holistic approach and connecting individual factors, which would allow establishing the pattern, the Office conducted a fragmented analysis of factors, such as filtering criteria, SDT proceedings, proportionality criteria, cover-up allegations, lack of action regarding cases of superior responsibility, and even attempts by the Government to

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accounts given by certain witnesses, we have a duty to protect our Armed Forces personnel and our veterans from that very alarming scenario unfolding.”; UK Minister of Defence, Johnny Mercer stated: “I am unaware of a finding where the MoD in and of itself has been found to have brought vexatious prosecutions, but there have been many attempts to do so, in the process costing the public purse millions of pounds and ruining the lives of some of our finest people.” – Minutes of the Joint Committee on Human Rights’ session collecting oral evidence: The Overseas Operations (Service Personnel and Veterans) Bill, HC 665, 5 October 2020, available at: <https://committees.parliament.uk/oralevidence/985/pdf/>. See also UK Government, Press Release: Armed Forces protected from vexatious claims in important step, 18 March 2020, available at: <https://www.gov.uk/government/news/armed-forces-protected-from-vexatious-claims-in-important-step>.

<sup>216</sup> OTP’s letter to UK Minister of defence, Ben Wallace, 3 March 2021, available at: [https://www.icc-cpi.int/itemsDocuments/iraq/20210303-OTP2021-IRQUK\\_RC.pdf](https://www.icc-cpi.int/itemsDocuments/iraq/20210303-OTP2021-IRQUK_RC.pdf).

<sup>217</sup> Minutes of the Joint Committee on Human Rights’ session collecting oral evidence: The Overseas Operations (Service Personnel and Veterans) Bill, HC 665, 5 October 2020, available at: <https://committees.parliament.uk/oralevidence/985/pdf/>.

<sup>218</sup> OTP, Final Report, para. 487.

change the legislation (as outlined above). This is particularly evident in the Prosecutor's conclusions relating to filtering criteria and cases of command/superior responsibility. For filtering criteria, the Prosecutor concluded that the criteria "do not, *in and of themselves*, support a finding of a lack of willingness [emphasis added]".<sup>219</sup> Similarly, for the cases of superior/command responsibility, the Prosecutor concluded that "the paucity of cases concerning command responsibility that have resulted in referrals for prosecution, and the subsequent fate of those cases cannot, *in and of itself*, provide a basis for the Office to argue that the UK authorities have sought to shield persons in military command or civilian superior or ministerial roles from criminal responsibility [emphasis added]".<sup>220</sup> These conclusions betray a compartmentalized assessment of such circumstances and factors, inconsistent with the Prosecutor's assertion that a holistic approach to the evidence to assess a large pattern of shielding was applied.<sup>221</sup>

161. Another striking example of a lack of holistic approach concerns the findings regarding attempts of cover-up. Here, the Prosecutor failed to link the testimonies of former IHAT members about repeated attempts to impede investigations of superior/command responsibility cases with the fact that none such cases have been prosecuted. The Prosecutor also failed to identify how the filtering criteria and their illegitimate application enabled IHAT to dismiss cases of superior/command responsibility without any investigative steps. Several former IHAT members testified that "cases involving superior responsibility were prematurely terminated or that there was leadership pressure within IHAT/IHAPT not to pursue them".<sup>222</sup> If the Prosecutor had considered these factors in their totality, the Office would have established that the testimonies regarding attempts at cover-up are credible and corroborated.

162. Furthermore, the Prosecutor found that "in situations where different national institutions may demonstrate varying and inconsistent degrees of willingness/unwillingness, primary consideration should be given to the conduct of the competent authorities responsible for carrying out the proceedings in question".<sup>223</sup> By doing so, the Prosecutor put the focus of the analysis on the conduct of investigative and judicial authorities and herewith disregarded the impact of other national institutions on the proceedings, such as the

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<sup>219</sup> OTP, Final Report, para. 312.

<sup>220</sup> OTP, Final Report, para. 371.

<sup>221</sup> OTP, Final Report, para. 487.

<sup>222</sup> OTP, Final Report, para. 381.

<sup>223</sup> OTP, Final Report, para. 457.

executive. This overly narrow approach constitutes a legal error that critically compromised the outcome of the Prosecutor's analysis.

163. It should be noted that the Prosecutor's failure to take into consideration decisions at the executive level when assessing "unwillingness" is in contradiction with the list of indicators provided by the already mentioned Policy Paper on Preliminary Examinations, which include: "intimidation of victims, witnesses or judicial personnel" and "failures of disclosure, fabricated evidence, manipulated or coerced statements, and/or undue admission or non-admission of evidence".<sup>224</sup> All of these indicators might involve actions undertaken not only by investigative and judicial authorities, but also by the executive.

164. Moreover, the Expert Paper on the Principle of Complementarity, referred to by the Prosecutor as a source of guidance in the assessment of "unwillingness",<sup>225</sup> lists further indicators that refer to the role of the executive branch, such as "direct or indirect proof of political interference or deliberate obstruction and delay"; "general institutional deficiencies", such as "political subordination of investigative, prosecutorial and judicial branch"; as well as "lack of resources allocated to the proceedings" and "non-cooperation with the ICC".<sup>226</sup>

165. In fact, by dismissing these indicators, the Prosecutor failed to categorize the following critical findings as indicators of "unwillingness" of the UK's executive authorities, namely:

- (i) The MoD lodging a complaint against law firms representing victims, which resulted in the illegitimate filtering of complaints and led to the dismissal of hundreds of cases without investigation, while leaving BBC/Sunday Times's grave allegations of obstruction of justice, backed by witness evidence, without any investigation;
- (ii) The then-Defence Secretary and the then-Prime Minister publicly denouncing IHAT's work;
- (iii) The UK Government appointing a senior civil servant as an IHAT official in order to exert pressure on investigators, in order to ensure that they did not look further up the chain-of-command beyond low-level perpetrators;
- (iv) The involvement of the SPA, part of the MoD, in the termination of cases by refusing to press charges in evidentially strong cases;

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<sup>224</sup> OTP, Policy Paper on Preliminary Examinations, para. 51.

<sup>225</sup> OTP, Final Report, fn. 497-498.

<sup>226</sup> OTP, Informal Expert Paper, para. 47 in combination with Annex 4.

- (v) A MoD lawyer instructing IHAT investigators to drop a case that had sufficient evidence for prosecution;
- (vi) MoD personnel obstructing IHAT's access to files by: not permitting IHAT staff to locate documents they had been vetted to inspect and imposing restrictions on access;
- (vii) The MoD announcing its intention to "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",<sup>227</sup> which is a deliberate falsification of the actual judgement;
- (viii) The MoD blocking requests of IHAT investigators' request to interview superior commanders;
- (ix) The MoD exercising pressure on IHAT to close cases as quickly as possible;
- (x) Closure of IHAT at the direction of Michael Fallon, then-UK Defence Secretary, before the work of IHAT was finished; and, finally,
- (xi) The MoD dismissing hundreds of cases for an illegitimate reason of being "contaminated by SDT judgment".<sup>228</sup>

166. These findings correspond to the indicators identified above, by manifesting and/or resulting in "intimidation of victims, witnesses or judicial personnel"; "failures of disclosure"; "undue admission or non-admission of evidence"; "direct or indirect proof of political interference or deliberate obstruction and delay"; and "general institutional deficiencies", such as "political subordination of investigative and prosecutorial branch".

167. Therefore, in analysing the totality of factors, the Prosecutor failed to consider the actions of the executive branch reflecting "intent to shield" *in connection with other factors* for the purposes of assessment of "unwillingness". The individual actions of the UK's investigative institutions (RMP, IHAT, SPLI, later MoD), judicial (court-martials) and executive institutions (MoD, SPA, the Government), as described throughout the present submission, are inevitably interlinked and *in their totality* effectively enabled perpetrators to escape accountability, and should have resulted in the conclusion that:

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<sup>227</sup>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.

<sup>228</sup> OTP, Final Report, para. 372-386.



- (i) Initial investigations by RMP conducted with unjustified delays and with clear lack of independence and impartiality resulted in significant lack of contemporaneous evidence and even destruction of evidence;
- (ii) MoD's prolonged refusal to launch a public inquiry into claims resulted in IHAT starting investigations seven years after first cases of ill-treatment were reported;
- (iii) Based on "lack of evidence" and "passage of time", hundreds of cases were prematurely and/or illegitimately dismissed by IHAT/SPLI;
- (iv) Hundreds of cases were directly dismissed as a result SDT proceedings initiated by MoD;
- (v) Other cases were inadequately investigated by IHAT, partly due to MoD or RMP restricting or refusing access to evidence;
- (vi) Cases against superior commanders investigated by IHAT were dropped under pressure of the executive branch;
- (vii) The remaining cases were taken over by MoD, who prematurely closed down IHAT;
- (viii) As a result, since 2017, MoD continuously dismissed hundreds of cases; and, finally,
- (ix) Not a single case out of 3,400 submitted was forwarded to the stage of criminal proceedings as an alleged war crime, and, herewith, not a single perpetrator has been brought to justice.

All of these actions and factors are clearly interlinked and in their totality, they clearly reflect "unwillingness" in the sense of Article 17(2).

**Error 7: The Prosecutor's complementarity assessment was not conducted on the basis of well-identified "potential cases" arising from the preliminary examination pursuant to Article 53(1)(b) of the Statute and Rule 48 RPE.**

168. The Prosecutor erred in engaging in an abstract complementarity assessment outside the parameters of the "potential cases" as required by Article 53(1)(b) of the Statute.

169. Article 53(1)(b) of the Statute requires the Prosecutor to assess whether the "case" would be admissible under Article 17 of the Statute. According to the jurisprudence, the reference

to “case” in Article 53(1)(b) is to be construed as “potential case”.<sup>229</sup> The reference to “potential” in this provision serves the purpose of anchoring the admissibility assessment to certain parameters – namely, the crimes allegedly committed during the incidents and the groups of persons that are likely to be the focus of an investigation.<sup>230</sup> This is because “the admissibility assessment, whether of actual or potential cases, cannot be conducted in the abstract.”<sup>231</sup> Accordingly, the very existence of an investigation under Article 17(1), or the assessment of the State’s unwillingness pursuant to Article 17(2), have to be scrutinised against the specific investigative activities at the domestic level *vis-à-vis* such potential cases.

170. In the present case, the Prosecution failed to conduct a complementarity assessment according to these principles. In the subject-matter analysis, the Prosecutor identified a “sample pool”<sup>232</sup> of incidents involving sixty-eight victims (“Incidents”) for which there was a reasonable basis to believe that members of the UK armed forces committed crimes within the jurisdiction of the Court.<sup>233</sup> However, the complementarity assessment does not engage in a specific analysis of the concrete investigative steps carried out – or not carried out – in relation to the Incidents and the relevant potential cases. Rather, the OTP confined its scrutiny to an institutional overview of the mechanisms set up at the domestic level to tackle the crimes of UK troops in Iraq.

171. Against this background, the Petitioners submit that the disconnection between the subject-matter jurisdiction and the complementarity analysis irremediably vitiated the Prosecutor’s conclusion concerning: (1) the existence (inaction), and (2) genuineness (unwillingness) of the domestic proceedings carried out by domestic authorities.

**a) The Prosecutor erroneously ruled out *Inaction* by the UK authorities, conducting an abstract analysis of the domestic mechanisms for investigating crimes committed in Iraq pursuant to Article 17(1)(a)-(b) of the Statute.**

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<sup>229</sup> *Burundi* Article 15 Decision, para.143; *Côte d’Ivoire* Article 15 Decision, para.190; *Kenya* Article 15 Decision, paras. 45, 48. *Afghanistan* Appeal Judgement, paras. 40-42.

<sup>230</sup> *Kenya* Article 15 Decision, para. 49.

<sup>231</sup> *Kenya* Article 15 Decision, para. 49.

<sup>232</sup> OTP, Final Report, para. 75.

<sup>233</sup> OTP, Final Report, paras. 75-114. This includes: (1) seven incidents of war crimes of wilful killing/murder pursuant to Article 8(2)(a)(i) or Article 8(2)(c)(i) of the Statute (OTP, Final Report, paras. 76-80, 113); (2) torture and inhuman/cruel treatment under Article 8(2)(a)(ii) or Article 8(2)(c)(i) of the Statute and outrages upon personal dignity under Article 8(2)(b)(xxi) or Article 8(2)(c)(ii) against 54 prisoners (OTP, Final Report, paras. 81-100, 113); (3) rape and/or other forms of sexual violence under article 8(2)(b)(xxii) or article 8(2)(e)(vi) against seven victims.

172. At paragraph 278 of the Final Report the Prosecutor concluded that:

[I]t could not be said that the UK authorities have remained inactive in relation to the potential cases that the Office would likely focus on, in the sense of failing to take ‘steps directed at ascertaining whether those suspects are responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses’ and undertaking ‘tangible, concrete and progressive investigative steps’<sup>234</sup>

173. Contrary to such a conclusion, the “inaction” analysis contained in the Final Report does not provide any clear indication that the alleged crimes stemming from the Incidents had been investigated, nor that the UK authorities undertook any tangible, concrete, and progressive investigative steps in this regard. Indeed, the Prosecutor’s assessment pursuant to Article 17(1)(a)-(b) of the Statute was carried out in the abstract, without taking into account the potential cases as identified in the subject-matter section. The fact that the UK authorities did indeed set up a number of investigative mechanisms into the bulk of allegations of killings, torture, mistreatments and injuries against the Iraqi prisoners does not rule out that those same authorities might have failed to take action with regard to specific Incidents and potentially related cases. This affected the Prosecutor’s ability to determine whether the UK authorities had remained inactive in relation to such Incidents pursuant to Article 17(1)(a)-(b) of the Statute.

174. Both at Case and Situation levels, the assessment under Article 17(1)(a)-(b) of the Statute is essentially based on the “same person, same conduct” test.<sup>235</sup> This means that “‘the underlying incidents under investigation both by the Prosecutor and the State, alongside the conduct of the suspect under investigation that gives rise to his or her criminal responsibility for the conduct described in those incidents’ must be compared.”<sup>236</sup> In addition, a case is being or has been investigated within the meaning of Article 17(1)(a)-(b) of the Statute if “tangible, concrete and progressive investigative steps are being

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<sup>234</sup> OTP, Final Report, para. 278

<sup>235</sup> *Burundi Article 15 Decision*, para. 147, referring to *The Prosecutor v Francis Kirimi Muthaura et al.*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, 30 August 2011, ICC-01/09-02/11-274, para. 39; *The Prosecutor v William Samoei Ruto et al.*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, 30 August 2011, ICC-01/09-01/11-307, para. 40. See also OTP, Policy Paper on Preliminary Examinations, November 2013, para. 47.

<sup>236</sup> *Burundi Article 15 Decision*, para.147; referring to, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgment on the Appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled “Decision on the admissibility of the case against Saif Al-Islam Gaddafi”, 21 May 2014, ICC-01/11-01/11-547-Red, para. 77.

undertaken.”<sup>237</sup> According to the Court’s case law, such assessment involves a specific review of the quality, the quantity, and the adequacy of the investigative steps taken at the domestic level with respect to the specific (potential) case.<sup>238</sup> Incomplete domestic investigations (“scarce in quantity” or “lacking in progression”)<sup>239</sup> would not lead to inadmissibility of a case.

175. In line with these considerations, it can be argued that “[f]or the inadmissibility ground to apply there must be an ‘investigation’; not any national examination of a case will be relevant. The term ‘investigation’ means ‘the making of a search or inquiry; systematic examination; careful and minute research’, indicating that there must be an examination of some detail reflecting a sufficient measure of thoroughness. Otherwise it will be considered as inaction.”<sup>240</sup>

176. These principles have been applied *equally* at both case and situation levels. Appeals and Pre-Trial Chambers articulated the inaction analysis on the adequacy of the domestic investigation *vis-à-vis* the cases or potential cases identified by the Prosecutor. For instance, in *Simone Gbagbo*, the Pre-Trial Chamber concluded that the Cote d’Ivoire remained inactive *vis-à-vis* her case since, in the thirty-two months of the domestic investigation, the *juge d’instruction* carried out *four* investigative steps that were sparse and disparate, including the questioning of Simone Gbagbo and of one victim.<sup>241</sup> The Appeals Chamber confirmed this conclusion.<sup>242</sup> Likewise in the *Ruto et al.* case, the Pre-Trial Chamber II, in concluding that Kenya was inactive, considered that the domestic authorities did not provide, *inter alia*, information on: (1) whether the suspects were

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<sup>237</sup> *Burundi Article 15 Decision*, para.148; *Prosecutor v Simone Gbagbo*, Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo, 11 December 2014, ICC-02/11-01/12-47-Red (“*Simone Gbagbo* Admissibility Decision”), para. 65; *Prosecutor v Simone Gbagbo*, Judgment on the appeal of Côte d’Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled “Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo”, 27 May 2015, ICC-02/11-01/12-75-Red (“*Simone Gbagbo* Admissibility Appeal Judgement”), para.122.

<sup>238</sup> *Burundi Article 15 Decision*, para.159, 164-165, 172-175; *Simone Gbagbo* Admissibility Decision, paras. 66-74.

<sup>239</sup> *Simone Gbagbo* Admissibility Decision, para. 70; *Simone Gbagbo* Admissibility Appeal Judgement, para. 122. This conclusion has also been endorsed by the Prosecutor. See also Public redacted version of "Prosecution’s Response to the Government of the Republic of Côte d’Ivoire’s Appeal against Pre-Trial Chamber I’s “Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo””, 2 February 2015, ICC-02/11-01/12-61-Conf, Public redacted version of "Prosecution’s Response to the Government of the Republic of Côte d’Ivoire’s Appeal against Pre-Trial Chamber I’s “Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo””, ICC-02/11-01/12-61-Conf, 2 February 2015, ICC-02/11-01/12, para. 23 (“It does not suffice [...] that any slight evolution in the national investigation will meet this threshold for inadmissibility. When the investigative steps taken are found to be “scarce in quantity and lacking in progression” and “disparate in nature”, as in this case, Côte d’Ivoire’s efforts amount to “inaction” and the case is admissible”)

<sup>240</sup> J. Stigen, “The Relationship between the International Criminal Court and National Jurisdictions, The Principle of complementarity”, p.203.

<sup>241</sup> *Simone Gbagbo* Admissibility Decision, paras. 65-72.

<sup>242</sup> *Simone Gbagbo* Admissibility Appeal Judgement, paras. 128-131.

actually questioned; (2) the contents of the reports about their questioning; and (3) whether relevant witnesses had been questioned.<sup>243</sup> Again, the Appeals Chamber confirmed this decision.<sup>244</sup>

177. At the situation level, in the *Burundi* Article 15 Decision, Pre-Trial Chamber III's determination on the existence of the investigation within the meaning of Article 17(1)(a)-(b) of the Statute hinged on an articulated analysis of the specific and concrete efforts of the domestic judicial mechanisms set in place to investigate alleged crimes. With respect to potential cases, Pre-Trial Chamber III considered that Burundi remained inactive, since the domestic investigations were incomplete. In support of its conclusion, Pre-Trial Chamber III observed that the domestic authorities "did not seek access to a pool of witnesses who knew a lot about what really happened",<sup>245</sup> failed to seize other authorities that could compel persons in possession of relevant information to testify,<sup>246</sup> and did not conduct forensic investigations.<sup>247</sup> The Pre-Trial Chamber concluded that it was incumbent on such authorities to "investigate, using all the means at its disposal, not to wait for others, such as the victims, to bring the necessary information to it."<sup>248</sup>

178. Against this background, while reflecting full alignment with the principles mentioned above,<sup>249</sup> the OTP's Final Report fails to provide any indication on whether UK investigations fully covered the same incidents at the basis of its subject matter analysis and, more specifically, whether the domestic authorities carried out tangible, concrete and progressive investigative steps. In no part of the forty-seven-page section titled "Inaction" does the Prosecutor identify, deal with, or analyse the specific investigative efforts put in place by UK authorities to investigate those incidents and assess their adequacy.

179. Conversely, the OTP Final Report does not provide any indication that the Prosecutor assessed whether UK investigations covered the same incidents/crimes or group of persons that would be the target of the OTP's investigation. Nor does the Prosecutor assess whether at the domestic level, tangible investigative steps had been undertaken to the specific

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<sup>243</sup> *Prosecutor v. Ruto et al.*, ICC-01/09-01/11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, 30 May 2011, para. 69.

<sup>244</sup> *Prosecutor v. Ruto et al.*, ICC-01/09-01/11, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", 30 August 2011, paras. 41, 62.

<sup>245</sup> *Burundi* Article 15 Decision, para.164.

<sup>246</sup> *Burundi* Article 15 Decision, para.164.

<sup>247</sup> *Burundi* Article 15 Decision, para.164.

<sup>248</sup> *Burundi* Article 15 Decision, para.164.

<sup>249</sup> OTP, Final Report, para.155.

relevant cases in order to address the circumstances surrounding the alleged crimes and the relevant responsibilities.

180. Indeed, a large part of the “Inaction” section of the OTP’s Final Report consists of an abstract, broad description of the theoretical criminal and non-criminal mechanisms in place in the UK meant to investigate the conduct of members of the UK armed forces in Iraq.<sup>250</sup>

181. Regarding the criminal mechanisms, most of the Prosecutor’s analysis focuses on a rather historical/institutional overview of the: (1) initial investigative response to the allegations of killings and abuse by members of the UK armed forces in Iraq;<sup>251</sup> (2) IHAT;<sup>252</sup> (3) SPLI;<sup>253</sup> and (4) SPA.<sup>254</sup> Here, the Prosecutor confined the assessment to a quantitative description of the caseload and record of such mechanisms without ever examining the concrete investigative steps taken *vis-à-vis* the alleged crimes.

182. A large part of the cases concerning the crimes allegedly committed by members of UK armed forces in Iraq were “sifted-out” without any active and concrete investigative activity. As noted in the OTP’s Final Report, the IHAT investigation was articulated in three main filtering stages: (1) initial assessment; (2) pre-investigation; and (3) investigation.<sup>255</sup> According to the OTP’s Final Report, at the initial assessment and the pre-investigation stage, IHAT screened out most of the allegations without any meaningful investigative activity – mostly on the basis of a review of a victim’s complaint or a scoring method.<sup>256</sup> In total, 1,667 allegations were screened out following the initial assessment, while 661 allegations were screened out at the pre-investigation level.<sup>257</sup> The OTP’s Final Report failed to identify whether any of the alleged crimes covered by the Incidents had been filtered-out by UK authorities during these initial phases of IHAT’s assessment, and if so, on the basis of which concretely carried-out investigative steps.<sup>258</sup>

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<sup>250</sup> OTP, Final Report, paras. 159-274.

<sup>251</sup> OTP, Final Report, paras. 159-162.

<sup>252</sup> OTP, Final Report, paras. 163-181.

<sup>253</sup> OTP, Final Report, paras. 182-191.

<sup>254</sup> OTP, Final Report, paras. 192-204.

<sup>255</sup> OTP, Final Report, paras. 171-181.

<sup>256</sup> OTP, Final Report, paras. 171-174.

<sup>257</sup> OTP, Final Report, paras. 171, 173.

<sup>258</sup> Concluding the analysis on “inaction”, the Prosecutor observes that “[a]lthough the initial assessment of a claim might not lead to a fully-fledged investigation being undertaken (based on the screening criteria), or an investigation or prosecution might be abandoned after a subsequent assessment, the Office considers that it is difficult to argue that the State had remained inactive in relation to such a claim, since such assessments form part of the investigative and prosecutorial process”, OTP, Final Report, para. 276. While this statement may be correct in abstract terms, without a full review of the concrete investigative efforts it cannot form the basis to conclude that a case is inadmissible.

183. Similar considerations apply to the Prosecutor’s discussion of non-criminal mechanisms. The OTP’s Final Report includes a generic description of the public inquiries (Baha Mousa and Al Sweady inquiries), Iraq Fatality Investigations, Systemic Issues Working Group, and the civil proceedings, and fails to explain how such an analysis would be relevant for the purpose of Article 17(1) of the Statute.
184. A weak attempt to link the domestic proceedings with the crimes stemming from the Incidents is made in the sub-section titled “Individual Cases”. Here, the OTP’s Final Report gives a summary description of UK proceedings related to cases of killings and ill-treatment,<sup>259</sup> which only partially covered the allegations of war crimes committed against Iraqi nationals. The “Individual Cases” section, however, is merely descriptive. The Prosecutor failed to scrutinise the specific investigative steps in relation to the specific incidents, which is required to address the admissibility of a specific case. A proper assessment was replaced by a broad description of the work of judicial or quasi-judicial mechanisms established to deal with the bulk of allegations concerning the crimes committed by UK armed forces in Iraq.
185. With respect to the most serious allegations of killings, the OTP’s Final Report only provides a history of the domestic proceedings. Even though the cases did not result in prosecutions, allegedly due to lack of evidence,<sup>260</sup> the Prosecutor did not engage in any analysis on the adequacy of the investigations, nor did the Office assess whether “tangible, concrete and progressive investigative steps are being undertaken”. The short summary of these cases does not include any consideration on whether such proceedings covered the likely objects of the ICC investigation.
186. Similarly, with regard to the ill-treatment cases, the OTP’s Final Report does not assess whether UK authorities investigated any of the (potential) cases stemming from the Incidents within the meaning of Article 17(1). The Prosecutor’s analysis is limited to the consideration that in most cases, the investigation was discontinued due to lack of evidence or to conduct that was not considered of a sufficient gravity to amount to a war crime.

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<sup>259</sup> With respect to the cases of killings, see OTP, Final Report, paras. 207-211 (death of Radhi Nama), 212 (death of Abdul Jabbar Mossa Ali), 213-215 (death of Baha Mousa), 216 (death Tariq Sabri Mahmud), 217-219 (death of Naheem Abdullah), 220-221 (death of Ahmed Jabber Kareem Ali), 222-226 (Death of Sayeed Radhi Shabram Wawi Al-Bazooni). With respect to the cases of ill-treatment see OTP, Final Report, paras. 228 (ill-treatment committed against eight men detained with Baha Mousa), 229(viii) (IHAT 98), 229(ix) (IHAT number not known), 229(x) (IHAT/SPLI number not known), 229(xi) IHAT 8 (Whiskey 3), 229(xii) IHAT 167 (Whiskey 18).

<sup>260</sup> OTP, Final Report, paras. 207-211 (death of Radhi Nama), 212 (death of Abdul Jabbar Mossa Ali), 213-215 (death of Baha Mousa), 216 (death Tariq Sabri Mahmud), 217-219 (death of Naheem Abdullah), 220-221 (death of Ahmed Jabber Kareem Ali), 222-226 (Death of Sayeed Radhi Shabram Wawi Al-Bazooni).

Again, the Prosecutor did not provide any indication as to whether UK proceedings had the same object as the ICC investigation.

**b) The failure to conduct the complementarity assessment with regard to the specific “potential cases” affected the Prosecutor’s ability to determine the UK’s “unwillingness” pursuant to Article 17(2)(a)-(c) of the Statute.**

187. The Prosecutor’s analysis concerning the State’s “unwillingness” under Article 17(2), broken down in its three components (intent to shield, unjustified delay, and lack of independence and impartiality), was carried out in abstract terms. The Prosecutor did not take into account specific cases pursued at the domestic level in relation to the above-mentioned Incidents.

188. The Policy Paper on Preliminary Examinations reads that the indicators of the State’s “unwillingness” under Article 17(2)(a) of the Statute requires a case-specific analysis of individual proceedings carried out at the domestic level.<sup>261</sup> Indeed, this includes considerations related to, *inter alia*, (1) manifestly insufficient steps in the investigation or prosecution; (2) deviations from established practices and procedures; (3) ignoring (or giving insufficient weight to) evidence; (4) flawed forensic examination; and (5) manipulated or coerced statements.<sup>262</sup> These indicators clearly show that a determination concerning a State’s “unwillingness” under Article 17(2)(a) of the Statute requires an in-depth analysis of specific evidence collected and/or investigative steps carried out at the domestic level for any case/incident identified.

189. In contrast, instead of assessing these factors for determining “unwillingness” under Article 17(2)(a) of the Statute, the OTP’s Final Report provides only a broad overview of the filtering criteria, the role and impact of the disciplinary tribunal findings, the closure of allegations on the basis of proportionality criteria, the response to allegations of systemic issues, and allegations of cover up.<sup>263</sup> In discussing these aspects, the Prosecutor never addressed the concrete investigative activities carried out by domestic authorities *vis-à-vis* the specific Incidents.<sup>264</sup>

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<sup>261</sup> OTP, Policy Paper on Preliminary Examinations, para. 51. See also OTP, Final Report, para. 295.

<sup>262</sup> OTP, Policy Paper on Preliminary Examinations, para. 51.

<sup>263</sup> OTP, Final Report, paras. 305-406.

<sup>264</sup> It is symptomatic, in this regard, that the Prosecutor considered and accepted the UK arguments on the application of the proportionality criteria only at “face value”. OTP, Final Report, paras. 361. See *supra*, Error 3.



190. In other words, there is no indication that the Prosecutor concretely evaluated the domestic authorities' willingness to proceed, or rather to shield, the suspects in relation to these specific incidents, particularly in light of the investigatory steps taken by UK authorities, their assessment of the evidence gathered during such proceedings, or the quality of forensic evidence and statements. Instead, the OTP's Final Report suggests that the Prosecutor did not receive this type of information from the UK Government.<sup>265</sup>
191. The Prosecutor failed to address the specific delays related to the proceedings covering the specific incidents or their related potential cases under the terms of Article 17(2)(b) of the Statute. Rather, the OTP's Final Report provides only abstract considerations related to delays that occurred in the investigations carried out by the RMP, IHAT/SPLI, and SPA.<sup>266</sup>
192. Following the same flawed approach, the Prosecutor only addressed the question concerning the lack of independence and impartiality complementarity limb, as required under Article 17(2)(c) of the Statute, in abstract terms.<sup>267</sup> Instead of focusing on specific aspects of the individual proceedings, the Prosecutor engaged in a broad analysis, which cannot be considered adequate to assess whether the UK Government was willing to investigate the potential cases. Indeed, most of the indicators identified in the Policy Paper on Preliminary Examinations and arising from the jurisprudence of the ECtHR with regard to the lack of independence and impartiality seem to require authorities to focus on specific aspects of a case,<sup>268</sup> rather than conducting a general institutional analysis of the available judicial mechanisms.
193. In conclusion, the Prosecutor's analysis of both complementarity prongs has been conducted in the abstract without any precise link to the specific criteria as stemming from the identification of potential cases. The Prosecutor failed to answer the crucial question of complementarity: whether the concrete incidents and the person(s) that would likely be the

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<sup>265</sup> OTP, Final Report, paras. 358 and 359.

<sup>266</sup> OTP, Final Report, paras. 425-433.

<sup>267</sup> OTP, Final Report, paras. 443-447 (RMP), 448-459 (IHAT/SPLI and SPA), 460-479 (UK Government), 480 (UK Courts).

<sup>268</sup> Concerning the indicators related to the lack of independence see, for instance, OTP, Final Report, paras. 435, referring to *inter alia* "the alleged involvement of the State apparatus, including those department (sic) responsible for law and order, in the commission of the alleged crimes, department (sic) responsible for law and order, in the commission of the alleged crimes, political interference in the investigation, prosecution or trial", 440 (referring to: (1) specific actions or omissions of the national authorities, such as the failure to carry out certain measures which would shed light on the circumstances of the *case*; (2) giving excessive weight to the statements of the suspects; (3) failure to undertake apparently obvious and necessary lines of inquiry; and (4) inertia). Concerning the indicators related to the lack of impartiality see, for instance, OTP, Final Report, para. 435, referring to, *inter alia*, (1) connections between the suspect and competent authorities responsible for investigation, prosecution or adjudication of the crimes (2) dismissals or reprisals in relation to investigative, prosecutorial or judicial personnel concerned.

object of the Prosecutor's investigation have been investigated at the domestic level and, if so, whether these specific investigations have been conducted genuinely.

**Error 8: The Prosecutor erred in not considering the lack of domestic steps regarding superior/command responsibility and failed to identify potential cases involving superior/command responsibility.**

194. It is very troubling that, when assessing the conduct of the UK authorities under Article 17(2), the Prosecutor did not give proper consideration to the lack of domestic steps regarding superior/command responsibility. Even more troubling is the fact that the Prosecutor, disregarding important information received by victims' representatives and civil society organisations,<sup>269</sup> failed to identify any potential cases involving superior or command responsibility that could be the object of the ICC investigation.

195. According to the Policy Paper on Preliminary Examinations, in a situation "where there are or have been national investigations or prosecutions, the Office shall 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."<sup>270</sup> Moreover, according to the Pre-Trial Chamber, "this assessment cannot be undertaken on the basis of hypothetical national proceedings that may or may not take place in the future: it must be based on the concrete facts as they exist at the time."<sup>271</sup>

196. According to the OTP's findings, IHAT and SPLI appear to have examined patterns that may be evidence of systematic criminal behaviour and may give rise to responsibility at

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<sup>269</sup> 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 ECCHR and PIL, 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](https://www.ecchr.eu/fileadmin/Juristische_Dokumente/January_2014_Communication_by_ECCHR_and_PIL_to_ICC_OTP_re_Iraq_UK_public_version.pdf); Communication to the Office of the Prosecutor of the International Criminal Court, Situation Iraq/United Kingdom -Status of preliminary examination, submitted on 1 September 2017 by ECCHR, available at [https://www.ecchr.eu/fileadmin/Juristische\\_Dokumente/September\\_2017\\_Submission\\_by\\_ECCHR\\_to\\_ICC\\_OTP\\_re\\_Iraq\\_UK.pdf](https://www.ecchr.eu/fileadmin/Juristische_Dokumente/September_2017_Submission_by_ECCHR_to_ICC_OTP_re_Iraq_UK.pdf); Communication to the Office of the Prosecutor of the International Criminal Court, Situation Iraq/United Kingdom, submitted on 29 June 2017 by ECCHR, available at [https://www.ecchr.eu/fileadmin/Juristische\\_Dokumente/June\\_2017\\_Submission\\_by\\_ECCHR\\_to\\_ICC\\_OTP\\_re\\_Iraq\\_UK.pdf](https://www.ecchr.eu/fileadmin/Juristische_Dokumente/June_2017_Submission_by_ECCHR_to_ICC_OTP_re_Iraq_UK.pdf); Communication to the Office of the Prosecutor of the International Criminal Court, Situation Iraq/United Kingdom - Follow-up, submitted on 31 July 2019 by ECCHR, available at [https://www.ecchr.eu/fileadmin/Juristische\\_Dokumente/ECCHR\\_Follow\\_Up\\_Communication\\_to\\_OTP\\_War\\_crimes\\_by\\_UK\\_forces\\_in\\_Iraq\\_July\\_2019.pdf](https://www.ecchr.eu/fileadmin/Juristische_Dokumente/ECCHR_Follow_Up_Communication_to_OTP_War_crimes_by_UK_forces_in_Iraq_July_2019.pdf).

<sup>270</sup> OTP, Policy Paper on Preliminary Examinations, para. 49.

<sup>271</sup> OTP, Policy Paper on Preliminary Examinations, para. 47 referring to the *Prosecutor v. Joseph Kony et al.*, Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04-01/05-377, 10 March 2009, paras. 49-52.

the command/superior level. Subsequently, IHAT/SPLI have referred a small number of cases involving command responsibility to the SPA involving the immediate supervisory levels within the units where the alleged crimes occurred, but these cases were reported as not having survived the scrutiny of the “full code test”.<sup>272</sup> In 2017, IHAT further informed the OTP that its investigations, to date, had not revealed the involvement of any high commanding officers in the commission of the alleged abuses.<sup>273</sup> In February 2020, the SPLI informed the OTP that ongoing investigations focusing on command responsibility included Whiskey 22 and Whiskey 54, a wider case around command responsibility linked to the death of Baha Mousa, while another ongoing investigation, Whiskey 57, concerned *inter alia* alleged sexual abuse.<sup>274</sup> However, the fact is that, to date, not a single criminal proceeding involving superior/command responsibility has been carried out by the UK authorities.

197. The complete absence of criminal proceedings in this regard is striking given the fact that the OTP found evidence that “several levels of institutional civilian supervisory and military command failures contributed to the commission of crimes against detainees by UK soldiers in Iraq”.<sup>275</sup> Furthermore, the ECtHR’s 2011 ruling in *Al-Skeini*<sup>276</sup> revealed the necessity to examine whether evidence available supported referring criminal charges against commanders and other superiors for the underlying conduct, which was ultimately determined to be a “key aspect” of IHAT’s work.<sup>277</sup>

198. Nevertheless, the focus of IHAT and SPLI has centred on the role of physical perpetrators and their immediate supervisors.<sup>278</sup> The High Court’s 2013 ruling in *Ali Zaki Mousa* explicitly identified deficiencies in the investigations in terms of the poor prospects for prosecutions, as well as the lack of adequate investigations into systemic abuse and

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<sup>272</sup> OTP, Final Report, para. 370.

<sup>273</sup> OTP, Final Report, para. 243.

<sup>274</sup> OTP, Final Report, para. 191, 247.

<sup>275</sup> OTP, Final Report, para. 371: “the MoD and the UK Government appear to have failed to guard against the gradual erosion of doctrine and practice with respect to the treatment of detainees over the course of several decades. This conclusion of collective failure is of extreme gravity in terms of its consequences for the treatment of civilians in conflict and should continue to trigger deep institutional reflection.”

<sup>276</sup> As the ECtHR observed, “[t]he investigation should also be broad enough to permit the investigating authorities to take into consideration not only the actions of the State agents who directly used lethal force but also all the surrounding circumstances, including such matters as the planning and control of the operations in question”, adding that an independent examination must also consider “broader issues of State responsibility, for the death, including the instructions, training and supervision given to soldiers undertaking tasks such as this in the aftermath of the invasion”. ECtHR, *Al-Skeini and others v United Kingdom*, no. 55721/07, Judgment, 7 July 2011, paras. 163, 174.

<sup>277</sup> OTP, Final Report, para. 4, 230.

<sup>278</sup> OTP, Final Report, para. 278.

training.<sup>279</sup> As a response, the MoD established a Systemic Issues Working Group (“SIWG”) for the purpose of “identifying, reviewing, and correcting areas where its doctrine, policy and training have been insufficient to prevent practices or individual conduct that breach its obligations under international humanitarian law”.<sup>280</sup> However, SIWG is not tasked with examining the question of liability under criminal law and did not have the capacity to trigger criminal investigations, as was laid down in ECCHR’s submission to the OTP in 2019.<sup>281</sup> On the contrary, SIWG reviewed actions addressing the issues identified and determined whether they were appropriate and sufficient or further action was necessary.<sup>282</sup> Ultimately, SIWG considered that “there was sufficient evidence to conclude that assaults in detention had occurred, and may have been systemic”,<sup>283</sup> but noted that “given the enhancements to doctrine, policy and training, and the evidence of disciplinary action in appropriate cases, the SIWG was satisfied that there is not currently a systemic issue around assaults in detention.”<sup>284</sup> The “systematic assaults” that SIWG referred to, potentially amounting to war crimes under Article 8 (2) (a) of the Rome Statute, were not further investigated. This evinces that establishment of SIWG was not aimed at conducting an effective investigation into the role of superiors or commanders. No other steps were undertaken by the UK authorities to effectively investigate potential crimes committed by commanders or superiors.

199. Furthermore, with regard to IHAT’s work on superior responsibility, several former IHAT investigators reported to the Prosecutor “their frustration at the outcome of inquiries into systemic issues submitted for internal IHAT/IHAPT review, whether in terms of recommendation for further investigative steps or referrals for prosecution, in view of their concern that cases involving superior responsibility were prematurely terminated or that there was leadership pressure within IHAT/IHAPT not to pursue them”.<sup>285</sup>

200. These findings indicate that principles of due process have been disrespected and reflect the “unwillingness” of authorities to investigate by putting the “deliberate focus of proceedings on low-level or marginal perpetrators despite evidence on those more

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<sup>279</sup> UK EWHC, *R (Ali Zaki Mousa and others) v. Secretary of State for Defence No. 2*, [2013] EWHC 1412 (Admin),

24 May 2013, paras. 192-193; *see generally* paras. 126-194.

<sup>280</sup> OTP, Final Report, para. 257.

<sup>281</sup> ECCHR’s July 2019 submission to the OTP, p. 31, available at:

[https://www.ecchr.eu/fileadmin/Juristische\\_Dokumente/ECCHR\\_Follow\\_Up\\_Communication\\_to\\_OTP\\_War\\_crimes\\_by\\_UK\\_forces\\_in\\_Iraq\\_July\\_2019.pdf](https://www.ecchr.eu/fileadmin/Juristische_Dokumente/ECCHR_Follow_Up_Communication_to_OTP_War_crimes_by_UK_forces_in_Iraq_July_2019.pdf).

<sup>282</sup> OTP, Final Report, para. 260.

<sup>283</sup> OTP, Final Report, para. 261.

<sup>284</sup> OTP, Final Report, para. 262.

<sup>285</sup> OTP, Final Report, para. 381.

responsible”;<sup>286</sup> undertaking “manifestly insufficient steps in the investigation or prosecution; deviations from established practices and procedures”; “ignoring evidence or giving it insufficient weight”; as well as intimidation of personnel.<sup>287</sup> Furthermore, the findings evince that the focus of domestic proceedings was not on those most responsible for the most serious crimes committed and that they did not result in any outcome thus far. The fact that the UK authorities are allegedly still investigating three potential cases cannot be taken into consideration for the assessment of the “unwillingness”, as the Court ruled.<sup>288</sup>

201. The Prosecutor thus failed to give proper consideration to the lack of domestic steps regarding superior/command responsibility, and consequently, failed to identify potential cases of superior/command responsibility for opening an investigation. As clarified in the *Lubanga* case, the admissibility assessment consists of an examination of “both the person and the conduct which is the subject of the case before the Court”.<sup>289</sup> Thus, the Court identified two limbs for the assessment of admissibility: *gravity of conduct* and *individual responsibility* for this conduct.

202. When assessing the gravity of conduct under the Article 15 of the Statute, the Prosecutor analysed a number of specific incidents and came to the conclusion that there is a reasonable basis to believe that members of the UK armed forces committed war crimes against at least sixty-eight persons in their custody between 2003 and 2009, including war crimes of unlawful killing, torture and inhuman/cruel treatment, and outrages upon personal dignity as well as rape and/or other forms of sexual violence.<sup>290</sup> However, the Prosecutor failed to conduct an analysis of the second limb of assessment – individual responsibility for the identified conduct.

203. When setting the frame for analysis of individual responsibility, the Prosecutor rightly noted that “a command responsibility case at the ICC could not base itself on the widespread practice of the use of hooding or other prohibited techniques, but would need to concentrate on a smaller sub-set of incidents where such conduct was carried out in a manner that resulted in cruel or inhuman treatment, and draw relevant inferences from a

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<sup>286</sup> OTP, Final Report, para. 277.

<sup>287</sup> Indicators provided by the OTP in Policy Paper on Preliminary Examinations, para. 51, as well as in the Informal Expert Paper, 2003, p. 28-30.

<sup>288</sup> OTP, Policy Paper on Preliminary Examinations, 2013, para. 47, referring to *Prosecutor v. Joseph Kony et al.*, Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04-01/05-377, 10 March 2009, paras. 49-52.

<sup>289</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor’s Application for Warrant of Arrest, Article 58, ICC-01/04-01/06 (10 February 2006), paras. 21, 31, 38.

<sup>290</sup> OTP, Final Report, para. 2.

pattern of such incidents with respect to supervisory failures”.<sup>291</sup> The Prosecutor further noted, “the Office would normally select for prosecution those situated at the highest rather than the lowest echelons of responsibility”.<sup>292</sup> Following this guidance, the Prosecutor should have analysed the identified incidents of superior/command responsibility of higher-ups in the chain-of-command and considered “whether the national proceedings encompass the same persons for the same conduct as that which forms the basis of the proceedings before the Court”.<sup>293</sup>

204. However, this guidance found no application in the Prosecutor’s analysis. In fact, there is no analysis of individual responsibility of superiors/commanders regarding any of the cases identified by the Prosecutor, including at least seven cases of unlawful killing; at least fifty-four cases of torture, inhuman/cruel treatment or outrages upon personal dignity; war crimes of other forms of sexual violence against at least seven individuals, and one case of rape.

205. Lastly, in the section titled “Systemic Issues”,<sup>294</sup> the OTP’s Final Report provides a short description of the efforts of the IHAT in addressing “systemic issues”. Yet it is inconclusive as to whether domestic authorities investigated the same person(s) that would be the object of the Prosecutor’s investigation or whether “tangible, concrete and progressive investigative steps are being undertaken” in this regard.<sup>295</sup>

206. In addition, the UK Government’s position that the person(s) who oversaw and delivered the training of interrogators “would not meet the requirements of article 28”<sup>296</sup> does not address the question of whether these individuals were ever investigated. For instance, the fact that the UK legal framework differentiates between the responsibility of the Commanding Officer of a sub-unit and that of the Commanding Officer of a unit in terms of superior responsibility<sup>297</sup> seems to be overly restrictive and in contrast with the notion

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<sup>291</sup> OTP, Final Report, para. 369.

<sup>292</sup> OTP, Final Report, para. 253.

<sup>293</sup> OTP, Policy Paper on Preliminary Examination, para. 47 referring to *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", ICC-01/09-01/11-307, 30 August 2011, paras. 1, 47; *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", ICC-01/09-02/11-274, 30 August 2011, paras. 1, 46.

<sup>294</sup> OTP, Final Report, paras. 230-270.

<sup>295</sup> Without entering in any particular detail, the OTP, Final Report simply reports that the explanation of UK authorities: (1) did not find evidence of responsibility of “high commanding officers” or of systematic or systemic criminal behaviour (2) indicates that the SPLI is carrying out two command responsibility cases. See OTP, Final Report, paras. 243, 245, 247.

<sup>296</sup> OTP, Final Report, para. 238.

<sup>297</sup> OTP, Final Report, para. 238.

of “effective control”, as developed by ICC jurisprudence.<sup>298</sup> This consideration should have prompted the Prosecutor to carefully scrutinize the conduct of the specific group of persons that were covered by the investigations undertaken at the domestic level.

207. Ultimately, in a situation as such, where UK authorities have refused to provide access to the case files for the purposes of assessment, the opening of an investigation would have enabled the OTP to exercise full investigative powers and receive access to the files. This would have allowed the OTP to conduct a thorough analysis based on existing evidence as opposed to uncorroborated statements by the authorities.

#### **a) Potential cases of superior/command responsibility**

208. **Baha Mousa** - The case of Baha Mousa, among the Incidents identified by the Prosecutor, is another striking example where superior responsibility should have been properly analysed. Baha Mousa was hooded for almost twenty-four hours during his thirty-six hours of custody and suffered at least ninety-three injuries at the hands of UK soldiers prior to his death. As already mentioned under Error 2, one of the perpetrators, Corporal Payne, was convicted by court martial of “inhumane treatment” to the deeply inadequate sentence of twelve months imprisonment.

209. Major Michael Peebles, an intelligence officer who at the time of Baha Mousa’s killing was instructing soldiers at the camp,<sup>299</sup> was charged with “negligently performing a duty” by court martial, but in 2007 he was cleared of those charges “due to a lack of evidence”.

210. When analysing the findings of the Baha Mousa Inquiry, the OTP mentions the court martial proceedings against physical perpetrators and mid-ranking supervisors<sup>300</sup>, but fails to examine the publicly available testimonies from Peebles himself and soldier Aktash, who was deployed at the same location as Peebles, which provides solid evidence for the purposes of assessment of complementarity under Article 20(3).<sup>301</sup>

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<sup>298</sup> See, for instance, *Prosecutor v. Bemba*, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343, 21 March 2016, paras. 179 (“Article 28(a) not only covers the immediate commanders of the forces that committed the crimes, but is applicable to superiors at every level, irrespective of their rank, from commanders at the highest level to leaders with only a few men under their command”), 185 (“Article 28 contains no requirement that a commander have sole or exclusive authority and control over the forces who committed the crimes. [...] [T]he effective control of one commander does not necessarily exclude effective control being exercised by another commander. [...] [M]ultiple superiors can be held concurrently responsible for actions of their subordinates”).

<sup>299</sup> He had the responsibility for deciding whether detainees should be released, handed over to the police, or sent to the Theatre Internment Facility (TIF) for interrogation; Baha Mousa Inquiry, Report: Volume I, 8 September 2011, paras. 2.913, available at: [The Baha Mousa Public Inquiry Report HC 1452-I \(publishing.service.gov.uk\)](http://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/101441/the-baha-mousa-public-inquiry-report-hc-1452-i.pdf).

<sup>300</sup> OTP, Final Report, para. 228.

<sup>301</sup> For example, Peebles admitted to the inquiry that he had instructed the soldiers guarding Baha Mousa to start using conditioning techniques and stress positions which he said he believed, at the time, were lawful, “standard practice” and “part of the process“. Peebles admitted that “he accepted that he did not issue any order postponing conditioning, in order to prevent the Detainees from being put in stress positions”. This is despite the fact that in

211. The Baha Mousa Inquiry categorizes the acts of Peebles as “serious misconduct”<sup>302</sup> and states that Peebles should bear responsibility for some incidents investigated by the Inquiry.<sup>303</sup> The Inquiry pointed out that Peebles should have put a stop to “conditioning” many hours earlier given the heat and squalid conditions the victims were subjected to.<sup>304</sup> After tactical questioning, Peebles failed to tell Corporal Payne and the guards to cease conditioning.<sup>305</sup> Indeed, blame for the use of stress positions, hooding, sleep deprivation and noise to aid tactical questioning for prolonged periods was attributed to Peebles.<sup>306</sup>
212. The facts available in the Baha Mousa Inquiry are more than sufficient to warrant an investigation of Major Peebles for international criminal liability under the doctrine of superior responsibility. Given the unequivocal language of the conclusion of the Baha Mousa Inquiry – that there was “no vestige of justification”<sup>307</sup> for Peebles not ordering the cessation of hooding and stress positions long before Baha Mousa’s death – it is surprising that the inadequate acquittal of Peebles was not considered by the Prosecutor as a potential case for the assessment of complementarity under Article 20(3). Given that the ongoing investigation of the “Whiskey 54” case concerning Baha Mousa involves allegations regarding superior/command responsibility,<sup>308</sup> the Prosecutor should have requested access to the case files to assess whether the investigation addressed the responsibility of Major Peebles, and if so, how far this investigation had been conducted adequately.
213. **Camp Breadbasket** - Among the identified incidents that passed the “gravity test” and should have been analysed in terms of superior/command responsibility, there are crimes committed at the Camp Breadbasket in May 2003: war crimes of torture and inhuman/cruel

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his interviews, Peebles acknowledged that video footage Corporal Payne abusing detainees was ‘pretty harsh’, but seemed ‘reluctant’ to say whether it was ‘over the top’. Furthermore, soldier Aktash, who was deployed at the same location, testified to the inquiry that prior to the killing of Baha Mousa he had overheard Peebles answer, “Yes, but don’t go as far as before” in response to a question over the radio as to whether the “shock of capture” should be “commenced”. Aktash added that “after hearing this snatch of radio traffic he spoke to Lt Euan Crawford, then present in the Operations Room, and Peebles. Peebles explained that on a previous occasion the men had gone a bit too far and there were injuries to prisoners.” Aktash believed that Peebles allowed mistreatment of detainees to happen. In a separate instance of mistreatment, Peebles accepted that he was ‘cognisant’ of an order to put a detainee next to a generator, which was very loud and hot, and that it ‘might’ have been he who gave the order. He justified it on the basis that it was not a punishment, but a ‘naughty schoolboy routine’; Baha Mousa Inquiry, Report: Volume I, 8 September 2011, paras. 2.407-2.417, 2.741, 2.878, 2.896, 2.914, 2.916, 2.921, available at: [The Baha Mouse Public Inquiry Report HC 1452-I \(publishing.service.gov.uk\)](http://publishing.service.gov.uk/The-Baha-Mousa-Public-Inquiry-Report-Volume-I).

<sup>302</sup> Baha Mousa Inquiry, Report: Volume I, 8 September 2011, paras. 2.903, available at: [The Baha Mouse Public Inquiry Report HC 1452-I \(publishing.service.gov.uk\)](http://publishing.service.gov.uk/The-Baha-Mousa-Public-Inquiry-Report-Volume-I)

<sup>303</sup> Baha Mousa Inquiry, Report: Volume I, 8 September 2011, paras. 2.956, available at: [The Baha Mouse Public Inquiry Report HC 1452-I \(publishing.service.gov.uk\)](http://publishing.service.gov.uk/The-Baha-Mousa-Public-Inquiry-Report-Volume-I)

<sup>304</sup> Ibid., para 2.966.

<sup>305</sup> Ibid., para 2.966

<sup>306</sup> Ibid., para. 2.1322.

<sup>307</sup> Ibid., para. 2.966.

<sup>308</sup> OTP, Final Report, para. 191.



treatment; outrages upon personal dignity against at least fifty-four persons in their custody, as well as war crimes of rape and/or other forms of sexual violence against seven victims.<sup>309</sup>

214. The findings in paras. 88-92 of the OTP's Final Report reveal relevant information on the role of the superior/command officials in the committed crimes. First, multiple military personnel knew about the alleged abuses (including the alleged sexual crimes) and failed in their duty to report them.<sup>310</sup> Second, one of the military personnel testified that the crimes reflected the policy of the higher-ups towards the Iraqi population.<sup>311</sup> Finally, Major Dan Taylor, the officer in charge of Camp Breadbasket – who had ordered his subordinates to round up the victims and “work them hard” – never faced charges, despite the fact that the Army's Chief of Staff acknowledged that this order represented a breach of the Geneva Conventions.<sup>312</sup> The court martial regarding crimes in Camp Breadbasket resulted in the conviction of only four perpetrators for service disciplinary offences, and not war crimes, while rape and other forms of sexual violence were not addressed at all.
215. These findings indicate that national proceedings were not aimed at investigating the conduct of superior/command officials and disregarded the available evidence. Therefore, national proceedings did not encompass the same persons for the same conduct in a manner as the ICC Prosecutor's investigation would. While it remains unclear whether the investigation of the “Whiskey 57” case concerning sexual abuse, supposedly at Camp Breadbasket,<sup>313</sup> addresses the responsibility of Major Dan Taylor, the Prosecutor failed to request access to the case files on Major Dan Taylor and therefore failed to conduct an analysis into his individual responsibility.
216. **Camp Stephen** - Among the identified incidents that passed the “gravity test” and should have been analysed in terms of superior/command responsibility are the unlawful killings of Rhadi Nama and Abdul Jabbar Mossa Ali, who died shortly after being detained by soldiers of the Black Watch Regiment at Camp Stephen, Basra, in May 2003.<sup>314</sup> After several lines of inquiries, the investigators closed the case known as “Whiskey 1”, as it did

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<sup>309</sup> OTP, Final Report, para. 2.

<sup>310</sup> OTP, Final Report, para. 91.

<sup>311</sup> OTP, Final Report, para. 91.

<sup>312</sup> OTP, Final Report, para. 92. See also ECCHR's submission to the OTP, July 2019, p. 35-36, available at: [https://www.ecchr.eu/fileadmin/Juristische\\_Dokumente/ECCHR\\_Follow\\_Up\\_Communication\\_to\\_OTP\\_War\\_crimes\\_by\\_UK\\_forces\\_in\\_Iraq\\_July\\_2019.pdf](https://www.ecchr.eu/fileadmin/Juristische_Dokumente/ECCHR_Follow_Up_Communication_to_OTP_War_crimes_by_UK_forces_in_Iraq_July_2019.pdf)

<sup>313</sup> OTP, Final Report, para. 191 in conjunction with para. 88. The report does not directly disclose the content of the case “Whiskey 22”.

<sup>314</sup> OTP, Final Report, para. 78, 207-212.

not meet the “full code test” and there was no realistic prospect of a conviction on the referred charges, including command responsibility.<sup>315</sup>

217. Notably, the closure of the case in October 2020 followed a thorough investigation by BBC/Times alleging that IHAT investigators had found overwhelming evidence that the deaths of two Iraqi civilians, Rhadi Nama and Abdul Jabbar Mossa Ali, were caused by their treatment by UK soldiers at Camp Stephen in May 2003. The OTP’s Final Report describes these allegations as follows:

Reportedly, more than ten army personnel gave evidence to IHAT that detainees had been subjected to physical abuse. [...] Former IHAT investigators reported to the BBC/Times that they had found evidence that the Black Watch’s (then) commanding officer, Lieutenant-Colonel Michael Riddell-Webster, had been warned about mistreatment of detainees by the regiment’s chaplain before the deaths of Rhadi Nama and Abdul Jabbar Mossa Ali [...]. Reportedly, IHAT investigators had recommended that senior officers and soldiers at Camp Stephen should be prosecuted, but no charges ever eventuated.<sup>316</sup> [...] IHAT investigators who sought permission to interview senior officers at Camp Stephen were blocked from doing so by the Ministry of Defence.<sup>317</sup>

218. In light of these highly relevant revelations, the Prosecutor conducted an investigation and came to the conclusion that the Black Watch’s then-commanding officer, Lieutenant-Colonel Michael Riddell-Webster, indeed had been warned about the risk that Rhadi Nama and Abdul Jabbar Mossa Ali might be subjected to ill-treatment: “the officer reportedly spoke to his subordinate officers before the deaths and told them that if there was any ill-treatment of detainees, it had to stop. After Rhadi Nama’s death, the officer went to Camp Stephen in person to speak with the subordinate officers and ensure there was no further ill-treatment. Despite this, Abdul Jabbar Mossa Ali also died thereafter”.<sup>318</sup>

219. Despite these findings, the Prosecutor accepted the explanation of the former Director of IHAT that “there was insufficient evidence to proceed” and that the former IHAT investigator was wrong in his assessment regarding irregularities in the investigation regarding Camp Stephen because he “did not have an overview of the entire case”.<sup>319</sup>

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<sup>315</sup> OTP, Final Report, para. 207-212.

<sup>316</sup> OTP, Final Report, para. 374-375.

<sup>317</sup> Furthermore, the OTP’s Final Report found that “the BBC/Times showed former Director of Public Prosecutions, Ken Macdonald, a copy of the evidence they had obtained on the deaths of Rhadi Nama and Abdul Jabbar Mossa Ali at Camp Stephen. Macdonald said that it was “staggering” that no one had been charged based on that evidence. In a piece published by the Sunday Times, Macdonald asserted that the evidence suggests that “many crimes witnessed” at Camp Stephen “were not spontaneous, but sanctioned at senior levels”. He further asserted that the geography of Camp Stephen and its layout rendered it “inconceivable that officers were unaware of the appalling excesses that occurred daily in plain sight” - OTP, Final Report, para. 377-378.

<sup>318</sup> OTP, Final Report, para. 390.

<sup>319</sup> OTP, Final Report, para. 392-393.

220. It remains unclear as to why the OTP considered these explanations as plausible and, in a way, clarified the grave concerns uncovered by BBC/Times' and the Prosecutor's own investigation. By relying on these explanations instead of requesting the UK authorities to provide access to the case files in order to conduct an adequate analysis of superior responsibility of Lieutenant-Colonel Michael Riddell-Webster, the Prosecutor wrongfully disregarded a significant case for the assessment of complementarity under Article 20(3).
221. Even though the MoD appointed a special inspector, Baroness Hallett, to investigate the deaths in custody of Radhi Nama and Mousa Ali in November 2020,<sup>320</sup> it remains unclear what steps the investigation will result in. Another case that Baroness Hallett was involved in as a part of the Iraq Fatality Investigations was the death of Sayeed Radhi Shabram. The investigation resulted in £100,000 compensation to Shabram's family. Yet no criminal prosecution was initiated.<sup>321</sup>
222. **Sabah Al-Sadoon** - The case of Mr. Al-Sadoon, which we already introduced and is further detailed below in the following Section III, provides additional evidence which is also relevant for the assessment of complementarity, in particular with regard to the superior responsibility of Lieutenant-Colonel Michael Riddell-Webster, the Black Watch's former commanding officer.

### **Section III. New Facts and Evidence**

223. The case of Mr. Al-Sadoon provides additional evidence and facts that need to be taken into serious consideration by the Prosecutor. Together with the legal and factual errors as analyzed under Section II, these new facts and evidence warrant the reopening of the preliminary examination in the Situation at stake.
224. Mr. Al-Sadoon was arrested and subjected to a ten-hour-long torture by Black Watch soldiers in Basra on 22 June 2003, as he testified to IHAT investigators. He was subjected to gruesome torture of beating, kicking, and other torture methods. As a result of his torture, he endured multiple injuries, including broken bones and bleeding in his kidney. The alleged mistreatment Mr. Al-Sadoon suffered occurred one month after the deaths of Rhadi Nama and Abdul Jabbar Mossa Ali, who died shortly after being detained by soldiers of the Black Watch Regiment in May 2003. The mistreatment Mr. Al-Sadoon was subjected

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<sup>320</sup> Confirmation of Appointment and Terms of Reference, Ministry of Defense, available at: <https://www.gov.uk/government/publications/investigation-into-the-death-of-radhi-nama-and-mousa-ali/confirmation-of-appointment-and-terms-of-reference-accessible-version>

<sup>321</sup> OTP, Final Report, para. 222.

to can amount to war crimes of torture and inhuman/cruel treatment within the meaning of Article 8(2)(a)(ii) or Article 8(2)(c)(i)), and attempted wilful killing within the meaning of Article 8(2)(a)(i) of the Statute.

225. Under the “reasonable basis to believe” standard, this evidence is a further indication of Lieutenant-Colonel Michael Riddell-Webster’s possible superior responsibility within the meaning of Article 28 (a) (i) and (ii) of the Statute, and herewith should serve as new evidence for the purposes of assessment under Article 15(6) of the Statute.

226. When Mr. Al-Sadoon was arrested and tortured, Riddell-Webster was Commanding Officer of the Black Watch Regiment between 6 April and 27 June 2003.<sup>322</sup> Moreover, under the “reasonable basis to believe” standard, the information available indicates that Riddell-Webster should have known that his forces were committing or were about to commit such crimes. Specifically, Riddell-Webster testified that he had daily meetings with his subordinates.<sup>323</sup> Under his command and before the arrest/torture of Mr. Al-Sadoon, two persons died while detained by the Black Watch Regiment, namely Rhadi Nama on 8 May 2003 and Abdul Jabbar Mossa Ali on 13 May 2003.<sup>324</sup> As established by the Prosecutor, Riddell-Webster had been warned about possible ill-treatment of persons at Camp Stephen before the deaths of Rhadi Nama and Abdul Jabbar Mossa Ali.<sup>325</sup> Read together, these circumstances point to a reasonable inference that Riddell-Webster should have known that his subordinates mistreated or were about to mistreat Mr. Al-Sadoon. However, there is no indication that Riddell-Webster took all necessary and reasonable measures to prevent or repress their commission or to submit the matter (torture of Mr. Al-Sadoon) to the competent authorities.<sup>326</sup>

227. Mr. Al-Sadoon did not receive any update or information from IHAT investigators until his case was closed in September 2020. The case of Mr. Al-Sadoon (Official number 1230) is not listed among the cases marked as completed by IHAT in their final report.

228. On 3 September 2020, SPLI informed Mr. Al-Sadoon about the closure of his case in a letter stating that “after conducting enquiries it has been determined that there is no realistic

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<sup>322</sup> Witness Statement of Michael Lawrence Riddell-Webster, In the matter of an investigation into the death of Mr. Ahmed Jab bar Kareem Ali, MOD-83-0000327-A, 14 September 2016, para.1, available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/686650/witnessstatementofmichaelriddell-webster\\_mod-08-0000327-z\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/686650/witnessstatementofmichaelriddell-webster_mod-08-0000327-z_.pdf).

<sup>323</sup> Witness Statement of Michael Lawrence Riddell-Webster, In the matter of an investigation into the death of Mr. Ahmed Jab bar Kareem Ali, MOD-83-0000327-A, 14 September 2016, para.10, available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/686650/witnessstatementofmichaelriddell-webster\\_mod-08-0000327-z\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/686650/witnessstatementofmichaelriddell-webster_mod-08-0000327-z_.pdf).

<sup>324</sup> OTP, Final Report, para. 78.

<sup>325</sup> OTP, Final Report, para. 390.

<sup>326</sup> For more details, see OTP, Final Report, para. 390.

prospect of any criminal charges being brought against any member of the UK Armed Forces and that it would not be proportionate to conduct further enquiries”. The letter further added that SPLI had forwarded the material it gathered to the MoD so that it could decide whether to initiate any further (non-criminal) inquiry surrounding his complaint. The MoD publishes summaries of their decisions on the website. However, the last update on the website was undertaken on 18 June 2019.<sup>327</sup> In 2021, Mr. Al-Sadoon sent a letter of inquiry to the MoD, which remains unanswered so far.

229. The case of Mr. Al-Sadoon was not part of the submission by ECCHR/PIL in 2014. Neither is his case among the cases identified by the Prosecutor as meeting the threshold of gravity for the purposes of complementarity assessment. Therefore, the facts of Mr. Al-Sadoon’s case must be considered as new information and new facts for the purposes of the assessment under Article 15(6) of the Statute.

230. Mr. Al-Sadoon’s case, as well as the lack of investigatory steps by the UK authorities, provides further evidence for the Request to be accepted. Mr. Al-Sadoon’s case illustrates the deficient investigatory procedure established by the UK authorities, as elaborated upon under the Error 3 of Section 2, which resulted in Mr. Al-Sadoon being deprived of justice.

231. To the extent that the circumstances surrounding Mr. Al-Sadoon’s case were not part of the Prosecutor’s subject-matter assessment, and by implication the complementarity determination, this evidence should be considered “new facts or evidence” pursuant to Article 15(6) of the Statute.

#### **Section IV. Request for Relief**

232. The Petitioners submit that the Prosecutor erred in closing the preliminary examination of the Situation in Iraq/UK without seeking an authorization to open an investigation.

233. The Petitioners are well aware that, unlike situations triggered by a State Party or UN Security Council referrals under Articles 13(a)-(b) and 14 of the Statute, with regard to preliminary examinations initiated by the Prosecutor *proprio motu* the Statute does not provide for autonomous power of the victims or information providers to seek judicial review of the Prosecutor’s decision not to open an investigation.

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<sup>327</sup> Decisions on Ministry of Defence investigations into alleged breaches of Article 2 and Article 3 of the European Convention on Human Rights (ECHR) during military operations in Iraq, available at: <https://www.gov.uk/guidance/mod-decisions-on-alleged-human-rights-breaches-during-operation-telic>.

234. In this context, the victims' demands for justice for the crimes they suffered rest solely on the Prosecutor's assessment of the criteria set forth in Article 53(1)(a)-(c) of the Statute.<sup>328</sup> A decision not to pursue an investigation pursuant to Article 15(6) of the Statute may irremediably frustrate such demands. Accordingly, such scrutiny is to be carried out with the utmost consideration of victims' rights and on a solid legal basis, as already elaborated in the Introduction to the present Request.
235. Moreover, similar to States Parties and Security Council, victims and information-providers maintain an interest in the outcome of the preliminary examinations carried out by the Prosecutor. In the present case, Sabah Noori Salih Al-Sadoon is a victim of grave alleged war crimes committed by members of the UK armed forces in Iraq, while ECCHR is the author of the Article 15 communication, which triggered the reopening of the preliminary examination in 2014.<sup>329</sup> However, as noted above, Sabah Noori Salih Al-Sadoon and ECCHR do not have the ability to directly request the Pre-Trial Chamber to review the decision by the Prosecutor not to initiate an investigation.
236. It is on this basis that the Petitioners ask the Prosecutor to either proceed with a *proprio motu* reconsideration of the decision to close the preliminary examination in the Situation of Iraq/UK due to factual and legal errors in the Final Report and/or based on new facts and evidence, or to trigger a ruling from the Pre-Trial Chamber under Article 19(3) of the Statute to review the the final decision to close the preliminary examination.

**a) Reasons supporting a *proprio motu* Reconsideration**

237. The Petitioners respectfully submit that the Prosecutor should proceed with a *proprio motu* reconsideration of the decision to close the preliminary examination in the situation of Iraq/UK due to factual and legal errors in the Final Report and/or based on new facts and evidence. Indeed, nothing in the Statute prevents the Prosecutor from *proprio motu* reconsidering this decision. Decisions to close a preliminary examination are not final in nature, as stated in Article 15(6) of the Statute.
238. As the Petitioners thoroughly elaborated, several errors led the OTP to the decision not to seek an authorization to initiate an investigation pursuant to Article 15(3) of the Statute. In the present Request, the Petitioners advanced serious legal and factual errors made by the Prosecutor that warrant the opposite of her conclusion.

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<sup>328</sup> Via Rule 48 of the Rules of Procedure and Evidence.

<sup>329</sup> OTP, Final Report, paras. 15-16.

239. Additionally, given that the circumstances surrounding Mr. Al-Sadoon’s case were not part of the Prosecutor’s subject matter assessment, and by implication the complementarity assessment, they should be considered “new facts or evidence” pursuant to Article 15(6) of the Statute.

240. While not binding in the present case, the OTP can rely on the standard for reconsideration under Article 53(3)(a) of the Statute as guidance to reconsider their decision.<sup>330</sup> According to the Appeals Chamber, reconsideration under Article 53(3)(a) may be based on legal and factual errors.<sup>331</sup> In line with the standard articulated above, the arguments advanced by the Petitioners reflect both legal and factual errors<sup>332</sup> by the Prosecutor, which individually and as a whole have affected the Prosecutor’s determination on complementarity, and the OTP’s ultimate decision of 9 December 2020 not to seek the authorization to open an investigation in the Situation in Iraq/UK.

#### **b) Reasons supporting a proceeding under Article 19(3) of the Statute**

241. In the Situation in the State of Palestine, Pre-Trial Chamber I observed that the Prosecutor may seek a ruling from the Court pursuant to Article 19(3) of the Statute during the preliminary examination phase.<sup>333</sup> This applies to both questions of jurisdiction and *admissibility*.<sup>334</sup> The conclusion of Pre Trial Chamber I is consistent with the view of authoritative commentators,<sup>335</sup> as well as the Prosecutor’s position.<sup>336</sup>

242. In the present case, the Petitioners highlighted numerous errors in the Prosecutor’s complementarity analysis, including applying an overly high and incorrect evidentiary standard for proving the UK Government’s general shielding of perpetrators as well as failing to address the role of the legislative and executive branches in obstructing domestic

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<sup>330</sup> *Situation on The Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Appeals Chamber, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I’s “Decision on the ‘Application for Judicial Review by the Government of the Union of the Comoros’”, 2 September 2019, ICC-01/13-98 (“*Comoros* 2019 Appeals Judgment”), paras. 78-82.

<sup>331</sup> *Comoros* 2019 Appeals Judgment, paras. 78, 80, 82.

<sup>332</sup> See Errors 1-8.

<sup>333</sup> *Situation in the State of Palestine*, Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine’, 5 February 2021, ICC-01/18-143 (“*Palestine* Article 19(3) Decision”), paras. 71-86.

<sup>334</sup> *Palestine* Article 19(3) Decision, para. 75.

<sup>335</sup> C. K. Hall, D. D. Ntanda Nsereko and M. J. Ventura, “Article 19 Challenges to the jurisdiction of the Court or the admissibility of a case” in O. Triffterer and K. Ambos (eds.) *The Rome Statute of the International Criminal Court. A Commentary*, 3<sup>rd</sup> Edition, 2016, p. 875 referred to in *Palestine* Article 19(3) Decision, para. 73. See also L. Trigeaud, “Article 19. Contestation de la Compétence de la Cour ou de la Recevabilité d’une Affaire” in J. Fernandez and X. Pacreau (eds.) *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article* (2019), p. 930, referred to in *Palestine*, Article 19(3) Decision, para. 75.

<sup>336</sup> Application under Regulation 46(3), Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, 9 April 2018, ICC-RoC46(3)-01/18-1, paras. 52-54.

prosecutions.<sup>337</sup> The significance of these errors cannot be overemphasized, given that this is the first time the Court has addressed similar questions concerning “willingness” by the State.<sup>338</sup>

243. The analysis of complementarity is crucial to assess whether an investigation should be open in this situation.<sup>339</sup> Even if the new Prosecutor, Mr. Karim Khan were to decide not to reconsider *proprio motu* the decision to close the preliminary examination in the present Situation taken by his predecessor, there are nonetheless compelling reasons to seek a ruling under Article 19(3) of the Statute.
244. In the first place, the OTP’s Final Report, the Prosecutor recognized that the determination of the genuineness of the UK proceedings surfaced novel legal issues which the Court has never addressed.<sup>340</sup> The errors of law and fact that were advanced above by the Petitioners cover these aspects of the Prosecutor’s complementarity assessment. A judicial review of the OTP’s Final Report would clarify in particular the proper interpretation of “unwillingness” under Article 17(2)(a)-(c) of the Statute and provide guidance on how a preliminary examination meets the criteria for an investigation to be opened.
245. Secondly, the absence of clear precedent concerning “unwillingness” renders the Prosecutor’s conclusion to close the preliminary examination unsafe and potentially prejudicial to the rights of the victims. Pursuant to Article 21(3) of the Statute, the right of the victims to have an effective and adequate investigation also attaches to preliminary examinations activities.<sup>341</sup>
246. Thirdly, in the absence of clarification by the Court, the Prosecutor’s approach will crystallise and affect future proceedings, having a significant impact on the Court’s jurisdiction. In particular, the Prosecutor’s approach in this case has significant implications in instances where domestic proceedings are carried out alongside the ICC proceedings, which are relevant in almost all proceedings. As noted by the OTP Informal Expert Paper on the principle of complementarity, without the qualifier of genuineness, *any* national proceeding would preclude the opening of an ICC investigation, even if the national proceeding(s) were fraudulent or hopelessly inadequate.<sup>342</sup> The Prosecutor’s

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<sup>337</sup> See, e.g., Errors 1, 5.

<sup>338</sup> OTP, Final Report, para. 293.

<sup>339</sup> In the present case, there is no information reflecting substantial reasons to believe that an investigation in the present situation would not serve the interests of justice under Article 53(1)(c) of the Statute.

<sup>340</sup> OTP, Final Report, paras. 149, 293, 302.

<sup>341</sup> A. Schüller and C. Meloni, “Quality Control in the Preliminary Examination of Civil Society Submissions”, in Morten Bergsmo and Carsten Stahn (eds.) *Quality Control in Preliminary Examination: Volume 2* (2018), at pp. 535-536.

<sup>342</sup> OTP, Informal Expert Paper, p. 8, para. 22.



approach in the present case risks having the effect of diluting the complementarity assessment, particularly where States have initiated proceedings in relation to the same alleged crimes under ICC preliminary examination or investigation, such as in the situations in Colombia or in the State of Palestine.

247. Finally, seeking a ruling under Article 19(3) of the Statute would be consistent with the principles of public scrutiny of prosecutorial activity and with the detailed nature of the OTP's Final Report, which transparently acknowledges the gaps of ICC practice in relation to the complementarity assessment and the challenges this entails in the concrete application of Article 17(2) of the Statute. The level of detail of the OTP's Final Report reflects an intention to trigger broader engagement of victims and stakeholders. Against this background, it would defeat the very purpose of the OTP's intense public engagement on the issue to preclude victims and stakeholders from triggering a review of the Prosecutor's decision in this regard.

## **Section V. Conclusion**

248. The Petitioners submit that individually and as a whole the various legal and factual errors as well as the new evidence demonstrate that a mistaken complementarity assessment has vitiated the decision not to open an investigation on the Iraq/UK Situation.

249. First, the Prosecutor adopted an incorrect standard of proof to assess whether the UK was unwilling genuinely to carry out the investigation and prosecution *vis-à-vis* the identified war crimes.

250. Second, the Prosecutor failed to give principles of due process full consideration when interpreting "unwillingness" under Article 17(2) of the Statute.

251. Third, the Prosecutor adopted an incorrect interpretation of "intent to shield" and was wrong to conclude that the proceedings were not undertaken "for the purpose of shielding the person concerned from criminal responsibility" within the meaning of Article 17(2)(a).

252. Fourth, the Prosecutor failed to take into account crucial initial delays in determining that there had not been an "unjustified delay in the proceedings" within the meaning of Article 17(2)(b) of the Statute.

253. Fifth, the Prosecutor was wrong not to conclude that the proceedings were not conducted independently or impartially within the meaning of Article 17(2)(c) of the Statute.

254. Sixth, the Prosecutor failed to consider the totality of factors stemming from actions of UK authorities in assessing "unwillingness" under Article 17(2) of the Statute, and thus

was wrong to conclude that the UK was not unwilling genuinely to carry out the investigation and prosecution *vis-à-vis* the identified war crimes.

255. Seventh, the Prosecutor erred in conducting a complementarity assessment in abstract, without basing it on incidents and potential cases arising from the preliminary examination, pursuant to Article 53(1)(b) of the Statute and Rule 48 RPE.
256. Eighth, the Prosecutor failed to consider the lack of domestic steps relating to superior/command responsibility and failed to identify potential cases in this respect.
257. Additionally, given that the circumstances surrounding Mr. Al-Sadoon's case were not part of the Prosecutor's subject-matter assessment, and by implication the complementarity determination, they should be considered "new facts or evidence" pursuant to Article 15(6) of the Statute.
258. Each of these legal or factual errors are serious enough to render the Prosecutor's conclusion erroneous and unsafe. Therefore, the Petitioners request that the Prosecutor undertakes a *proprio motu* reconsideration of the final decision, or in the alternative, seek a ruling from the Court under Article 19(3).
259. Based on the above, the Petitioners request that the Prosecutor:
  - a. Reconsider the decision not to seek authorization to initiate an investigation pursuant to Article 15(3) of the Statute on the basis of a revised complementarity assessment; and/or new evidence pursuant to Article 15(6) or, in the alternative,
  - b. Seek a ruling from the Court on the question of admissibility of the potential cases arising from the present situation pursuant to Article 19(3) of the Statute.