



**THE UK MILITARY IN IRAQ:
EFFORTS AND PROSPECT FOR ACCOUNTABILITY
FOR INTERNATIONAL CRIMES ALLEGATIONS?**

A Discussion Paper

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The bulk of the data upon which our research and analysis is based is open-source. This has been supplemented with select informal consultations with officials, lawyers, advisors in specialist organisations and others, as well as with formal information requests to government departments and others. We are thankful to all the individuals and organisations that supplied us with primary data, provided us with explanations to clarify certain data in our possession or provided context to missing or unavailable data. Due to the sensitivity of the subject matter, many persons with whom we have been in contact have provided analysis or background information on a personal, informal or confidential basis. We are very grateful for those inputs which have enriched significantly our findings.

We are convinced that open and frank dialogue and exchange of views is essential to research, particularly on questions affecting public policy. Unfortunately, however, only a small proportion of relevant United Kingdom (UK) Government agencies with whom we have sought to be in contact have agreed to supply information or respond to requests for clarification. Official requests for information under the Freedom of Information Act have not yet led to substantive responses. We are concerned by the impact this may have on transparency and the public’s right to information. Despite these challenges, we have sought to explain and take into account governmental and other perspectives that have featured in public statements and reports. We are grateful to those agencies and institutions which agreed to answer certain questions in writing or meet with our research team to provide clarification, in particular the offices of the Iraq Fatality Investigations.

This research is a collaboration between Dr Carla Ferstman at the University of Essex School of Law and Dr Thomas Obel Hansen at the Transitional Justice Institute at Ulster University. They are joined in the research by Dr Noora Arajärvi who serves as the Project’s research officer. While we are grateful for all the inputs and comments we have received as set out above, all errors and omissions are ours alone. In addition, the research was written in our personal academic capacities and does not necessarily reflect the views of the academic institutions with whom we are affiliated.

I. INTRODUCTION

The focus of our research

This research has been carried out in order to contribute to public debate about the adequacy of the official response relating to allegations of serious abuses perpetrated by the UK military during the Iraq war and occupation, also taking into account the ongoing International Criminal Court (ICC) preliminary examination concerning these allegations.

The research has focused on reviewing and assessing the steps taken domestically to promote (or obstruct) accountability and developing recommendations regarding any accountability deficits concerning alleged abuses perpetrated by the UK military in Iraq. In our research we have considered the decision-making processes and rationales given for keeping open or closing domestic criminal investigations and not pursuing prosecutions, as well as decisions to transfer matters to inquiry processes in lieu of criminal processes; procedural and regulatory aspects relating to the few military investigations and related procedures which remain open and their progress; rulings of civil courts with oversight over certain matters relevant to the investigations; any lacunae in UK legislation as well as issues relating to the UK Government's cooperation with the preliminary examination of the ICC Prosecutor and analysis of the ICC Prosecutor's policy statements and practice regarding the concepts of complementarity, where relevant to the Iraq preliminary examination.

Methodology

Our main methodology has been to seek out, compile and analyse publicly available information through official sources, and to supplement this with a select number of informal and formal interviews. Thus, we have reviewed information on official websites, analysed parliamentary reports, court judgments and filings, media statements, academic studies, advocacy and policy reports. In addition, we have sought to fill certain gaps in information with Freedom of Information Act requests. We took all possible steps to consider the issues from an array of perspectives and angles and to obtain the widest possible array of viewpoints.

Partly as a result of the difficulties we encountered in accessing certain information that in our estimation should have been in the public domain, we have decided to feature the right to information as one of the substantive focuses of our discussion paper (See Section III.I(a)).

As part of our research, we submitted evidence to the UK Defence Committee's Statute of limitations – veterans' protection inquiry.¹ The scope of that inquiry is explained as a 'Committee investigation into the question of how former service personnel can be protected from the spectre of investigation and re-investigation for events that happened many years, and often decades, earlier.'²

The background to our research – the need to engage with and challenge public narratives

The research was carried out under the spectre of two separate but sometimes intertwined public narratives relating to the Iraq claims and the legal processes set up to address them, which have developed and become ingrained over time.

¹ Our Written Evidence is available on the website of the Committee: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/defence-committee/statute-of-limitations-veterans-protection/written/87024.pdf>

² As set out on the Inquiry front page: <https://www.parliament.uk/business/committees/committees-a-z/commons-select/defence-committee/inquiries/parliament-2017/inquiry13/>

One – the perspective that despite the significant physical and other evidence of serious abuses and wrongful deaths including civil judgments finding the Ministry of Defence (MoD) liable for harm caused to Iraqis as well as several out of court settlements, a large proportion of criminal investigations have been shut down and as a result there has been a lack of criminal accountability for acts of extreme seriousness which would under normal circumstances result in conviction and punishment.

Two – the perspective that soldiers have been subjected to an inordinate degree of scrutiny – the ‘spectre of investigation and reinvestigation for events that happened many years, and often decades, earlier’³ which has been unfair to them and has negatively impacted morale.

These two perspectives operate alongside each other – they are not necessarily contradictory, despite the strict and oversimplified logic of polarity that has often been applied to them.

Ideally, criminal investigations and prosecutions should bring about closure – closure to the victims of abuses and their families, who have a right to understand what happened and why, and the right to expect that criminal behaviour will result in appropriate sanctions; closure to the suspects, who should receive fair treatment in any investigations and prosecutions and be either found guilty where the evidence so supports or cleared of wrongdoing where the evidence is wanting. In addition, criminal investigations and prosecutions are vital tools to maintain proper oversight and control over persons who, because of their positions, functions and access to weapons, exert significant power over the local population. Criminal procedure is an important check on the potential for abuse of power. It helps reinforce the rule of law, reminds individuals of the limits of acceptable behaviour and makes clear that there will be consequences when those limits are overstepped. The purposes of criminal investigations were described by Lord Bingham in *R (Amin) v Secretary of State for the Home Department*: ‘to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their loved ones may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.’⁴

However, this justification for criminal investigations and prosecutions becomes murky, if investigations are delayed, weak, inefficient or ineffective, or – as will sometimes happen – where the investigations are *pro forma*, instituted half-heartedly in order to comply with a perceived rule or directive as opposed to with the clear intention to arrive at the truth. In such situations, both the victims of abuse, and the individuals accused of the abuse, lose out – neither get real closure. The victims will not see the perpetrators prosecuted and the accused person is never fully cleared of suspicion. The individuals – whether they are private persons or officials of the State - may evade prosecution, but, and as we have seen with our research, the prospect of investigation and re-investigation is ever-present.

This murkiness has been considered by judges and others, and is mainly perceived through the lens of two legal principles:

The first is the principle of double jeopardy, also known as *ne bis in idem* – the notion that an individual who is accused of a crime should not be tried more than once on the same (or similar)

³ UK Parliament Defence Committee, ‘Statute of limitations – veterans protection inquiry’, ‘scope of the inquiry’, <https://www.parliament.uk/business/committees/committees-a-z/commons-select/defence-committee/inquiries/parliament-2017/inquiry13/>.

⁴ *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, para. 31.

charges and on the same facts. This principle is in place to promote finality and is understood to be part of the requirements of a fair trial. In English law as in some other jurisdictions, the principle is subject to exceptions.⁵ For instance, with certain serious offences, a new trial can take place even after an acquittal when new, compelling, reliable and substantial evidence comes to light.⁶ Human rights bodies have recognised more broadly that double jeopardy will also not apply to dismissals or acquittals where the decisions were taken to shield a person from criminal responsibility. As the Inter-American Court of Human Rights has held:

With regard to the *ne bis in idem* principle, although it is acknowledged as a human right ... it is not an absolute right, and therefore, is not applicable where: i) the intervention of the court that heard the case and decided to dismiss it or to acquit a person responsible for violating human rights or international law, was intended to shield the accused party from criminal responsibility; ii) the proceedings were not conducted independently or impartially in accordance with due procedural guarantees, or iii) there was no real intent to bring those responsible to justice. A judgment rendered in the foregoing circumstances produces an “apparent” or “fraudulent” *res judicata* case. On the other hand, the Court believes that if there appear new facts or evidence that make it possible to ascertain the identity of those responsible for human rights violations or for crimes against humanity, investigations can be reopened, even if the case ended in an acquittal with the authority of a final judgment, since the dictates of justice, the rights of the victims, and the spirit and the wording of the American Convention supersedes the protection of the *ne bis in idem* principle.⁷

The inapplicability of the rule on double jeopardy to shield a person from multiple proceedings when the initial proceeding was carried out in such a way to shield a person from criminal responsibility also follows from Article 20 of the ICC Statute and is also incorporated into the UK’s ICC Statute.⁸

Whether a new trial will take place will depend on the overall circumstances, and a range of factors will be taken into account in arriving at such a decision. That is the law with respect to completed prosecutions; the related question as to whether investigations which are closed without any decision taken to prosecute can be re-opened, has also been answered in the affirmative. The double jeopardy rule does not normally extend to investigations which have not resulted in a final acquittal or conviction.⁹ It only applies to proceedings which achieve finality – investigations which are aborted do not tend to fall within that category. Furthermore, even if there is a final proceeding resulting in an acquittal, as indicated, proceedings can exceptionally be re-opened.

The second is the principle of the effectiveness of investigations. Human rights law requires that investigations are effective, meaning that they are sufficiently robust and independent so as to be capable of leading to a prosecution. This is an obligation of means and not of result. As set out by the European Court of Human Rights (ECtHR), ‘[n]ot every investigation should necessarily be successful or come to a conclusion which coincides with the claimant’s account of events; however, it should in principle be capable of leading to the establishment of the facts of the case and, if the allegations prove to be true, to the identification and punishment of those responsible.’¹⁰ An investigation which falls short of those requirements will not comply with a State’s procedural

⁵ The introduction of exceptions in English law is summarised in, Sally Broadbridge, ‘Double Jeopardy’, House of Commons Library, Home Affairs Section, Research Briefing SN/HA/1082, 27 January 2009, available at: <http://researchbriefings.files.parliament.uk/documents/SN01082/SN01082.pdf>.

⁶ Part 10 of the Criminal Justice Act 2003. Art 4 of Protocol No. 7 of the European Convention on Human Rights similarly provides for an exception to the rule on double jeopardy: ‘2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.’ See also, UN Human Rights Committee, General Comment No. 32 on Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc CCPR/C/GC/32, 23 August 2007, para. 56.

⁷ *Almonacid-Arellano et al v Chile*, Inter-American Court of Human Rights Series C No. 154, 26 September 2006, para.154

⁸ ICC Statute, Art. 20(3).

⁹ See, e.g., a series of judgments of the European Court of Human Rights: *Marguš v Croatia* (Grand Chamber), Appl. no. 4455/10, 27 May 2014, para. 120; *Sundqvist v Finland*, Appl. no. 75602/01, 22 November 2005; *Smirnova v Russia*, Appl. no. 46133/99 48183/99, 3 October 2002; *Harutyunyan v Armenia*, Appl. no. 34334/04, 7 December 2006.

¹⁰ *Mikheyev v Russia*, ECtHR, Appl. no. 77617/01, 26 January 2006, para. 107.

obligations under human rights law, particularly for right to life and torture and ill-treatment cases.¹¹ The remedy for this failing in certain circumstances *may* be to require a new investigation, and/or in some cases, to re-institute criminal proceedings.¹²

Thus, when considering the public narratives about the lack of criminal prosecutions amounting to impunity, or the spectre of ‘investigation and re-investigation’ resulting in a denial of the rights of suspects, it is important to consider the requirements and limits of the underlying legal framework of double jeopardy on the one hand, and the obligation for investigations to be effective, on the other. We have found this to be a helpful way in which to consider and analyse the facts and possible solutions for gaps or structural weaknesses where these have become apparent through the research.

A summary of our preliminary findings

The preliminary findings are set out at the end of this discussion paper.

In summary, our discussion paper raises a number of concerns about the adequacy of criminal investigations into alleged soldier abuses. Investigations in Iraq have been negatively impacted by the initial governmental position that investigations into conduct in Iraq did not need to comply with the procedural obligations under Articles 2 (right to life) and 3 (prohibition of torture and ill-treatment) of the European Convention on Human Rights (ECHR or European Convention),¹³ coupled with ‘a more or less obvious closing of ranks,’¹⁴ and the failure of the chain of command to address that closure. As noted in the court martial proceedings relating to the death of Baha Mousa:

...the beatings and ill-treatment of the detainees continued and intensified. And yet none of those soldiers has been charged with any offence simply because there is no evidence against them as a result of a more or less obvious closing of ranks.¹⁵

Commenting on this, Sir William Gage, who chaired the Baha Mousa inquiry, noted:

I hoped that it would be possible to breach the ‘more or less obvious closing of ranks’ referred to by the Judge Advocate (Mr Justice McKinnon) at the court martial. This closing of ranks has often been referred to in the press as the ‘wall of silence’. To some extent this was successful and the evidence of some soldiers went a great deal further than hitherto. However, I have concluded that a number, not all, continued to hide behind oft-repeated phrases such as ‘I can’t remember’ or ‘I did not see anything untoward’. This was, to say the least, regrettable and cannot be excused or justified.¹⁶

These failings impeded certain evidence from coming to light and the passage of time appears to have entrenched those initial evidentiary gaps. Our understanding is that later the Iraq Historic Allegations Team (IHAT) investigations, despite good intentions, were further hampered in their efforts to arrive at the truth by the passage of time since the initial allegations, as well as the perception that the investigations were simply being kept open to give a good showing to the ICC that genuine investigations were underway (and consequently that there was no jurisdiction for the ICC to proceed to a full investigation). Furthermore, our research indicates that there has been real or perceived interference in the decisions to close investigations, though the extent to which this occurred is a subject requiring further investigation.

¹¹ Ibid.

¹² See, e.g., *Brecknell v United Kingdom*, ECtHR, Appl. no. 32457/04, 27 November 2008.

¹³ *Al-Skeini and Others v The United Kingdom* (Grand Chamber), ECtHR, Appl. no. 55721/07, 7 July 2011.

¹⁴ Court martial proceedings concerning the death of Baha Mousa, McKinnon J, Transcript, 13 February 2007, CM 79/22/19-23.

¹⁵ Ibid.

¹⁶ Sir William Gage, ‘The Report of the Baha Mousa Inquiry’, Vol I, HC 1452–I, 8 September 2011, para. 2.4.

Soldiers have been negatively impacted by the continuing uncertainty caused by the lack of finality of investigations. However, this has as much to do with the inadequacy of initial investigations (as determined by the courts) as it has been by the perseverance of victims of the alleged abuse and their counsel, whose efforts to seek out the truth have largely failed. The Government's position should have been neutral and detached in order to preserve and foster the independence of the process of investigations and prosecutions. Instead, Government officials have focused at least in part on avoiding the opening of an ICC investigation and, at least some of them, on blaming lawyers – and by extension the victims of alleged abuses – for pursuing legal claims. As we argue, the Government should focus on increasing the capacity for efficient, transparent and effective investigations that comply with its procedural obligations under the European Convention and which are capable of weeding out quickly any spurious or clearly unfounded claims, and strengthening the capacity for robust, timely and transparent investigations where credible allegations are raised. Naturally there will be a mixture of quality in allegations made as there is with all criminal complaints. Strengthening investigative capacity and independence, and facilitating focus on broader systemic issues would be the best way to give effect to the rights of victims, protect soldiers from legal uncertainty and ensure full compliance with the UK's legal obligations.

In general, our view is that the ICC preliminary examination and the prospect for it to develop into a full investigation has played a useful, albeit limited, role in maintaining pressure on UK authorities to keep open investigations for which there has been otherwise little political appetite. However, this has not significantly impacted the quality or scope of legal processes in the UK, nor has it been an impetus for domestic prosecutions – and with the passage of time the prospect for prosecutions continues to diminish.¹⁷

Wider significance of findings

One aspect of our research has been focused on assessing the extent to which lessons have been learned and policies adopted and implemented to safeguard against the prospect of future abuses. This part of our inquiry was judged as particularly important, given the resurfacing of the banned '5 techniques' from Northern Ireland onto the battlefield in Iraq.¹⁸

In the context of addressing Iraq allegations, a Systemic Issues Working Group (SIWG) was set up by the MoD specifically to address such 'wider' issues. However, information on the follow-up of the findings of this group remains opaque. As the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence recently concluded with respect to efforts to address the legacy of the 'Troubles' in Northern Ireland, and which we see as a conclusion also applicable to the legacy of abuses in Iraq: 'It is critical, however, to direct attention to instruments that may capture the more "structural" dimension of violations and abuses, so that victims and society receive answers on whether the violations were part of a pattern reflecting a policy under the responsibility of institutions with identifiable chains of command. This issue is critical to establishing the trustworthiness of institutions.'¹⁹ The UN Special Rapporteur further noted: '[t]he structural and systemic dimensions of violence and rights violations and abuses should be examined. A

¹⁷ See generally, Thomas Obel Hansen, 'Accountability for British War Crimes in Iraq? Examining the Nexus Between International and National Justice Responses', in Morten Bergsmo and Carsten Stahn (ed), *Quality Control in Preliminary Examination: Reviewing Impact, Policies and Practices*, Vol 1 (Brussels: Torkal Opsahl Academic EPublisher, 2018) 399; Human Rights Watch, 'Pressure Point: The ICC's Impact on National Justice: Lessons from Colombia, Georgia, Guinea, and the United Kingdom', May 2018, pp. 116-152.

¹⁸ The Rt Hon Sir William Gage, 'The Report of the Baha Mousa Inquiry', Vol II, HC 1452-II, 8 September 2011, who refers throughout to a 'gradual loss of the doctrine' prohibiting the use of the 'five techniques' – involving hooding, white noise, food and drink deprivation, painful stress positions and sleep deprivation.

¹⁹ UN General Assembly, 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his mission to the United Kingdom of Great Britain and Northern Ireland' UN Doc. A/HRC/34/62/Add.1, 17 November 2016, para. 111.

comprehensive understanding of the past requires instruments that do not treat it merely as a series of unconnected events.’²⁰

Beyond the need to take all steps to forestall the prospect of recurrence of serious abuses, in our view, it would have been appropriate for the SIWG to have considered the adequacy of investigations and prosecutions, particularly after the finding of the ECtHR regarding the extraterritorial application of the UK’s human rights obligations to conflict contexts, at least in respect of individuals who are within their authority or effective control.²¹ This does not appear to have been a focus of the group or any other Government agency or body,²² nor does it appear to have been the focus of Parliament. Instead, the SIWG has focused mainly on identifying training needs and areas for changes in operational policies and the Central Government and the Parliament’s Defence Committee has largely focused on limiting the prospect for future civil suits and criminal investigations, including by exploring the possibility for derogations to the European Convention in future instances in which military are deployed overseas as well as adopting a statute of limitations covering conflict-related crimes of the past.

²⁰ Ibid, para. 125.

²¹ *Al-Skeini and Others v The United Kingdom* (Grand Chamber), ECtHR, Appl. no. 55721/07, 7 July 2011.

²² Indeed, as recently as November 2017, the UK Government asserted that ‘The UKG continues to take the view that the international human rights obligations under the UN treaties ratified by the UK, including CAT, are primarily territorial and do not have extraterritorial effect.’ See, UN Committee Against Torture, ‘Sixth periodic report submitted by the United Kingdom of Great Britain and Northern Ireland under Article 19 of the Convention pursuant to the optional reporting procedure, due in 2017’, UN Doc CAT/C/GBR/6, 29 January 2018, para. 9.

II. THE CONTEXT

II.1 INTRODUCTION

Numerous sources suggest that British forces taking part in the Iraq war and occupation were responsible for serious abuse of Iraqi detainees, unlawful deaths and other crimes. Less than two months after the US and UK invaded Iraq, Amnesty International began investigating claims that Iraqi prisoners of war were tortured by British and US troops. The organisation found that a ‘substantial portion’ of the detainees interviewed had been mistreated.²³ Later that year, an inquiry into the death of Baha Mousa, an Iraqi civilian in British custody, found that his death was caused by factors which included stress positions and lack of food and water.²⁴ In January 2004, Britain’s Armed Forces Minister Adam Ingram rejected calls for an independent inquiry, asserting that the complaints procedures in place were adequate. However, just a few months later, in May 2004, allegations of human rights abuses were again made against British troops in the aftermath of the Battle of Danny Boy in Basra.²⁵ These allegations were examined in the five-year Al-Sweady Inquiry, which concluded in 2014 and ultimately determined that the vast majority of the allegations were untrue. In his conclusions, Sir Thayne Forbes writes that ‘the vast majority of the allegations made against the British military, which this Inquiry was required to investigate (including, without exception, all the most serious allegations), were wholly and entirely without merit or justification....’; he also notes however that ‘certain aspects of the way in which the nine Iraqi detainees, with whom this Inquiry is primarily concerned, were treated by the British military, during the time they were in British custody during 2004, amounted to actual or possible ill-treatment.’²⁶ A report by the International Committee of the Red Cross (ICRC) expressed concerns about the treatment of detainees. The report which details serious violations of international humanitarian law in UK-controlled areas was later leaked.²⁷ NGOs and charities operating in southern Iraq, the area controlled by British troops following the 2003 invasion, continued to investigate and document allegations of mistreatment of detainees, including torture and deaths of inmates. The allegations were then passed on to Public Interest Lawyers (PIL), who eventually took on the cases. This led to strong responses by the political leadership in the UK, including calls for suspending the *Human Rights Act 1998*.²⁸

On 10 January 2014, the European Center for Constitutional and Human Rights (ECCHR) and PIL submitted a 250-page communication to the ICC Prosecutor detailing alleged abuses perpetrated by British troops in Iraq from 2003-2008 and asking the Prosecutor to conduct a preliminary examination and to ‘submit a request for authorization of an investigation to the Pre-Trial Chamber under Article 15(3) of the ICC Statute, in order to initiate a full investigation with all duties and powers provided by Article 54 of the ICC Statute.’²⁹

The ICC Prosecutor is currently conducting a preliminary examination of the situation in Iraq. In November 2017 the Prosecutor concluded that there is a reasonable basis to believe crimes within the Court’s jurisdiction were committed and the Office is therefore now focusing on whether potential cases would be admissible under the ICC’s complementarity regime.³⁰ A range of investigative

²³ Amnesty International, *Iraq: One Year on the Human Rights Situation Remains Dire* (2004), AI Index: MDE 14/006/2004, 10-11. See also, BBC News: ‘Timeline: Alleged abuses in Iraq’, 10 May 2004, available at http://news.bbc.co.uk/1/hi/uk_politics/3701887.stm.

²⁴ The Rt Hon Sir William Gage, *The Report of the Baha Mousa Inquiry*, Volume 1, HC 1452-I (2011), para. 2.1043.

²⁵ Jonathan Owen, ‘Exclusive: Devastating dossier on “abuse” by UK forces in Iraq goes to International Criminal Court’, *The Independent*, 11 January 2014.

²⁶ Sir Thayne Forbes, ‘The Report of the Al Sweady Inquiry’, HC 818-I, 17 December 2014, paras. 5.196-5.199.

²⁷ House of Commons, Hansard, ‘Iraq: Security/Mistreatment Allegations’ Vol 421, 10 May 2004; the leaked report: <https://cryptome.org/icrc-report.htm>.

²⁸ See e.g. Tim Ross, ‘Defence Secretary Michael Fallon: Suspend the Human Rights Act to Protect Our Troops’, *The Telegraph*, 26 December 2015.

²⁹ ECCHR and PIL, Dossier, ‘The Responsibility of Officials of the United Kingdom for War Crimes Involving Systematic Detainee Abuse in Iraq from 2003-2008’, 10 January 2014.

³⁰ Office of the Prosecutor (OTP), ‘Report on preliminary examination activities 2017’, 4 December 2017, paras. 193-197

processes have been put in place in the UK, the most renowned being the IHAT, which until recently was tasked with criminal investigations of the Iraq claims. However, due to pressures and claims of inefficiency, IHAT was terminated in 2017, leaving a smaller team of service police investigators – the Service Police Legacy Investigation (SPLI) – to complete the investigation of remaining cases. Despite thousands of claims, criminal accountability has been very minimal. In the notorious incident of the death of Baha Mousa, only one British soldier was convicted after having pled guilty to the crime of inhuman treatment; he was sentenced to twelve months imprisonment. Other processes are in place, including civil claims and inquisitorial inquiries for certain fatality cases. Taken together, however, as noted by Human Rights Watch, these legal processes come across as ‘piecemeal, ad-hoc, and almost exclusively driven by the efforts of individual victims, their families, and legal representatives.’³¹

II.2 LEGAL PROCESSES IN THE UK

A variety of legal processes have been established to address alleged abuses committed during the Iraq war and occupation, but they do so in quite different ways:

- Criminal investigations, initially Royal Military Police (RMP) investigations which led to a limited number of courts martial, and more recently the investigations undertaken by the IHAT and later the SPLI, in conjunction with the Service Prosecution Authority (SPA).
- A coroner type process, known as the Iraq Fatality Investigations (IFI).
- Civil suits, public inquiries and judicial reviews aimed at satisfying obligations under the ECHR (and the implementing legislation in the UK, the *Human Rights Act 1998*) to investigate violations of Articles 2 and 3 of the European Convention. Additionally, the military has undertaken its own investigations, leading to the publication of the Aitken Report (2008) and the Purdy Report (2010).³²

a) Criminal investigations and trials in the UK

Courts martial

From the invasion of Iraq in March 2003 to January 2008, 229 allegations of criminal activity were investigated by the RMP. Of these, 20 were taken forward, some of them simply summarily dealt within the chain of command and some by court martial. Four courts martial led to the conviction of altogether seven soldiers, with sentences ranging from a severe reprimand to dismissal with disgrace and imprisonment.³³ One case was referred to the Crown Prosecution Service, leading to a not guilty verdict, and a further 12 allegations were investigated but did not result in prosecution.³⁴

In the first court martial in Osnabrück, Germany, in January 2005, three soldiers were accused of abuse of Iraqi civilians at Camp Breadbasket near Basra on 15 May 2003.³⁵ The defence lawyers submitted that the soldiers had been following superior orders and they had been ordered to bring the

³¹ Human Rights Watch, ‘Pressure Point: The ICC’s Impact on National Justice: Lessons from Colombia, Georgia, Guinea, and the United Kingdom’, May 2018, p. 120.

³² Brigadier Aitken, ‘The Aitken report: an investigation into cases of deliberate abuse and unlawful killing in Iraq in 2003 and 2004’, 25 January 2008; Brigadier Purdy OBE, ‘Army Inspectorate Review into the implementation of Policy, Training and Conduct of Detainee Handling’, 15 July 2010.

³³ Rachel Kerr, *The Military on Trial: The British Army in Iraq* (Wolf Legal Publishers: Nijmegen, 2009).

³⁴ MoD SIWG, ‘Systemic Issues Identified from Service Police and Other Investigations into Military Operations Overseas: August 2018,’ para. 7.1.6.

³⁵ *R v Kenyon, Larkin and Cooley* (Osnabruck, Germany), cited in Rachel Kerr, ‘The UK in Iraq and the ICC: Judicial Intervention, Positive Complementarity and the Politics of International Criminal Justice’, in Morten Bergsmo and Carsten Stahn (eds), *Quality Control in Preliminary Examination: Volume 1*, (Torkel Opsahl Academic EPublisher: Brussels, 2018) 451, pp. 487-488: Appendix 2.

suspects into the camp with the intention of ‘working them hard.’³⁶ The defendants felt the chain of command had broken down and that this resulted in them becoming scapegoats, whereas the Army Prosecution Authority admitted that the order that was given was illegal under the Geneva Conventions but claimed that that the soldiers went beyond the orders given with their behaviour.³⁷ The soldiers were given sentences from 140 days to two years.³⁸

In the case of the killing by shooting of Hassan Abbas Said (later: IHAT 177 and investigation by IFI), the commanding officer determined that this was not an unlawful killing, deciding against court martial. The Army Prosecuting Authority, however, passed the case to the Attorney-General who then referred it to the Crown Prosecution Service. In April 2005, the Central Criminal Court found the soldier not guilty of murder and discharged the case after the Crown Prosecution Service offered no evidence. At a later point, during an IFI investigation to establish the facts of the situation that led to the death of Hassan Said, Sir George Newman noted that ‘the soldier who fired the shot refused to co-operate’ but that ‘it was not in the interests of the Investigation to take steps to compel him to provide evidence.’³⁹

In another case, Nadheem Abdullah died from blows to his head, inflicted by one or more soldiers on 11 May 2003.⁴⁰ In November 2005, a court martial dismissed the charges against seven soldiers who had been charged with murder, despite the finding that there might be sufficient evidence to show that Abdullah had died as a result of an assault carried out by the seven defendants.⁴¹ The evidence was too weak or vague to secure a conviction and the prosecution was unable to identify any single defendant who applied unlawful force, leading to a verdict of ‘no case to answer’. Nonetheless, the court martial noted that the RMP investigation was inadequate and suffered from serious omissions.⁴² In a subsequent IFI investigation into the death of Mr Abdullah, both factual and procedural issues were raised. Sir George Newman indicated that he found no evidence, and it was not suggested to him at any stage, that the degree of force which was used to cause the fatal injury was necessary to secure Mr Abdullah’s compliance with the demands of the soldiers. Sir George Newman found that the treatment was more violent than was required in the circumstances.⁴³ He made exhaustive inquiries to find the transcript of the court martial but concluded that it had probably, in all its previous forms, including as a disk, been destroyed or thrown away. There were certain hard copy extracts, including the Judge Advocate’s ruling at the closing of the prosecution’s case, which demonstrated that there had been major issues of credibility, particularly in connection with some of the Iraqi witnesses. Importantly, it transpired that the soldiers had not given oral evidence and thus had not been examined and cross-examined during the court martial.⁴⁴

The drowning of Ahmed Jabbar Kareem Ali in the British custody in May 2003 (later: IHAT 85 and investigation by IFI) led to the indictment of four soldiers for manslaughter. A court martial found that the use of ‘wetting’, in the form of submerging looters in canals and rivers to encourage them to

³⁶ Audrey Gillan, ‘Seniors’ behaviour infected’ soldiers’, *The Guardian*, 11 February 2005.

³⁷ REDRESS, ‘UK Army in Iraq: Time to Come Clean on Civilian Torture’, October 2007, pp. 9-11.

³⁸ Audrey Gillan, ‘Army cleared major who gave illegal order’, *The Guardian*, 22 January 2005.

³⁹ IFI, ‘Consolidated Report into the Death of Nadheem Abdullah and the Death of Hassan Abbas Said’, Cm 9023, March 2015, para. 3.15.

⁴⁰ *Ibid.*

⁴¹ *R v Evans and others* (Colchester, UK), cited in Rachel Kerr, ‘The UK in Iraq and the ICC: Judicial Intervention, Positive Complementarity and the Politics of International Criminal Justice’ in Morten Bergsmo and Carsten Stahn (eds), *Quality Control in Preliminary Examination: Volume 1*, (Torkel Opsahl Academic EPublisher: Brussels, 2018) 451, pp. 487-488: Appendix 2.

⁴² See ECCHR and PIL, Dossier, ‘The Responsibility of Officials of the United Kingdom for War Crimes Involving Systematic Detainee Abuse in Iraq from 2003-2008’, 10 January 2014, pp. 222-223.

⁴³ IFI, ‘Consolidated Report into the Death of Nadheem Abdullah and the Death of Hassan Abbas Said’, Cm 9023, March 2015, para. 11.12.

⁴⁴ *Ibid.*, para. 3.4.

go home, constituted minimum use of force in the circumstances.⁴⁵ Four soldiers were found not guilty of murder by court martial in May and June 2006.⁴⁶ In a subsequent investigation, Sir George Newman noted: ‘it is not presently clear to what extent details of the state of affairs up to the 8th of May 2003 were communicated to London. This in turn raises questions about the extent of the knowledge of the chain of military command in Iraq as to what was happening on the ground.’⁴⁷

Most controversial was the case concerning Baha Mousa (later: IHAT 153).⁴⁸ On 15 September 2003, Baha Da’oud Salim Mousa, an Iraqi civilian, died whilst in British custody at a military base in Southern Iraq. In the days and hours leading up to his death, Mousa was subjected to numerous assaults, resulting in 93 separate injuries. Seven soldiers were charged (*R v Payne*) with manslaughter and inhuman treatment, including commanding officer, Colonel Jorge Mendonca. Only one was convicted, corporal Donald Payne, who pled guilty to inhumane treatment as a war crime and was sentenced to 12-months imprisonment.⁴⁹ To date, this is the only conviction of a British soldier under the ICC Act.⁵⁰ To the extent public information is available, the case is still under consideration by either the SPLI or the Director of Service Prosecutions (DSP).⁵¹

Accordingly, altogether four courts martial relating to the situation in Iraq have been completed, leading to the conviction of seven soldiers, out of which only one concerned a war crime. Most defendants have been acquitted or the cases discontinued by the Advocate General.

IHAT and SPLI

IHAT was established by the MoD in March 2010 to investigate allegations of criminal conduct by British military personnel during operations in Iraq between 2003 and 2009, as a way to comply with Britain’s obligations to undertake independent investigations under human rights law.⁵² This followed an application for judicial review filed in February 2010 in the case *Ali Zaki Mousa v Secretary of State for Defence (No. 1)*, which challenged the ongoing RMP investigations in light of the Government’s obligations under Articles 2 and 3 of the ECHR, and demanded a single public inquiry into all instances of killing and mistreatment in Iraq.⁵³ The High Court rejected the application brought by PIL, opting instead to endorse the Government’s ‘wait and see’ approach – with the possibility of reassessing the need to establish an inquiry after the conclusion of the IHAT’s work and the work of the other public inquiries.⁵⁴ The Court ordered certain changes to IHAT procedures in order to increase independence, because of the inclusion of RMP personnel in the investigation of matters where the RMP had been involved in Iraq, and in March 2012, the MoD announced that RMP personnel were to be removed from IHAT and replaced by members of the Royal Navy Police.

⁴⁵ *R v Selman, McCleary and McGing* (Colchester, UK), cited in Rachel Kerr, ‘The UK in Iraq and the ICC: Judicial Intervention, Positive Complementarity and the Politics of International Criminal Justice’ in Morten Bergsmo and Carsten Stahn (eds), *Quality Control in Preliminary Examination: Volume 1*, (Torkel Opsahl Academic EPublisher: Brussels, 2018) 451, pp. 487-488: Appendix 2.

⁴⁶ See Paolina Massidda, ‘Criminal Responsibility of International Military Missions and Personnel’ in Marco Odello and Ryszard Piotrowicz (eds), *International Military Missions and International Law*, (Brill, The Netherlands, 2011) 211, pp. 224-225.

⁴⁷ IFI, ‘Consolidated Report into the Death of Ahmed Jabbar Kareem Ali’, Cm 9324, September 2016, para. 7.10.

⁴⁸ See e.g. Nathan Rasiyah, ‘The Court-martial of Corporal Payne and Others and the Future Landscape of International Criminal Justice’, (2009) 7 (1) *Journal of International Criminal Justice* 177.

⁴⁹ *R v Payne* (Bulford, UK), cited in Rachel Kerr, ‘The UK in Iraq and the ICC: Judicial Intervention, Positive Complementarity and the Politics of International Criminal Justice’ in Morten Bergsmo and Carsten Stahn (eds), *Quality Control in Preliminary Examination: Volume 1*, (Torkel Opsahl Academic EPublisher: Brussels, 2018) 451, pp. 487-488: Appendix 2. In the same chapter, for discussion, see pp. 462-463.

⁵⁰ Rasiyah (2009), supra n. 48, p. 177.

⁵¹ Information based on the absence of the case number (IHAT 153) from the published list of concluded investigations, and the statement by Mark Warwick to the High Court on 19 September 2016, stating that this case has been allocated to full investigation and remains ongoing. A Freedom of Information request on the status of the case is pending with the Ministry of Defence, for updated information, see https://www.whatdotheyknow.com/request/list_of_cases_under_dsp_review.

⁵² MoD blog, ‘IHAT: What it is and what it does’, 13 January 2016, available at <https://modmedia.blog.gov.uk/2016/01/13/ihat-what-it-is-and-what-it-does/>. ‘The IHAT is to investigate the specific cases which the United Kingdom now has an obligation to investigate following the judgment in July 2011 of the European Court of Human Rights in the case of *Al-Skeini*.’ Set out in the terms of reference of IHAT on 1 May 2012, and quoted in *R (Ali Zaki Mousa) v Secretary of State for Defence (No. 2)* [2013] EWHC 1412 (Admin) (24 May 2013) para. 26.

⁵³ [2011] EWCA Civ 1334.

⁵⁴ *Ibid.*

Lawyers pursued another judicial review, challenging the independence of the reformed IHAT in *R (Ali Zaki Mousa and others) v Secretary of State for Defence (No. 2)*, which led to a High Court ruling on 25 May 2013 that brought about further reforms of IHAT.⁵⁵ Among other issues, the High Court decided that a High Court Judge (Mr Justice Leggatt) should be appointed to oversee the judicial processes relating to abuse by British troops in Iraq. Justice Leggatt, who held a number of case management hearings between 2014-2017, has provided oversight of the timeliness and effectiveness of all parts of the process.⁵⁶

Decisions by the ECtHR have impacted the way British courts have approached questions relating to IHAT's independence – and hence the various re-structuring of IHAT over the years. Notably, in *Al-Skeini v United Kingdom*, the ECtHR held that human rights law applies to the Iraq war and occupation in situations where UK forces were an occupying force or when they had custody over an individual and that the RMP investigations were not sufficiently independent to satisfy the standards in the Convention.⁵⁷

IHAT was set up prior to the ICC's re-opening of the preliminary examination in 2014 and was initially not intended to function as a mechanism of complementarity. However, once the ICC Prosecutor re-opened the preliminary examination, IHAT was portrayed by British authorities as a process that ought to lead the ICC Prosecutor to terminate the preliminary examination with reference to the complementarity principle. For example, statements by the MoD noted that 'without IHAT's vital work, our Armed Forces would be open to referral to the International Criminal Court – something this Government is determined to avoid.'⁵⁸

IHAT's mandate was to review allegations, investigate those deemed credible, and decide which cases should then be referred to the SPA for further consideration for prosecution. Rather than considering systemic issues – and potentially investigating those responsible – IHAT appears to have almost exclusively focused on the conduct of individual soldiers.

In order to assist IHAT, the SPA established a stand-alone Iraq Historic Allegations Prosecution Team (IHAPT).⁵⁹ The SPA, headed by the DSP, works independently from the military chain of command.⁶⁰ IHAT was required to consult the DSP before a final decision was made that there was insufficient evidence to bring a charge, and it was the SPA that had the responsibility for the final decision as to whether there was a case for prosecution.⁶¹ The DSP would only direct a prosecution to be brought if it was satisfied that there was a realistic prospect of conviction and that it is in the public and service interest to bring charges.⁶²

At its peak, IHAT had 147 staff, 127 of whom were employed via the recruitment firm Red Snapper.⁶³ There appears to be five processes or 'pillars' to the work of IHAT, as set out in the Calvert-Smith

⁵⁵ *R (Ali Zaki Mousa and others) v SSD (No. 2)* [2013] EWHC 1412. The details are discussed in Jonathan Horowitz and Steve Kostas, 'Case Watch: British Judges Raise Standards for Investigating Wartime Abuses', in *Open Society Foundations*, 29 May 2013, available at <https://www.opensocietyfoundations.org/voices/und-59>.

⁵⁶ Council of Europe, Secretariat of the Committee of Ministers, 'Communication from the United Kingdom Concerning the Case of Al-Skeini and Others Against United Kingdom (Application No. 55721/07)', 4 October 2016, DH-DD (2016)1072, <https://rm.coe.int/16806aa9bf>, 55.

⁵⁷ *Al-Skeini and Others v The United Kingdom* (Grand Chamber), ECtHR, Appl. no. 55721/07, 7 July 2011.

⁵⁸ Ministry of Defence blog, 'IHAT: What it is and what it does', 13 January 2016.

⁵⁹ See Sir David Calvert-Smith, 'Review of the Iraq Historic Allegations Team', 15 September 2016, para. 4.8.

⁶⁰ For a description of the SPA's mandate, see its website available at: http://spa.independent.gov.uk/test/about_us/index.htm. See further 'The Armed Forces Act 2006' (Chapter 52), 8 November 2006, which addresses issues relating to jurisdiction, offences, modes of liability, investigation and prosecution.

⁶¹ *R (Ali Zaki Mousa and others) v SSD (No. 2)* [2013] EWHC 1412, para. 36.

⁶² *Al-Saadoon and others v Secretary of State for Defence* [2015] EWHC 1769 (Admin) (26 June 2015), para. 21.

⁶³ House of Commons Defence Committee, 'Who guards the guardians? MoD support for former and serving personnel' HC 109, 10 February 2017 paras. 45-46. According to MoD response to a Freedom of Information Request in February 2016, IHAT employed 105 contractors through Red Snapper: <https://www.whatdotheyknow.com/request/313269/response/774368/attach/html/2/20160223%20FOI201601402%20Response.doc.html>.

Report: initial assessment and recording, pre-investigation, allocation of resources, investigation, post-investigation.⁶⁴ However, an official communication by the UK to the Council of Europe provides different information on the stages of the IHAT investigation. It notes that there were eight stages: initial information gathering; assessment of the information gathered; joint consideration with the SPA, investigation (including victims and witnesses) through to completion and referral for a prosecution decision or disciplinary action.⁶⁵

IHAT investigations have cost well above £50 million.⁶⁶ IHAT had an initial caseload of 165 cases, but between November 2014 and April 2015 it received a large number of additional cases, which led to the extension of its mandate first to December 2016 and then to December 2019.⁶⁷ Based on the official figures, IHAT received a total of around 3400 allegations of potentially criminal behaviour. Out of these, 2470 originated from the work of PIL and 718 from Leigh Day.⁶⁸ However, Leigh Day subsequently clarified that they only directly referred 15 cases to IHAT, the remainder being referred by the MoD in response to civil claims brought by the law firm.⁶⁹ At its closure, IHAT reported that it had decided not to pursue 1,668 allegations after an initial assessment, while 40 still had to undergo preliminary evaluation; 34 investigations, involving 108 victims, were ongoing; and that it had closed, or was closing, 700 allegations.⁷⁰

IHAT has referred only two cases to the SPA for prosecution, but the SPA decided not to proceed with either of them. Two cases were referred to the Royal Air Force for further investigation but have been since closed, and one soldier was referred to his commanding officer for disciplinary action and was fined £3,000.⁷¹ Accordingly, IHAT investigations have not led to a single prosecution for war crimes in Iraq.

With reference to continuing concerns as to the length and expense of the process, in April 2016, the Attorney General directed Sir David Calvert-Smith, a retired judge and former director of public prosecutions, to conduct an independent review of IHAT. Sir Calvert-Smith's final report, published in September 2016, concluded that IHAT would be able to finish its work by the end of 2019 if the report's recommendations were implemented and if there was 'no further surge of new applications.'⁷²

In February 2017, the Common's Defence Committee, which had for long been critical of IHAT's performance, published a report, *Who guards the guardians?*, which concluded that IHAT had proven 'unfit for purpose', and had become a 'seemingly unstoppable self-perpetuating machine, deaf to the concerns of the armed forces, blind to their needs, and profligate with its own resources.'⁷³ The Defence Committee recommended that IHAT be closed, in part because it was unconvinced that the ICC would 'commit to investigate such a large case load which is based, to a great extent on discredited evidence.'⁷⁴ In April 2017, then Defence Secretary Michael Fallon announced that he had decided that IHAT would close in June 2017 and the service police should complete investigations

⁶⁴ Sir David Calvert-Smith, 'Review of the Iraq Historic Allegations Team', 15 September 2016, paras. 6.1-11.9.

⁶⁵ Communication from the United Kingdom concerning the case of Al Skeini against the UK (Application No. 55721/07), 21 March 2016, 4

⁶⁶ Lianna Brinded, 'British Iraq War veterans may be prosecuted for war crimes', in *Business Insider*, 2 January 2016.

⁶⁷ Sir David Calvert-Smith, 'Review of the Iraq Historic Allegations Team', 15 September 2016, para. 3.5.

⁶⁸ House of Commons Defence Committee, 'Who guards the guardians? MoD support for former and serving personnel' HC 109, 10 February 2017, para. 18.

⁶⁹ Ibid; Further supplementary written evidence submitted by Leigh Day to the Defence Sub-Committee, 20 January 2017.

⁷⁰ Iraq Historic Allegations Team, 'The Iraq Historic Allegations Team (IHAT) Quarterly Update,' 27 July 2017, 2-3.

⁷¹ IHAT, *The Iraq Historic Allegations Team (IHAT) Quarterly update*, October–December 2016.

⁷² Sir David Calvert-Smith, 'Review of the Iraq Historic Allegations Team', 15 September 2016.

⁷³ House of Commons Defence Committee, 'Who guards the guardians? MoD support for former and serving personnel' HC 109, 10 February 2017, para. 122.

⁷⁴ Ibid, para. 120.

into the small number of remaining cases a year earlier than planned.⁷⁵ IHAT was permanently shut-down on the stipulated date of 30 June 2017. As of 1 July 2017, the remaining investigations were integrated into the service police system and taken over by a new investigative unit, the SPLI.⁷⁶

SPLI, led by a senior Royal Navy Police Officer, comprises 40 Royal Navy Police (RNP) and Royal Air Force Police (RAFP) personnel,⁷⁷ supported by a small number of civil servants and contractors.⁷⁸ SPLI inherited cases from IHAT, and one referral from IHAT to the SPA. The referral has since been discontinued by the SPA.⁷⁹ Moreover, most remaining allegations of ill-treatment have been discontinued during 2017-2018.⁸⁰ There is very limited public information on the structure and management of SPLI.

b) The Iraq Fatality Investigations (IFI)

The IFI was established following a High Court ruling in *R (Ali Zaki Mousa) v Secretary of State for Defence (AZM2)*, which held that the fatality investigations conducted by IHAT which were discontinued should be followed up where necessary with a coronial inquest, which involves the families of the deceased and considers the wider circumstances to the extent required by Article 2 ECHR.⁸¹

Once the IHAT or SPLI, in conjunction with the SPA, decides that there is no realistic prospect for prosecution, a case is passed on to the MoD. The Secretary of State for Defence then decides whether or not the case should be referred to IFI, as set out by the High Court in *AZM2*.⁸² The decision is made on a case-by-case basis.⁸³ Communication by the UK to the Committee of Ministers of the Council of Europe in 2016 elaborates the test, stating ‘if a death occurred within the jurisdiction of Article 1 ECHR, and there is an arguable or credible allegation that it amounts to a breach of Article 2 ECHR (i.e. the circumstances of the incident are incompatible with international humanitarian law), then it must be referred to IFI if the IHAT investigation does not lead to a prosecution.’⁸⁴

At the end of an inquiry, the Inspector produces a report in which he sets out his findings. The report aims at satisfying two objectives, namely providing: 1) ‘a narrative account’ of the immediate circumstances in which the death occurred; and 2) an examination of the wider circumstances in which the death occurred and any lessons which should be learned.⁸⁵

⁷⁵ As cited in MoD news, ‘IHAT to close at the end of June’, 5 April 2017.

⁷⁶ IHAT, <https://www.gov.uk/government/groups/iraq-historic-allegations-team-ihat>.

⁷⁷ SPLI, Quarterly Update from 1 July to 30 September 2017, 31 October 2017, para. 1.2; MoD, ‘Annual Report and Accounts 2017-2018’, HC 1272, 19 July 2018, 84.

⁷⁸ MoD, ‘Annual Report and Accounts 2017-2018’, HC 1272, 19 July 2018, 84.

⁷⁹ SPLI, Quarterly Update from 1 July to 30 September 2017 (31 October 2017), para. 4.1.

⁸⁰ MOD decisions on alleged human rights breaches during Operation Telic, MOD decisions on Article 3 cases (updated 29 August 2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736613/20180828_Article_3_cases_ENGLISH_DJEP_PDF.pdf.

⁸¹ [2013] EWHC 1412 (Admin), 24 May 2013, paras. 212-225 and [2013] EWHC 2941 (Admin), 2 October 2013.

⁸² *Ibid.*

⁸³ *R (Ali Zaki Mousa) v Secretary of State for Defence (No 2)* [2013] EWHC 1412 (Admin), 24 May 2013, para. 215.

⁸⁴ Council of Europe, Secretariat of the Committee of Ministers, ‘Communication from the United Kingdom Concerning the Case of Al-Skeini and Others Against United Kingdom (Application No. 55721/07)’, 4 October 2016, DH-DD (2016)1072, 4.

⁸⁵ Procedures for Iraq Fatality Investigations, para. 21,

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/716595/proceduresforiraqfatalitiesinvestigations.pdf.

c) Public inquiries and judicial reviews

A separate category of cases aim, as Rachel Kerr notes, ‘not at ensuring *individual* criminal responsibility but at ensuring *institutional* accountability at the level of the state.’⁸⁶ These cases, brought by British lawyers acting for Iraqi civilian claimants, sought to require the Government to conduct inquiries into alleged unlawful killing, abuse and mistreatment of Iraqi civilians. The claims were brought under the *Human Rights Act 1998*, which incorporates the ECHR into English law. Altogether, 13 judicial review cases relating to abuses Iraq have been brought in British courts.⁸⁷

The UK Government initiated two public inquiries related to allegations of ill-treatment and unlawful killing by British troops in Iraq. One concerned Baha Mousa. The Baha Mousa Inquiry report, published in September 2011, pointed to ‘corporate failure’ by the British Army as a reason for the use of banned interrogation techniques.⁸⁸ The report also suggested that prohibited interrogation methods may have been widespread.⁸⁹

In November 2009, the UK launched a second public inquiry to investigate allegations of torture and unlawful killing of Iraqis during a battle in 2004. Although pointing to some mistreatment, as noted above, the Al-Sweady Inquiry report, published in December 2014, rejected the most serious allegations of murder of Iraqi detainees as being ‘wholly without foundation and entirely the product of deliberate lies, reckless speculation and ingrained hostility.’⁹⁰

The Solicitors Regulation Authority (SRA) referred both PIL and Leigh Day to the Solicitors Disciplinary Tribunal (SDT) over their involvement in the Al-Sweady inquiry. Lead lawyer of PIL, Phil Shiner, admitted to a number of counts of misconduct relating to paying Iraqi middlemen to find claimants and was convicted for this by the SDT, whereas Leigh Day was cleared of all charges.⁹¹ Government officials, the pro-military establishment and parts of the media were quick to draw the conclusion that because Shiner was guilty of misconduct, the cases brought by PIL and hence the majority of cases before IHAT were flawed. Defence Secretary Michael Fallon stated after Shiner’s conviction: ‘Justice has finally been served after we took the unprecedented step of submitting evidence on his abuse of our legal system. Phil Shiner made soldiers’ lives a misery by pursuing false claims of torture and murder – now he should apologise. We will study any implications for outstanding legal claims closely.’⁹²

⁸⁶ Rachel Kerr, ‘The UK in Iraq and the ICC: Judicial Intervention, Positive Complementarity and the Politics of International Criminal Justice’ in Morten Bergsmo and Carsten Stahn (eds), *Quality Control in Preliminary Examination: Volume 1*, (Torkel Opsahl Academic EPublisher: Brussels, 2018) 451, p. 465.

⁸⁷ *Ibid.*

⁸⁸ Sir William Gage, ‘The Report of the Baha Mousa Inquiry’, Vol I, HC 1452–I, 8 September 2011, para. 2.1551.

⁸⁹ *Ibid.*

⁹⁰ Al-Sweady Inquiry and Sir Thayne Forbes (Chairman), Statement by Sir Thayne Forbes on the Report of the Al-Sweady Inquiry, 17 December 2014, [http://webarchive.nationalarchives.gov.uk/20150115114831/http://www.alsweadyinquiry.org/linkedfiles/alsweadyinquiry/t heal-sweadyinquiryreport-transcriptofchairmansstatement.pdf](http://webarchive.nationalarchives.gov.uk/20150115114831/http://www.alsweadyinquiry.org/linkedfiles/alsweadyinquiry/t%20heal-sweadyinquiryreport-transcriptofchairmansstatement.pdf), p. 3. The Report of the Al-Sweady Inquiry: Executive Summary, December 2014, para. 740.

⁹¹ Solicitors Disciplinary Tribunal, case no. 11510-2016, SRA and Philip Joseph Shiner, Judgement, date of hearing 23 January 2017, 2 February 2017. Leigh Day was cleared of all charges. See John Hyde, ‘Leigh Day and its lawyers cleared of all 19 charges’, in *The Law Society Gazette*, 12 June 2017 (the matter is under appeal).

⁹² As cited in Owen Bowcott, ‘Phil Shiner: Iraq human rights lawyer struck off over misconduct’, in *The Guardian*, 2 February 2017.

II.3 The International Criminal Court's preliminary examination

a) Overview of the ICC process

The UK ratified the ICC Statute on 4 October 2001 and almost simultaneously passed the International Criminal Court Act.⁹³ Although Iraq is not a State Party, the ICC can exercise jurisdiction over crimes committed on its territory by British nationals since the UK is a State Party.⁹⁴

In 2006, the ICC Prosecutor declined to open an investigation concerning alleged abuses by UK soldiers in Iraq on the ground that the number of crimes did not meet the gravity requirement under the ICC Statute.⁹⁵ On 10 January 2014, the ECCHR together with PIL submitted additional information to the Prosecutor, alleging the responsibility of UK military personnel for war crimes involving systematic detainee abuse in Iraq from 2003 until 2008.⁹⁶ ECCHR and PIL's January 2014 submission consisted of a 250-page document with detailed factual and legal analysis of alleged war crimes in Iraq by British service personnel.⁹⁷

In May 2014, ICC Prosecutor Fatou Bensouda announced that her Office had decided to re-open the preliminary examination.⁹⁸ She noted that the 10 January 2014 communication by ECCHR and PIL provided further information that was not available to the Office in 2006, emphasising that it 'alleges a higher number of cases of ill-treatment of detainees and provides further details on the factual circumstances and the geographical and temporal scope of the alleged crimes'.⁹⁹

In June 2015, PIL submitted a second communication,¹⁰⁰ which, in the words of the ICC Prosecutor, added 'substantively' to the allegations contained in the first communication, including expanding the list of alleged crimes in relation to new cases of alleged detainee abuses and providing additional information in support of the allegations.¹⁰¹ Whereas the first communication had 'focused entirely on detainee abuse' and was comprised primarily of an analysis of '85 Judicial Review cases involving over 100 victims of torture, inhuman and degrading treatment or punishment,' the second communication specified that the number of cases had reached a total of 1268 and that they collectively 'demonstrate a pattern of systemic abuse and command responsibility for the War Crimes alleged.'¹⁰² In addition to the issues covered in the first communication, the second communication also included allegations of denial of a fair trial, rape, sexual violence, degrading and humiliating treatment, and outrages upon personal dignity, and addressed what PIL considered an inadequate domestic response from the UK, particularly IHAT's investigations failing to lead to a prosecution of a single person and its delay in reaching a decision on the death of Baha Mousa.¹⁰³

⁹³ International Criminal Court Act 2001.

⁹⁴ Article 12(2)(b) of the ICC Statute.

⁹⁵ OTP, 'OTP response to communications received concerning Iraq', 9 February 2006, <http://www.legal-tools.org/doc/5b8996/>.

⁹⁶ OTP Report on Preliminary Examination Activities 2017, 4 December 2017, para. 173.

⁹⁷ See, ECCHR and PIL January 2014 communication.

⁹⁸ OTP, 'Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq', 13 May 2014, ICC-OTP-20140513 (<http://www.legal-tools.org/doc/d9d9c5/>).

⁹⁹ Ibid.

¹⁰⁰ PIL, 'Second 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 15 June 2015 by Public Interest Lawyers (International), on file with authors.

¹⁰¹ OTP, 'Report on Preliminary Examination Activities 2015', 12 November 2015, paras. 26–27 (hereinafter 'Report on Preliminary Examination Activities') (<http://www.legal-tools.org/doc/ac0ed2/>).

¹⁰² PIL Press Release: 'PIL International sends a Second Communication to the Office of the Prosecutor of the International Criminal Court', 6 November 2015.

¹⁰³ Ibid.

As detailed below, in November 2017, the Prosecutor progressed the preliminary examination to ‘Phase 3’, meaning that the focus is now on admissibility, including complementarity and gravity.

b) Focus of the preliminary examination

The focus of the Iraq/UK examination is limited to crimes allegedly committed by British service personnel. The preliminary examination involves an inquiry into two main forms of war crimes, namely (1) abuse of detainees (including torture and other forms of ill-treatment, rape and other forms of sexual violence); and (2) unlawful killings.¹⁰⁴

The submissions made by ECCHR and PIL suggest that detainee abuse was systematic. The argument put forward was that criminal responsibility ‘may attach all the way up the chain of command to the Chief of Defence Staff,’¹⁰⁵ on the basis that they ‘knew or consciously disregarded information about the abuse of Iraqi detainees by UK Services Personnel in Iraq’.¹⁰⁶ The submission suggests that in the apparent absence of detailed regulation of interrogation techniques in Iraq, the ‘limits of interrogation were, in effect, set by those responsible for training the interrogators’.¹⁰⁷ The OTP’s official reports do not specify whether, and if so how, the Office is examining whether the crimes were the result of plans or policies, direct orders from – or omissions by – the military or political leadership, though the mandate of the ICC – which focuses on the persons with greatest responsibility – would suggest that ordinary soldiers are not its main preoccupation.

In its November 2017 report on preliminary examination activities, the Office indicates that it has found ‘a reasonable basis to believe that in the period from 20 March 2003 through 28 July 2009 members of the UK armed forces committed the following war crimes against persons in their custody, including: wilful killing/murder (article 8(2)(a)(i) or article 8(2)(c)(i)), torture and inhuman/cruel treatment (article 8(2)(a)(ii) or article 8(2)(c)(i)), outrages upon personal dignity (article 8(2)(b)(xxi) or article 8(2)(c)(ii)), and rape or other forms of sexual violence (article 8(2)(b)(xxii) or article 8(2)(e)(vi)).’¹⁰⁸ The Office noted that ‘there is no reasonable basis to believe that war crimes within the jurisdiction of the Court were committed by British armed forces in the course of their military operations not related to the context of arrests and detentions.’¹⁰⁹

With the preliminary examination in phase 3, the admissibility assessment is ongoing, but the 2017 report provides limited information on how this assessment is progressing. Both the 2015 and 2016 reports on preliminary examinations noted that the ‘Office is in particular mindful that domestic proceedings involving a judicial review of the [IHAT] activities are taking place in the UK.’¹¹⁰

c) Evaluation of information providers

In its 2016 report on preliminary examination activities, the Prosecutor reported that it had undertaken a ‘rigorous independent evaluation of all relevant sources in its possession and in particular a thorough assessment of the seriousness of the information provided under Article 15 [of the ICC

¹⁰⁴ The 2015 Report on Preliminary Examinations Activities indicates that ECCHR and PIL had also submitted allegations relating to the failure to respect fair trial standards, noting that ‘at least 88 detainees were entitled to the protection of the Geneva Convention III until such time as their status would be determined by a competent tribunal in accordance with Article 5 of the Geneva Convention III’. [‘Report on Preliminary Examination Activities 2015’, para. 37]. There is no suggestion in the 2016 Report that the Office is actively examining these allegations.

¹⁰⁵ ECCHR and PIL January 2014 communication, p. 169.

¹⁰⁶ *Ibid.*, pp. 186-99.

¹⁰⁷ *Ibid.*, p. 22.

¹⁰⁸ OTP, Report on Preliminary Examination Activities 2017, para. 194.

¹⁰⁹ *Ibid.*, para. 196.

¹¹⁰ 2015 Report on Preliminary Examination Activities, para. 43; 2016 Report on Preliminary Examination Activities, para. 106.

Statute] and the reliability of the senders.’¹¹¹ The Prosecutor also stated that for this purpose, the Office had ‘researched open sources such as findings and decisions of domestic and regional bodies as well as national public inquiries in order to identify any relevant corroborative or corrective information’.¹¹² In the same report, the Office noted that it was ‘mindful of issues affecting in particular the reliability of the providers of information, including the closing-down of PIL, allegedly as a result of disruption of legal aid funding for breach of contractual requirements with the national competent agency; and allegations of misconduct against the PIL and other groups representing Iraqi’s claimants in the UK, leading inter alia to an investigation before the Solicitors Regulation Authority (SRA) and the subsequent referral of both PIL and Leigh Day to the Solicitors Disciplinary Tribunal (SDT).’¹¹³ The Office emphasised that it has ‘closely scrutinized and will continue to keep abreast of relevant developments at the national level in the context of the proceedings before the SDT’.¹¹⁴

In the 2017 report on preliminary examination activities, the Prosecutor reported that during its third mission to the UK from 13 to 14 February 2017, the Office gathered ‘further contextual and other information on the disciplinary proceedings against Phil Shiner, including the views of PIL’s associates’.¹¹⁵ In this regard, the Prosecutor took note that PIL lead counsel, Phil Shiner, had been found guilty in February 2017 by a SDT panel of 12 professional misconduct charges and struck off as a solicitor, further noting that PIL had collapsed in August 2016 after the Legal Aid Agency revoked its contract with the firm for breach of its ‘contractual requirements’ unrelated to the disciplinary proceedings.¹¹⁶

However, the Prosecutor concluded: ‘In assessing the credibility of the claims themselves, the Office has taken the position that individual statements received from PIL could be considered credible enough if substantiated with supporting material (such as detention records, medical certificates, photographs, etc.) and/or corroborated by information available from reliable third sources, including human rights reports, the findings of public inquiries in the UK and data pertaining to out-of-court compensation settlements or other relevant material.’¹¹⁷ The Prosecutor emphasised that the Office has paid ‘particular attention to the assessment of reliability of the sources and the seriousness of the information received [...] Since the more recent allegations against UK forces in Iraq were mostly brought to the Office’s attention by only one information-provider, the Office exercised an abundance of care in this regard.’¹¹⁸

d) Engagement with the UK Government

The ICC Prosecutor has consistently emphasised that her Office receives full cooperation from British authorities. For example, in the 2016 report on preliminary examination activities, the Prosecutor observed that during the reporting period, the Office received ‘full cooperation from relevant stakeholders, including the senders of the Article 15 communications and the UK government, in particular when seeking additional information for the purpose of verifying the seriousness of the

¹¹¹ 2016 Report on Preliminary Examination Activities, para. 100.

¹¹² *Ibid.*, para. 100.

¹¹³ *Ibid.*, para. 105.

¹¹⁴ *Ibid.*, para. 105.

¹¹⁵ 2017 Report on Preliminary Examination Activities, para. 199.

¹¹⁶ The Prosecutor also noted that on 9 June 2017, the SDT found all allegations against Leigh Day and its solicitors unproven; 2017 Report on Preliminary Examination Activities, para. 185.

¹¹⁷ 2017 Report on Preliminary Examination Activities, para. 191.

¹¹⁸ Further noting that ‘In making this assessment, the Office has independently examined all relevant circumstances bearing impact on the trustworthiness of the main information provider, including the findings of the Solicitors Disciplinary Tribunal (SDT) against Phil Shiner, the admissions made by Phil Shiner himself in the course of the disciplinary proceedings, the issues involving at least one of PIL main intermediaries in the field, as well as the overall political context in which the disciplinary proceedings against PIL took place.’ [2017 Report on Preliminary Examination Activities, para. 189-90].

information in the Office's possession'.¹¹⁹ The 2017 report similarly states that the Office 'is grateful to the UK authorities for their ongoing cooperation in the course of this preliminary examination'.¹²⁰

Throughout the preliminary examination, the ICC Prosecutor has remained in contact with UK officials to 'verify the seriousness of the information in its possession, discuss the progress of the Office's preliminary examination process, address methodological issues as well as to solicit updates and provision of additional relevant information'.¹²¹ This has involved several visits by the Prosecutor's Office to the UK, including at the premises of IHAT and SPA. During these visits, the general progress of domestic proceedings has been discussed and ICC prosecutors have requested information from the UK authorities concerning the status of these processes.¹²²

e) Assurances concerning persons testifying before the IFI

In a letter dated 2 December 2014, the ICC Prosecutor wrote to Sir George Newman, responding to a request of 'non-use undertaking' in relation to evidence given to the IFI investigation by soldiers 'alleged to have participated in the immediate circumstances leading to the deaths of two Iraqi nationals'. The Prosecutor informed that following a careful legal assessment of the request, it had come to the conclusion that such an undertaking would not violate the Office's obligations under the Statute. Accordingly, the Prosecutor provided IFI with an assurance that 'any self-incriminating evidence provided to the IFI by any of the soldiers alleged to have participated in the immediate circumstances' leading to the deaths of two Iraqis in 2003 will not be used by her office 'either directly or indirectly as incriminating evidence in any possible subsequent prosecution before the ICC of any soldier that provided the evidence'.¹²³ Our understanding is that this is the only preliminary examination where assurances of this nature have been provided. Arguably, the undertaking is uncontroversial since it is based on the principle that self-incriminating statements should not be used against accused persons; furthermore, IFI focuses on low-level perpetrators who are unlikely to become suspects in a potential ICC investigation.

Following consultation with the Director of Public Prosecutions and the DSP, the UK's Attorney-General similarly provided IFI with an undertaking 'in respect of any person who provides evidence to the [IFI] relating to a matter within its term of reference'. The undertaking provides that no evidence a person may give to the IFI will be used as evidence against that person in 'any criminal proceedings save that this undertaking does not apply to any proceedings in which it is alleged that a person has wilfully misled the IFI or conspired with others so to do'. The Attorney-General made it clear that 'evidence' includes oral evidence, any written statement, and any document or information produced to the IFI solely by that person.¹²⁴

In his progress report of 12 March 2018, Sir George Newman stated:

I shall seek assurances from the Attorney General and other prosecuting authorities, including the Prosecutor of the International Criminal Court, that evidence given to me by any individual will not be used against that

¹¹⁹ 2016 Report on Preliminary Examination Activities, para. 98.

¹²⁰ 2017 Report on Preliminary Examination Activities, para. 202.

¹²¹ 2015 Report on Preliminary Examination Activities, para. 40.

¹²² See further Thomas Obel Hansen, 'Accountability for British War Crimes in Iraq? Examining the Nexus Between International and National Justice Responses', in Morten Bergsmo and Carsten Stahn (ed), *Quality Control in Preliminary Examination: Reviewing Impact, Policies and Practices*, Vol 1 (Brussels: Torkal Opsahl Academic EPublisher, 2018) 399, pp. 425-26.

¹²³ Letter from Fatou Bensouda to Sir George Newman, dated 2 December 2014, 2014/042/FB/JCCD-du, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/689304/undertakingfromtheofficeoftheprosecutordated2december2014.pdf.

¹²⁴ Letter from the Attorney-General's Office to Sir George Newman, dated 4 August 2014, available at

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/689303/undertakingfromtheattorneygeneralsofficedated4august2014.pdf.

individual in any future criminal proceedings. In addition, it should be noted that, before a reference can be made to me to investigate, it must be clear that there will be no prosecution. Taken together, these circumstances are likely to make any attempt, made subsequently to my investigation, to prosecute, vulnerable to being declared an abuse of process. The comfort which the above assurances should provide is designed to encourage, in the public interest, a full investigation enabling Parliament, the media, and the public generally to be informed about the circumstances of a death.¹²⁵

f) Current issues relating to the assessment of complementarity

The ICC Prosecutor has made a range of comments relating to domestic legal mechanisms in the UK, including from the perspective of the Court's complementarity regime.

In the 2016 report on preliminary examination activities, the Office stated that its analysis of the crime basis 'drew extensively from the findings of two domestic inquiries, respectively into the death of an Iraqi civilian in UK custody (Baha Mousa inquiry) and allegations of unlawful killings and ill treatment of Iraqi nationals by British troops in Iraq in May 2004 (Al Sweady inquiry)'.¹²⁶ The Office emphasised that the inquiries 'provided credible and documented information on the context of alleged crimes, the military units involved and the UK military chain of command during the relevant time periods, as well on the factual circumstances of a specific set of alleged incidents of abuse in custody'.¹²⁷

Although the ICC Prosecutor's assessment was at the time focused on issues of subject-matter jurisdiction, the same report noted that 'the Office has also received and considered information on the progress of ongoing relevant national proceedings', emphasising that the Office 'is in particular mindful that domestic proceedings involving a judicial review of the Iraq Historic Allegations Team (IHAT) activities are taking place in the UK'.¹²⁸ The 2016 report further noted that the Office 'will continue to be in close contact with relevant stakeholders, including the UK government, in order to exchange views on relevant aspects of the Office's preliminary examination process' and to 'closely observe the activities and findings of ongoing national proceedings by the UK authorities as well as the periodic developments of judicial review proceedings in the High Court of Justice of England and Wales relevant for the entire preliminary examination process of the situation in Iraq/UK'.¹²⁹

The Office provides only limited information regarding the assessment of complementarity in the 2017 report on preliminary examination activities. However, the report observes that the conduct of British troops in Iraq has 'generated a wide array of proceedings before civilian and military authorities, including courts martial, civil and criminal cases, as well as judicial and public inquiries'.¹³⁰ The report also states that the Office 'received and considered information on relevant national proceedings conducted by the UK authorities, in particular with respect to the incidents of criminalities identified', and that in so doing, the Office 'maintained regular contact with the appropriate interlocutors, including the Service Prosecution Authority and IHAT, senior staff of both agencies, and other relevant State officials'.¹³¹ The report concludes that the 'Office's admissibility assessment is ongoing and is intended to be completed within a reasonable time frame'.¹³²

¹²⁵ Sir George Newman, Iraq Fatality Investigations, Progress Statement – 12 March 2018, pp 2-3.

¹²⁶ 2016 Report on Preliminary Examination Activities, para. 100.

¹²⁷ *Ibid.*, para. 100.

¹²⁸ *Ibid.*, para. 106.

¹²⁹ *Ibid.*, para. 108.

¹³⁰ *Ibid.*, para. 181.

¹³¹ 2017 Report on Preliminary Examination Activities, para. 202.

¹³² *Ibid.*, para. 203.

Beyond that, the 2017 report makes a range of comments concerning the closure of IHAT and the transition to SPLI. The ICC Prosecutor notes that during its third mission to the UK in February 2017, the Office received ‘updated information from the IHAT on the progress of their investigations amidst the decision of UK Defence Secretary to close IHAT ahead of the original scheduled time frame’.¹³³ The Prosecutor further notes that on the same day of the release of the report by the Defence committee that recommended IHAT be closed, the Defence Secretary announced, ‘amid concerns of political interference’, the closing of IHAT ahead of the originally scheduled time frame, ‘citing IHAT own forecasts that the unit’s caseload was expected to reduce to around 20 investigations by the summer 2017’.¹³⁴ The Prosecutor further makes clear that the Office has ‘closely scrutinised’ the transition between IHAT and its successor, the SPLI, ‘to gauge the effective continuity between the two entities in terms of corporate knowledge, procedures, expertise, and judicial oversight’.¹³⁵

g) Standards for the ICC Prosecutor’s assessment of complementarity in phase 3 of the preliminary examination

The ICC Prosecutor’s Policy Paper on Preliminary Examinations commits the Office to take active steps to encourage domestic proceedings, stating that where potential cases falling within the jurisdiction of the Court have been identified, the Office ‘will seek to encourage, where feasible, genuine national investigations and prosecutions by the States concerned in relation to these crimes’.¹³⁶ Although as follows from the analysis above, the Prosecutor has in some ways already actively engaged with national investigatory and prosecutorial mechanisms in the UK, such and other activities aimed at promoting a complementary justice process are likely to intensify in phase 3 as the Prosecutor operates with a so-called ‘phased approach’.¹³⁷

The Policy Paper states that the Prosecutor’s policy of investigating and prosecuting those ‘most responsible for the most serious crimes’ means that the Office’s efforts towards encouraging genuine national proceedings at the preliminary examination stage will ‘centre on potential cases that fall within the ambit of this policy, without being limited to those cases’.¹³⁸

The Prosecutor’s admissibility assessment is informed by standards in the ICC Statute as well as the Office’s Policy Paper. These standards clarify that the Office will rely on a two-fold test whereby any assessment of ‘unwillingness’ or ‘inability’ according to Article 17 of the Statute takes place only if it is first established that there is relevant investigatory or prosecutorial ‘activity’ in the State concerned.¹³⁹ The determination of whether there is relevant activity involves an assessment of ‘numerous factors, including the absence of an adequate legislative framework; the existence of laws that serve as a bar to domestic proceedings, such as amnesties, immunities or statutes of limitation; the deliberate focus of proceedings on low-level or marginal perpetrators despite evidence on those more responsible; or other, more general issues related to the lack of political will or judicial capacity’.¹⁴⁰

Should the ICC Prosecutor conclude that there is relevant activity in the UK, the Office will examine the standard of ‘unwillingness’. This involves an assessment of whether (a) the proceedings were or are being undertaken for the purpose of shielding the person concerned from criminal responsibility

¹³³ Ibid, para. 199.

¹³⁴ Ibid, para. 187.

¹³⁵ Ibid, para. 202.

¹³⁶ OTP, Policy Paper on Preliminary Examinations, 1 November 2013, para. 93.

¹³⁷ Ibid, para. 72.

¹³⁸ Ibid, para. 103.

¹³⁹ Ibid, para. 47.

¹⁴⁰ Ibid, para. 48.

for crimes within the ICC jurisdiction, (b) there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice, and (c) the proceedings were or are not conducted independently or impartially and in a manner consistent with an intent to bring the person concerned to justice.¹⁴¹

With respect to delays, the Prosecutor's assessment involves indicators such as 'the pace of investigative steps and proceedings; whether the delay in the proceedings can be objectively justified in the circumstances; and whether there is evidence of a lack of intent to bring the person(s) concerned to justice'.¹⁴²

With respect to 'independence', the Prosecutor will consider factors such as 'the alleged involvement of the State apparatus, including those department responsible for law and order, in the commission of the alleged crimes; the constitutional role and powers vested in the different institutions of the criminal justice system; the extent to which appointment and dismissal of investigators, prosecutors and judges affect due process in the case; the application of a regime of immunity and jurisdictional privileges for alleged perpetrators belonging to governmental institutions; political interference in the investigation, prosecution or trial; recourse to extra-judicial bodies; and corruption of investigators, prosecutors and judges.'¹⁴³

II.4 UK Government response to the ICC and broader approach to accountability

The UK Government has responded in multiple, partly contradictory, ways to the re-opening of the Iraq/UK preliminary examination. The Government has stated its support for the Court and intention to co-operate with the ICC Prosecutor.¹⁴⁴ At the same time, it has made it clear that it believes the preliminary examination should be closed. In so doing, it cites to three separate grounds: (1) the Court lacks jurisdiction since the crimes were not committed on a sufficiently large scale; (2) the existence of judicial measures in the UK which address crimes in Iraq renders the situation inadmissible under the ICC Statute's complementarity regime; and (3) the information that the preliminary examination is based on is not credible.¹⁴⁵

Further, UK authorities have proposed to derogate from human rights law so that it no longer applies to situations of armed conflict.¹⁴⁶

Most recently, driven by concerns in the military about the Iraq investigations, investigations of abuses in Northern Ireland and elsewhere, a debate has emerged about enacting a statute of limitations extending to all previous conflicts, to protect service personnel from a 'vicious cycle of investigation and re-investigation.'¹⁴⁷ At the time of writing, the Common's Defence Committee was still considering the options.

¹⁴¹ Ibid, para. 50.

¹⁴² Ibid, para. 52.

¹⁴³ Ibid, para. 53.

¹⁴⁴ On the same day that Prosecutor Bensouda announced publicly that the preliminary examination was re-opened, then Attorney General Dominic Grieve QC stated that the UK remains 'a strong supporter of the ICC' and will co-operate with the Court on the examination. As cited in Ian Cobain, 'ICC to examine claims that British troops carried out war crimes in Iraq', in *The Guardian*, 13 May 2014.

¹⁴⁵ For a further discussion of these responses, see Thomas Obel Hansen, 'Accountability for British War Crimes in Iraq? Examining the Nexus Between International and National Justice Responses', in Morten Bergsmo and Carsten Stahn (ed), *Quality Control in Preliminary Examination: Reviewing Impact, Policies and Practices*, Vol 1 (Brussels: Torkal Opsahl Academic EPublisher, 2018) 399.

¹⁴⁶ Ibid.

¹⁴⁷ Rt Hon Dr Julian Lewis MP, reiterating the Defence Committee's unanimous view. See <https://www.parliament.uk/business/committees/committees-a-z/commons-select/defence-committee/news-parliament-2017/statute-limitations-inquiry-launched-17-19/>.

III. KEY AREAS FOR ANALYSIS

III.1 THE NEED FOR EFFECTIVE INVESTIGATIONS

Investigations into allegations concerning wrongful deaths, torture and other forms of ill-treatment must be effective. The ECtHR makes this clear in its jurisprudence on Articles 2 and 3 of the ECHR. In particular, those responsible for carrying out the investigation must be independent from those implicated in the events; the investigation must be ‘adequate’; conclusions must be based on thorough, objective and impartial analysis of all relevant elements; the investigation must be sufficiently accessible to the victim’s family and open to public scrutiny; and it must be carried out promptly and with reasonable expedition.¹⁴⁸

In *Kelly v United Kingdom*, the ECtHR specified that an investigation into a wrongful death must be capable of establishing the cause of death and the identification of those responsible with a view to their punishment. But it is a test of means as opposed to ends:

[t]he authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard.¹⁴⁹

Nevertheless, positive investigative obligations should ‘be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities’.¹⁵⁰

a) Independence and impartiality

The requirements of independence and impartiality, including hierarchical, institutional and practical independence are a *sine qua non* of an effective investigation which is itself crucial to comply with the positive obligation to protect individuals from serious crimes, particular unlawful killing and torture and ill-treatment.¹⁵¹ The case law establishes that an investigation must be undertaken by a person or body independent of the State agents who may bear responsibility for the violation.¹⁵² Investigations must be independent and seen to be independent.

In *Ali Zaki Mousa v SSD No. 1*,¹⁵³ the Court of Appeal determined that IHAT investigations were not sufficiently independent because of the inclusion of members of the Provost Branch of the Army (the Royal Military Police) in the investigation of matters where that Provost Branch had been involved in Iraq. Following that judgment, certain changes were instituted, in particular, the Royal Military Police were replaced with the Royal Navy Police headed by the Provost Marshal (Navy) and more retired officers from civilian police forces were added. Also, the DSP and SPA were given a greater role.¹⁵⁴

¹⁴⁸ See e.g., *Armani Da Silva v United Kingdom (Grand Chamber)*, ECtHR, Appl. no. 5878/08, 30 March 2016, paras. 232 – 239.

¹⁴⁹ *Kelly and Others v United Kingdom*, ECtHR, Appl. no. 30054/96, 4 May 2001.

¹⁵⁰ *Osman v United Kingdom (Grand Chamber)*, ECtHR, Appl. no. 87/1997/871/1083, 28 October 1998, para. 116.

¹⁵¹ *Bati and Others v Turkey*, ECtHR, Appl. nos. 33097/96 and 57834/00, 3 September 2004, para. 135; *McCann v UK*, ECtHR (GC), Appl. No. 18984/9127, September 1995, para. 147.

¹⁵² *Güleç v Turkey*, ECtHR, Appl. no. 54/1997/838/1044, 27 July 1998, paras. 81-82; *Öğür v Turkey (Grand Chamber)*, Appl. no. 21594/93, paras. 91-92.

¹⁵³ [2011] EWCA Civ 1334, para. 36.

¹⁵⁴ Referred to in Sir David Calvert-Smith, ‘Review of the Iraq Historic Allegations Team’, 15 September 2016, para. 3.9.

In *Ali Zaki Mousa v SSD No. 2*,¹⁵⁵ the issue of independence and impartiality of IHAT was again canvassed. The Divisional Court held that with the changes that had been instituted, IHAT investigations were sufficiently independent, taking into account the procedural obligations required by Article 2 (right to life) of the European Convention. Crucial to the Court was that it saw ‘no objection in principle to a service police force investigating service personnel of the service which they police or another service police force. The only question is whether on the facts of a given case, the service police is independent of the events or personnel being investigated,’ nor with ‘[t]he fact that the service police forces work together in other matters or share some facilities ..., [this] does not affect the ability of one of the forces to investigate another’.¹⁵⁶ Furthermore, the Court expressed its satisfaction that ‘neither the Ministry of Defence nor the Royal Naval command nor any part of the hierarchy of the armed forces have or will have any influence whatsoever on his decisions including his decisions as to investigation or prosecution.’¹⁵⁷

Following the closure of IHAT and the transfer of pending cases to the SPLI and a number onward to the IFI, there is a question whether the structures of these bodies are sufficiently independent both in theory and in practise to satisfy the requirements of the European Convention. As explained earlier in this discussion paper, the SPLI is comprised of RNP and RAFP personnel and is led by a senior Royal Navy Police Officer. Decisions that a particular case has no realistic prospect of a criminal conviction are taken by SPLI in conjunction with the SPA. These decisions are then passed on to the MoD. This leaves the main decision making to the ‘more neutral’ SPLI and DSP, and provides the MoD with only a minimal ‘rubber-stamping role’ at the end of the process. Nevertheless, close institutional links between the investigatory bodies and the MoD appear to remain in place.

The IFI has a more limited mandate in that it does not consider or determine an individual’s liability; it receives cases and terms of reference through the Secretary of State for Defence. The SPA and SPLI are sources of evidence for the IFI.¹⁵⁸

As set out below, several concerns about the independence of investigatory bodies have been raised in the course of our research.

A first concern is the public statements that have been made by both the former Defence Minister and the current and former Prime Minister about IHAT investigations and claimant lawyers. As a general matter, it is inappropriate for the executive to comment on ongoing judicial proceedings as it gives the impression of the executive interfering in the work of the judiciary. Numerous judgments and other texts make clear that improper commenting on ongoing criminal proceedings can be inconsistent with the presumption of innocence.¹⁵⁹ This is directly relevant to the disciplinary proceedings against solicitors and their firms described elsewhere in this discussion paper, but arguably, the impropriety extends beyond comments made about the guilt of accused persons. In

¹⁵⁵ [2013] EWHC 1412 (Admin).

¹⁵⁶ *Ibid*, paras. 112-113.

¹⁵⁷ *Ibid*, para. 123.

¹⁵⁸ Published response of Sir George Newman to question posed by Dr Carla Ferstman in the course of this research project, 7 September 2018, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/738930/Progress_Statement_7_September_2018.pdf.

¹⁵⁹ See, e.g., *Alenet de Ribemont v France*, ECtHR, Appl. no. 15175/89, 10 February 1995, where the Chamber held that ‘the presumption of innocence may be infringed not only by a judge or court but also by other public authorities’ and indicated that: in the instant case some of the highest-ranking officers in the French police referred to Mr Alenet de Ribemont, without any qualification or reservation, as one of the instigators of a murder and thus an accomplice in that murder. This was clearly a declaration of the applicant’s guilt which, firstly, encouraged the public to believe him guilty and, secondly, prejudged the assessment of the facts by the competent judicial authority. There has therefore been a breach of Article 6 para. 2 [paras. 36, 41]. See also, ‘Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings’, paras. 16-18: ‘The presumption of innocence would be violated if public statements made by public authorities, or judicial decisions other than those on guilt, referred to a suspect or an accused person as being guilty, for as long as that person has not been proved guilty according to law. Such statements and judicial decisions should not reflect an opinion that that person is guilty.’ [para. 16].

serious cases where by law there is an obligation to carry out an effective investigation, commenting on the lack of utility of an investigation and the unfounded nature of the allegations has a chilling effect on the investigation and is inconsistent with the obligation to investigate serious crimes such as wrongful death, torture and other ill-treatment.

Numerous statements have been made by government and military officials, politicians and others about the ‘industry of vexatious claims’ and the ‘spurious’ allegations, ‘false claims’, ‘claims that are totally without foundation’ brought by ‘ambulance-chasing lawyers’ from ‘parasitic law firms’ against ‘our brave troops’; with some comments noting these firms are ‘the enemy of justice and humanity, not our armed forces or the Ministry of Defence.’¹⁶⁰ Such statements are unfortunate, irresponsible and may have been intended to influence proceedings, given the then ongoing disciplinary proceedings against several solicitors and solicitors firms, and the then ongoing IHAT investigations, though any suggestion of improper influencing has been ‘rejected utterly’ by the Government.¹⁶¹ Martyn Day, whose firm Leigh Day and some of its solicitors were also brought up on misconduct charges which the Solicitors Regulatory Tribunal determined not to be founded,¹⁶² indicated at the time of the verdict: ‘I have always felt that the SRA, whether directly or indirectly, was influenced by the political background to the case [...] It was clear that the government took a very strong interest in the prosecution – both of Phil Shiner and us [...] And the fact that [the MoD] said it was “disappointed” by the [tribunal] outcome is an indicator. It was totally inappropriate. It was an outrage that the prime minister was putting the boot into us at the time that the regulator was investigating us. [Ministers] said we were bringing spurious claims but 90% of them were settled.’¹⁶³ The Government’s statements have fostered a climate of deep suspicion. As Samira Shackle noted in her detailed exposé on the subject, ‘the tone of public discourse had become so partisan that any who questioned the actions of British troops were cast as unpatriotic traitors, while the armed forces were valorised by the very same institution that had, in the words of Johnny Mercer, been tempted to throw them “under a bus”.’¹⁶⁴

Other statements were made at various times about the need to close down IHAT as soon as possible, often making reference to the fact that IHAT was only in place to satisfy the ICC that the UK was meeting its obligations under the ICC Statute, and would be closed as soon as the preliminary examination was clear to close.¹⁶⁵ This would have contributed to immense pressure on investigators to expedite the closure of cases.

Second, there is a suggestion that reputational risks to the armed forces – at least as a matter of principle – were a factor that could have been taken into account in decision-making by investigative bodies, in deciding whether or how to proceed with an investigation. In February 2018, the terms of reference which transferred a matter to the IFI were amended: ‘Where it appears to the Inspector a risk exists that the public reputation of the armed forces could be adversely affected by the outcome of his investigations he should consider whether he should receive representations in connection with

¹⁶⁰ Andrew Woodcock, ‘May Offers Troops Protection against Legal Claims arising from Conflicts’, Huffington Post, 4 October 2016, updated 4 October 2017; House of Commons Debate, 27 January 2016, Col 203WH; David Cameron, statement on social media, 22 January 2016, <https://www.facebook.com/pg/DavidCameronOfficial/posts/>.

¹⁶¹ Minister of State for the Armed Forces, Letter, 22 February 2016, <https://redress.org/wp-content/uploads/2017/12/Reply-from-Ministry-of-Defence-22February-Correspondence-with-UK-Government-on-IHAT-Investigation.pdf>.

¹⁶² This is under appeal.

¹⁶³ Owen Bowcott, ‘No need to apologise to British soldiers over Iraq claims, says Martyn Day’, The Guardian, 22 June 2017.

¹⁶⁴ Samira Shackle, ‘Why we may never know if British troops committed war crimes in Iraq’, The Guardian, 7 June 2018.

¹⁶⁵ See e.g., ‘IHAT to close at the end of June’, 5 April 2017, <https://www.gov.uk/government/news/ihat-to-close-at-the-end-of-june>; ‘Government to protect Armed Forces from persistent legal claims in future overseas operations’ 4 October 2016, <https://www.gov.uk/government/news/government-to-protect-armed-forces-from-persistent-legal-claims-in-future-overseas-operations>; <https://modmedia.blog.gov.uk/2017/02/11/defence-in-the-media-saturday-11-february-2017/>.

that risk.¹⁶⁶ There is no suggestion that the receipt of representations could as such, impede the independence of this judicial body. Nevertheless, the paragraph suggests that ‘reputational risks’ are seen as an appropriate consideration in the fact-finding process. This was of some concern to the research team, for instance if reputational risks were to be used as a rationale to limit the public disclosure of the IFI findings. There is no suggestion that this has so far happened in practice, however.

Third, some questions have been raised about some of the assistance functions of the MoD. The MoD established the investigative structures, provides an array of administrative support to the relevant units and is also a link to locating military witnesses. Samira Shackle relays the impressions of several former IHAT employees she spoke with, who claimed that there was pressure to shut down investigations prematurely; however these claims were denied by an MoD spokesperson.¹⁶⁷

b) Robust investigations

Investigations must be sufficiently rigorous so as to be capable of leading to the truth and where appropriate, the prosecution of the suspects.¹⁶⁸ Authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, such as witness testimony and forensic evidence.¹⁶⁹ Any deficiency in the investigation which undermines its capability of establishing the circumstances of the case or the person responsible is liable to fall foul of the required measure of effectiveness.¹⁷⁰ This is not an obligation of result but nevertheless, a weak investigation that does not adequately explore all reasonable leads will not be effective.

Both the quality and scope of the investigation are relevant factors to consider. There is no suggestion in our research that the officials of IHAT, SPLI or IFI were or are less than fully diligent in their investigations. In respect of IHAT, the charge was one of over-zealousness as opposed to lack of diligence, but also that the IHAT investigators were without specialist knowledge or understanding of the military context.¹⁷¹ However, sometimes this ‘diligence’ resulted in other effectiveness problems – particularly certain inefficiencies in the investigative process of IHAT resulted in an overly lengthy process.¹⁷² Sometimes their work was impeded by other factors, most of which were outside their control – the sometimes limited information accompanying claims and weak initial investigations carried out before these bodies were established. As Lewis Cherry, military law solicitor, noted, in a session with the Defence Committee:

Lewis Cherry: For some of the people, probably the only wrongness about this is the delay in bringing it. Prosecutions should have been brought much nearer to the date. I have acted in some cases where there have been absolutely clear instances of prisoner abuse that were not prosecuted at the time and I was astonished—absolutely astonished. One case was abandoned by the Service Prosecuting Authority. Actually, a second case during the running of the Baha Mousa war crimes trial—I was told it was stopped and I was astonished, because the evidence was even better than that available at the Baha Mousa trial. It got dropped, but I fully expect that it is going to reopen. I see no reason why it should not and that is why I am expecting some calls.

These prosecutions and investigations should have been done in 2003 and 2004 and should have been coming to trial in 2005, not 10, 11 or 12 years later and so it runs on. We have not even touched the bottom of

¹⁶⁶ Confirmation of appointment and terms of reference for fatality investigation into the death of Saeed Radhi Shabram Wawi Al-Bazooni, 15 February 2018, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/696522/confirmationofappointmentandtermsofreference.pdf, para. 13.

¹⁶⁷ Samira Shackle, ‘Why we may never know if British troops committed war crimes in Iraq’, *The Guardian*, 7 June 2018.

¹⁶⁸ *Oğur v Turkey*, ECtHR, Appl. no. 21594/93, 20 May 1999, para. 88.

¹⁶⁹ *Y. v Slovenia*, ECtHR, Appl. no. 41107/10, 28 May 2015, para. 96.

¹⁷⁰ *Kelly and Others v United Kingdom*, ECtHR, Appl. no. 30054/96, 4 May 2001, para. 96.

¹⁷¹ Sir David Calvert-Smith, ‘Review of the Iraq Historic Allegations Team’, 15 September 2016, para. 2.5. See also, House of Commons Defence Committee, ‘Who guards the guardians? MoD support for former and serving personnel’ HC 109, 10 February 2017, para. 65.

¹⁷² See generally, Sir David Calvert-Smith, ‘Review of the Iraq Historic Allegations Team’, 15 September 2016.

Afghanistan yet. There is currently an investigation team being formed to investigate Afghanistan issues and I have again advised people as to where we are going to go and what might happen.

...

Q28 Mrs Moon: If they should have been brought to trial by 2005, why have they not been? What caused the delay?

Lewis Cherry: Lack of proper investigation. To be fair, it was very difficult in those circumstances for the service police to gather the normal sort of investigation that we would expect out on the ground, because we did not control the ground. It is very difficult to do a forensic follow-up after a shooting in a disturbed area. Let me put it in these terms: people were winning Victoria Crosses out on the ground. Trying to gather the information as to what took place at the time when VCs are being awarded gives you a fair idea of just how difficult it might be. Those are the sort of problems they faced. I am aware of prisoner abuse cases that took place inside the barracks, where there is photographic evidence of what went on, and I am astonished that they have not been brought earlier.¹⁷³

Another factor, at least for IHAT, is the fact that the work was impeded by the difficulties in many cases to secure direct witness evidence – particularly victim witness evidence from Iraq. Sir David Calvert-Smith has noted: ‘The current situation in which the Mensa [overseas investigations] process is in abeyance is the biggest single obstacle in the way of completing the IHAT process in time and would be biggest single problem facing the UK government in defending its handling of the issue in either the Divisional Court or an international tribunal.’¹⁷⁴

Evidentiary presumptions have been used to weed out allegations perceived to be weak or unsubstantiated. This was a sound approach in general terms, given the large numbers of allegations. However, it is questionable whether all the rationales for dumping cases were appropriate given the seriousness of the allegations. In a court ruling on 7 April 2016, it was determined that as a general rule IHAT could ‘properly decline to investigate such an allegation unless it is supported by a witness statement which is (i) signed by the claimant, (ii) gives the claimant's own recollection of the relevant events, (iii) identifies any other relevant witness known to the claimant and the gist of the evidence which the witness may be able to give, and (iv) explains what, if any, steps have been taken or attempts made since the incident occurred to bring it to the attention of the British authorities.’¹⁷⁵ This ruling may seem appropriate on its face but must be considered in context. PIL, who represented the bulk of the victims, ceased its representation of Iraqi victims only a few months after the ruling in August 2016 when its offices closed. Ever since, the bulk of the victims have been unrepresented, so it would have been virtually impossible for witness statements which did not satisfy the ruling to be rectified. As noted above, as of 31 March 2016, there were 1374 cases under consideration by IHAT.¹⁷⁶ In our view, steps should have been taken, such as appointing a ‘duty-counsel’ representative, to aid the victims to rectify their witness statements. There is no indication that any steps were taken to assist victims in this or any other way.

In addition, ‘lower-level incidents of ill-treatment’ were progressively weeded out of IHAT. On 24 October 2016, investigations into 489 lower-level allegations of ill-treatment were discontinued, as it was deemed ‘not proportionate’ to maintain the investigations. A further 68 allegations were discontinued for the same reasons on 19 September 2016. A number of other cases were discontinued because of insufficient evidence; others because it was not considered proportionate to investigate further given the length of time that had passed.¹⁷⁷

¹⁷³ Defence Committee, Oral evidence: ‘MoD support for former and serving personnel subject to judicial processes’, HC 109, 8 June 2016, Q28.

¹⁷⁴ This is discussed at length in Sir David Calvert-Smith, ‘Review of the Iraq Historic Allegations Team’, 15 September 2016, para. 13.8; see generally, paras. 13.3 – 13.8.

¹⁷⁵ *Al-Saadon & Ors v SSD & Ors* [2016] EWHC 773 (Admin), 7 April 2016, para. 289, and generally, paras. 284-293; Referred to in Sir David Calvert-Smith, ‘Review of the Iraq Historic Allegations Team’, 15 September 2016, para. 6.5.

¹⁷⁶ IHAT statistics, available on its website.

¹⁷⁷ IHAT report on work completed, available on its website.

Additional rationales to close cases have become apparent in more recent times, post IHAT. On 12 June 2018, for instance, the Secretary of State for Defence decided to close hundreds of cases because of all or some of the rationales below:

1. The combination of the criminal investigation undertaken by IHAT and SPLI and the oversight provided by the High Court in this case – including the availability of judicial review and civil proceedings in respect of any alleged ill-treatment – satisfies any Article 3 ECHR obligation which might arise.
2. No evidence was identified or provided to support the allegations. The possibility of obtaining further evidence which is relevant to the circumstances of the alleged ill-treatment in this case is low. The Secretary of State therefore considers that the costs of further inquiries outweigh the potential benefits.
3. The case does not highlight issues that are of such seriousness or ongoing importance that it is necessary to conduct further inquiry in order to learn lessons from it.
4. In addition to the above principal reasoning, some, albeit limited, reliance is placed upon the concerns that have emerged from the disciplinary action that has been taken against Mr Phil Shiner of Public Interest Lawyers.¹⁷⁸

The research team finds the bulk of these rationales to be of concern, for the following reasons:

In relation to the first rationale, as already set out, an effective investigation must be capable of establishing the truth and punishing the wrongdoers.¹⁷⁹ That other avenues have been pursued does not necessarily obviate the need for a criminal prosecution. A criminal prosecution serves a particular purpose and should be assessed on its own terms, on the basis of the cogency of the evidence.

Clearly an absence of sufficient evidence will make a prosecution impossible. The cost implications of further inquiries are but one consideration which should be taken into account, alongside the gravity of the alleged incidents. The primary consideration should be the likelihood of obtaining further evidence and the prospects of a successful criminal prosecution. There is no data provided to be able to scrutinise the assertions made about the low likelihood of further evidence, including what steps had already been attempted. In normal circumstances, the victims would have the opportunity to respond to such assertions. There is no indication whether victims have been informed and provided an opportunity to make representations, but this seems unlikely given what was noted about the absence of legal representation following the closure of PIL. Mr Justice Leggatt noted in *Al-Saadoon*, when setting out his views about how to weed out weak cases, that ‘it is appropriate to ask at an early stage whether there is a realistic prospect of obtaining sufficient evidence to charge an identifiable individual with a service offence. If it is clear that the answer to this question is “no”, there can be no obligation on IHAT to make any further enquiries.’¹⁸⁰ However he added:

[i]n some cases where the answer is not immediately clear, it may well be possible to identify one or more limited investigative steps which, depending on their outcome, may lead to the conclusion that there is no realistic prospect of meeting the evidential sufficiency test. Examples of such steps might be carrying out a documentary search or interviewing the complainant or a key witness. It goes without saying that it will be a matter for the judgment of the Director of IHAT in any particular case how the test formulated by the DSP is applied.¹⁸¹

It is not clear whether the 12 June 2018 decisions to close investigations carried out any documentary search or interviewed the complainants. Furthermore, following the closure of IHAT, it is unclear

¹⁷⁸ MoD decisions on Article 2 cases (updated 29 August 2018),

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736613/20180828_Article_3_cases_ENGLISH_DJEP_PDF.pdf; MoD decisions on Article 3 cases (updated 29 August 2018),

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736613/20180828_Article_3_cases_ENGLISH_DJEP_PDF.pdf.

¹⁷⁹ See, e.g., *Oğur v Turkey*, para. 88; *Y. v Slovenia*, para. 96; *Kelly and Others v United Kingdom*, para. 96.

¹⁸⁰ See, *Al-Saadoon & Ors v SSD & Ors* [2016] EWHC 773 (Admin), 7 April 2016, para. 283.

¹⁸¹ *Ibid.*

who ultimately took the decision to close investigations – the SPLI, SPA or the MOD. The communication on the closure of investigations was made by the Secretary of State for Defence.

Criminal prosecutions are normally pursued because there is evidence that a particular individual committed a crime. In our view, although it is a legitimate concern, whether an allegation will ‘highlight issues that are of such seriousness or ongoing importance that it is necessary to conduct further inquiry in order to learn lessons from it’ is not a factor that should *determine* whether a criminal case is pursued. A ‘lessons learned’ approach would normally be pursued alongside or in addition to any criminal prosecution, but a criminal prosecution is not necessarily the most suitable vehicle to use to foster such learning.

Making an adverse finding on the cogency of evidence because of the disciplinary action that has been taken against Phil Shiner of PIL is problematic. The SSD qualifies its statement noting that ‘some, albeit limited reliance’ is placed on this ground. However, in August 2017, counsel for the MoD noted that ‘the disciplinary proceedings surrounding Mr Shiner in the Solicitors Disciplinary Tribunal, which have been a catalyst for changes in the way that the IHAT investigative strategy has worked. That is likely to lead to a substantial increase in the tempo at which cases are terminated.’¹⁸² The disciplinary finding should have no bearing on the credibility of the victims Mr Shiner represented which should be assessed on their own merits. Many of the individuals that had been represented by Mr Shiner were recognised by UK courts to have suffered heinous abuses. This includes but is by no means limited to Shiner’s work on the ill-treatment and death of Baha Mousa and most recently, the findings of the High Court in the matter of *Alseran and Others v Ministry of Defence*.¹⁸³ Just because PIL gathered the evidence, this does not self-evidently mean that a case is fundamentally flawed ab initio.

The scope of investigations was also limited in several respects, which appears to have been detrimental to achieving accountability for those most responsible for the alleged crimes.

Importantly, the investigations do not appear on their face to have made any attempt to go up the chain of command. This may reflect a broader problem in the UK that commanders and the senior military leadership are rarely, if ever, held to account. As Samira Shackle notes in her exposé for The Guardian, ‘the last person in Britain to be prosecuted for crimes committed by forces under their command was in 1651 during the civil war.’¹⁸⁴ She relays her discussion with ‘Paul’, a retired police detective who worked as an investigator: ‘Wanting to investigate the chain of command, in one case, he requested permission from IHAT’s leadership to interview a senior army officer in relation to an alleged unlawful killing. This was refused. Every time he tried to pursue this line of inquiry, he claims that it was shut down by IHAT’s leadership or MoD lawyers.’¹⁸⁵ ‘Paul says’: ‘I felt the MOD were putting pressure on the senior leadership to wrap things up.’¹⁸⁶

Further – but related to the above – investigations appear to have been construed narrowly. IHAT was established with a mandate to investigate cases involving death or alleged ill-treatment of Iraqi civilians in British custody. This was later widened to include some cases involving the allegedly unlawful killing by British soldiers of Iraqi civilians who were not in custody. In Mr Justice Leggatt’s 2015 decision in the *Al-Saadoon* case, he held that the duty to investigate allegations of a violation of Article 3 (torture and ill-treatment) only applies in cases where the nature of the allegation is that

¹⁸² *Al-Saadoon & Ors v Secretary of State for Defence & Ors*, Hearing before Mr Justice Leggatt, 8 June 2017, Transcript (on file), para. 12.

¹⁸³ [2017] EWHC 3289 (QB), 14 December 2017.

¹⁸⁴ Samira Shackle, ‘Why we may never know if British troops committed war crimes in Iraq’, The Guardian, 7 June 2018.

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

the claimant was tortured or mistreated by British forces.¹⁸⁷ In other words, allegations that an individual was handed over to United States or Iraqi authorities in circumstances where there was allegedly a real risk that they would subject the claimant to torture or mistreatment were understood as outside the boundaries of the cases which needed to be investigated.¹⁸⁸

In 2016, the UK Government explained to the United Nations Human Rights Committee that:

The IHAT is aware of allegations that UK Armed Forces personnel transferred detainees into the custody of, or were present during interrogations by, US Forces at Camp Nama and other so-called “black sites”. However, it has not yet been able to identify Camp Nama with a particular location. This is because a number of the facilities operated by US Forces were known by various designations, and the IHAT’s investigation has not yet progressed to a point where these different names can be unambiguously resolved. If the IHAT assesses that the allegations are credible, and that there are viable and proportionate lines of enquiry available, these will be investigated in accordance with its investigative strategy.¹⁸⁹

The June 2018 Intelligence and Security Committee report into detainee mistreatment and rendition noted:

8. Under domestic law, ‘complicity’ in torture or CIDT means any involvement in torture or CIDT. (Under domestic law relating to secondary liability and joint enterprise, an individual may be prosecuted – as if they were the principal offender – for an offence that is carried out by another if they aid, encourage, counsel or procure the commission of an offence.) This is particularly relevant, as most allegations of UK involvement in mistreatment of detainees relate to facilitating, supporting or assisting others in that mistreatment. Complicity in torture or CIDT might result from, for example, sharing intelligence in the knowledge or belief that action might be taken on that intelligence with a real risk that torture or CIDT would result.

9. Conspiracy to commit offences outside the UK (an agreement by two or more people to carry out such a criminal act) is also an offence under domestic law. This might include, for example, prosecutions of pilots, aircrew or aircraft owners with knowledge of the fact that a flight carried a person likely to be subject to an offence in another jurisdiction (such as kidnapping, false imprisonment, assault or torture).¹⁹⁰

In this respect, it is also relevant to consider the ruling of the ECtHR in the case of *El Masri v Former Yugoslav Republic of Macedonia*,¹⁹¹ which concerned a German national who when in Macedonia, was handed over by the authorities to the CIA outside of any legal process, and was thereafter taken to Afghanistan where he was subjected to harsh interrogation techniques and unlawfully detained. The Grand Chamber held that:

192. The Court considers that the prosecuting authorities of the respondent State, after having been alerted to the applicant’s allegations, should have endeavoured to undertake an adequate investigation in order to prevent any appearance of impunity in respect of certain acts. The Court does not underestimate the undeniable complexity of the circumstances surrounding the present case. However, while there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, an adequate response by the authorities in investigating allegations of serious human rights violations, as in the present case, may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory (see *Anguelova v Bulgaria*, no. 38361/97, § 140, ECHR 2002-IV; *Al-Skeini and Others v the United Kingdom* [GC], no. 55721/07, § 167, ECHR 2011; and *Association 21 December 1989 and Others v Romania*, nos. 33810/07 and 18817/08, § 135, 24 May 2011). As the Council of Europe stated in its Guidelines of 30 March 2011 on eradicating impunity for serious human rights violations (see paragraph 105 above), “impunity must be fought

¹⁸⁷ *Al-Saadoon v SSD* [2015] EWHC 715 (Admin) 17 March 2015, para. 294 (2)-(4).

¹⁸⁸ *Ibid.*

¹⁸⁹ UN Human Rights Committee, ‘UK Government response to the Concluding Observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland’, 23 August 2016, para. 45,

https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fAFR%2fGBR%2f24948&Lang=en.

¹⁹⁰ ISC, ‘Detainee Mistreatment and Rendition: Current Issues’, HC 1114, 28 June 2018, paras. 8, 9.

¹⁹¹ *El Masri v FYRoM* (Grand Chamber), ECtHR, Appl. no. 39630/09, 13 December 2012.

as a matter of justice for the victims, as a deterrent to prevent new violations and to uphold the rule of law and public trust in the justice system”. The inadequate investigation in the present case deprived the applicant of being informed of what had happened, including of getting an accurate account of the suffering he had allegedly endured and the role of those responsible for his alleged ordeal.

193. In view of the above considerations, the Court concludes that the summary investigation that has been carried out in this case cannot be regarded as an effective one capable of leading to the identification and punishment of those responsible for the alleged events and of establishing the truth.

194. Against this background, the Court finds that there has been a violation of Article 3 of the Convention, in its procedural limb.

Mr Justice Leggatt distinguishes the *El Masri* case, holding that ‘the breach of the procedural aspect of article 3 found by the Court related to the failure to investigate Mr El-Masri’s criminal complaint. The subject matter of that complaint was his “ill-treatment by state agents and their active involvement in his subsequent rendition by CIA agents”: it was this “*prima facie* case of misconduct on the part of the security forces of the respondent State” which warranted an investigation.’¹⁹² However this is arguably a matter which should be revisited in light of the findings of the Intelligence and Security Committee in its report on detainee treatment and rendition.¹⁹³

With respect to the truth-telling functions of investigations, UK courts have determined that an inquisitorial process (which in this case became the IFI) was appropriate for Article 2 cases, however it was held that there was no need to establish a comprehensive inquiry into abuse allegations.¹⁹⁴ The work of the IFI is limited to Article 2 (allegations of wrongful death) cases, though in certain limited circumstances its investigations may go wider if there are facts related to other abuses which bear upon the Article 2 cases.¹⁹⁵ Cases of torture and other ill-treatment do not fall within the remit of the IFI because they are not Article 2 cases. Thus, any case of torture or other ill-treatment which did not result in death or was not connected to allegations of wrongful death would not benefit from an inquisitorial inquiry, once the criminal investigations were discontinued. However, the matter was kept open: ‘Once it is determined that there are cases in which there will be no prosecution, the procedure for Article 3 cases should be reviewed by the Secretary of State in the light of the experience in the Article 2 cases; it may well be possible to conduct the inquisitorial inquiry into these cases by taking a sample of the more serious cases.’¹⁹⁶ In order to fulfil its ‘lessons learned’ exercise and to comply with victims’ right to truth, an inquisitorial process should be instituted for Article 3 cases.

c) Prompt investigations

Investigations must be reasonably prompt. Prompt investigations are important for both the suspect who requires legal certainty and the victims and their families who have a right to know the truth of what happened and, where appropriate, obtain reparations. What constitutes ‘prompt’ will depend on the complexity of the circumstances being investigated. Consideration has been given in the jurisprudence to matters such as the opening of investigations, delays in identifying witnesses or

¹⁹² *Ibid*, para. 179.

¹⁹³ The Rt Hon. Dominic Grieve, Intelligence and Security Committee of Parliament, *Detainee Mistreatment and Rendition: 2001–2010*, HC 1113, 28 June 2018, p. 3.

¹⁹⁴ *R (Ali Zaki Mousa and others) v SSD* (No. 2) [2013] EWHC 1412 (Admin), paras. 211-231.

¹⁹⁵ Published response of Sir George Newman to question posed by Dr Carla Ferstman in the course of this research project, 7 September 2018, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/738930/Progress_Statement_7_September_2018.pdf.

¹⁹⁶ *R (Ali Zaki Mousa and others) v SSD* (No. 2) [2013] EWHC 1412, para. 230.

taking statements and the length of time taken for the initial investigation.¹⁹⁷ In the case of *McDonnell v United Kingdom*, the ECtHR determined that:

whatever the individual responsibility, or lack of responsibility, of those public officials involved in the investigation process, these delays cannot be regarded as compatible with the State's obligation under Article 2 to ensure the effectiveness of investigations into suspicious deaths, in the sense that the investigative process, however, it be organised under national law, must be commenced promptly and carried out with reasonable expedition. To this extent, the foregoing finding of excessive investigative delay, of itself, entails the conclusion that the investigation was ineffective for the purposes of Article 2 of the Convention. There has, accordingly, been a violation of Article 2 under its procedural aspect by reason of excessive investigative delay.¹⁹⁸

Structural issues resulting in inefficiencies and delays in the IHAT investigative process were comprehensively addressed in the report by Sir David Calvert-Smith.¹⁹⁹ Structural issues relating to IHAT were also considered in *Ali Zaki Mousa v SSD No. 2*,²⁰⁰ where the Divisional Court raised a number of concerns about the effectiveness of the IHAT investigative process. A key concern was timeliness, with the Court noting that the investigations were both lengthy and time-consuming. Given the large number of claims involving incidents occurring at many different times and in different locations, the Court judged it to be unlikely that IHAT would be able to complete its mandate without undue delay.²⁰¹ Because of these and other issues, the Court expressed concern that the UK was not effectively discharging its investigative obligations under Articles 2 and 3 of the European Convention. It determined that in a large portion of the cases, there was not a realistic prospect that persons would be held criminally responsible for the deaths of Iraqis.²⁰² Consequently an additional approach was proposed by the Divisional Court which focused on more streamlined inquiries on the model of coroner's inquests to investigate cases where a duty of investigation arises in Article 2 cases; matters were to be referred to such a process as appropriate, once the prospects for a criminal investigation were exhausted. This is what prompted the establishment of the IFI.²⁰³

Concerns about delays in criminal investigations continued to be the subject of comments by judges. For instance in the *Al-Saadoon* case, Mr Justice Leggatt noted that over one and a half years after the Divisional Court in *Ali Zaki Mousa v SSD No. 2* had emphasised the 'need for urgent and realistic decision-making' on three specific 'category 2' cases under investigation by the IHAT, the final decision was still yet to be made.²⁰⁴ Further, in relation to seven 'category 3' cases, only two investigations had been concluded. He described this state of affairs as 'deeply disappointing'.⁹ In 2017, Mr. Justice Leggatt again comments on inordinate delays with the conclusion of investigations, referring specifically to the Baha Mousa investigation:

I have got one [question] which relates to the reference to the Baha Mousa investigation still carrying on. I appreciate that I know nothing about the details of the investigation but it does seem to me that on the face of it, and I will try to avoid superlatives, but it is difficult to understand why almost six years after a major public inquiry was finished in 2011 there has still been no resolution of the question whether to prosecute anybody in relation to Baha Mousa. I think people would find that, on the face of it, extraordinarily difficult to understand.²⁰⁵

¹⁹⁷ *Y. v Slovenia*, ECtHR, Appl. no. 41107/10, 28 May 2015, para. 96.

¹⁹⁸ *McDonnell v United Kingdom*, ECtHR, Appl. no. 19563/11, 9 December 2014, para. 90.

¹⁹⁹ Sir David Calvert-Smith, 'Review of the Iraq Historic Allegations Team', 15 September 2016; see particularly, para. 13.11.

²⁰⁰ [2013] EWHC 1412 (Admin).

²⁰¹ *Ibid.*, paras. 213-251.

²⁰² *Ibid.*, paras. 180-182.

²⁰³ In *R (Ali Zaki Mousa) v Secretary of State for Defence (No 2)* [2013] EWHC 1412 (Admin) and [2013] EWHC 2941 (Admin), in judgments given on 24 May 2013 and 2 October 2013 respectively.

²⁰⁴ *Al-Saadoon v SSD* [2015] EWHC 1769 (Admin), para. 33.

²⁰⁵ *Al-Saadoon & Ors v Secretary of State for Defence & Ors*, Hearing before Mr Justice Leggatt, 8 June 2017, Transcript (on file), para. 46.

Concerns about delays in criminal investigations have also been expressed by Parliament,²⁰⁶ by the media,²⁰⁷ and others.

d) Transparent investigations

The transparency of investigations – whether criminal investigations, inquiries or other forms of processes – is important so that lessons can be learned and faulty practices rectified as well as to give proper public oversight of governmental activity which is necessary in any democracy. Transparency is also crucial to ensure the fairness of proceedings for complainants, who have a right to know what happened to their complaint and to respond as appropriate, if decisions are taken to close down an investigation or not to pursue a prosecution. Transparency is also important for suspects and defendants, so that they are clear on what allegations they face and are able to defend themselves against such allegations. Open justice is necessary for the rule of law.

When proceedings are ongoing, however, there may be reasons why certain information should be kept out of the public domain, particularly to safeguard the rights of accused persons, who have the right to be presumed innocent. As indicated earlier in this discussion paper, it is important for judicial officials and government authorities to refrain from commenting on the strength or weaknesses of allegations or cases, in order not to influence or to be perceived as influencing proceedings which must be independent.

In the course of our research, a range of concerns relating to transparency arose which are set out below.

First, objective information relating to the status of ongoing criminal investigations has been insufficient, as have the reasons why individual investigations were discontinued and decisions taken not to pursue prosecutions. Whereas IHAT published some limited information about cases under consideration, the SPLI only publishes the number of cases completed, with the SSD taking responsibility for publishing a case number and a short generic description (in English and Arabic) of the action taken. For instance, in the latest SSD statistical reports, cases are listed by number only with no accompanying factual summary. The Article 3 cases have a column for the decision taken; in each case what is listed here is simply ‘no inquiry’. There is an additional column ‘summary of reasons for decision’, in which generic reasons are provided (the same reasons appear in each case):

1. The combination of the criminal investigation, plus the availability of a civil damages claim in respect of the alleged ill-treatment, satisfies any Article 3 ECHR obligation which might arise.
2. The evidence submitted to the Solicitors Disciplinary Tribunal (SDT) and the SDT judgement in disciplinary proceedings brought against Mr Phil Shiner of Public Interest Lawyers (PIL) casts significant doubt upon the veracity and credibility of the allegations made by PIL.
3. Taking these matters into account, the Secretary of State has decided that any investigatory obligations have been fully met.

²⁰⁶ See e.g., House of Commons Defence Committee, ‘Who guards the guardians? MoD support for former and serving personnel’ HC 109, 10 February 2017, Annex 1: Principles for future investigations; under the heading ‘Support for former and service personnel’, ‘That justice delayed is justice denied and that investigations must be conducted in an expeditious manner.’ See also, Defence Committee, ‘Statute of limitations – veterans protection inquiry’, <https://www.parliament.uk/business/committees/committees-a-z/commons-select/defence-committee/inquiries/parliament-2017/inquiry13/>; House of Lords, ‘Armed Services: Claims - Motion to Take Note’, Lord Brown of Eaton-under-Heywood, 24 November 2016.

²⁰⁷ Robert Mendick, “‘When will this nightmare end?’ War vet tells of shock at fourth inquiry into suspicious death of Iraqi civilian”, The Telegraph, 23 September 2017.

A date is also provided for when the decision was taken.²⁰⁸

The same opaqueness exists with the Article 2 cases, though because of the existence of the IFI, in some cases, a decision is taken to refer a matter for an inquisitorial inquiry.²⁰⁹ Also, discrepancies in the names of victims and numbering systems has made it difficult, often impossible, to track the progress of cases, thereby undermining the public function of such proceedings. The opacity of the investigations has impeded transparency and, arguably, public oversight. A significant gap is understanding the full grounds for closing down specific investigations, which have not been explicitly and coherently laid out.

Second, as pointed to by the SIWG, there is a need to ensure that full and accurate contemporaneous records are produced and preserved in accordance with MoD records management policy. Among other flaws, the Working Group identified instances of incomplete log books and radio logs, difficulties for investigative bodies to locate photographs and other records relating to the treatment of certain detainees, incomplete records of actions taken in response to certain incidents, and the routine destruction of ‘written materials once the tasks to which they related were complete, as a consequence of which they will not be available to Service Police investigations or inquiries.’²¹⁰ Such conduct is enormously problematic from a rule of law perspective. In IFI’s investigation into the death of Nadheem Abdullah, Sir George Newman noted that he made exhaustive inquiries about the whereabouts of the transcript of the court martial trial in respect of the death of Mr Abdullah but concluded that it was not available and that it had, probably, in all its previous forms, including as a disk, been destroyed or thrown away.²¹¹ In the research team’s follow up queries to Sir George Newman, he indicated that ‘Court martial transcripts are sometimes not available as they may have been destroyed after a number of years in line with an institution’s record keeping policies.’²¹²

The computer database known as AP3 Ryan at Camp Bucca was taken out of active use in 2008, and ‘inadequate steps were taken to preserve the records held on it, despite the fact that this litigation was already in prospect. ... When disclosure of documents was given in these proceedings [*Alseran v SSD*], the MoD did not disclose the existence of the data stored on this laptop and disclosed only print-outs of data which had come from the AP3 Ryan database but is now held on a system called the Defence Archive System (DAS). Because the DAS does not run the AP3 Ryan software, the data stored on the DAS is displayed in a different format which is much harder to interpret and has some fields missing.’²¹³ Also at Camp Bucca, the first several hundred detainees on ‘the list of detainees’, have as the ‘date of capture’ 28 March 2003 in every single case. In some cases, the date of release shown is earlier than 28 March 2003.²¹⁴ Whether intentional or not, the factors pointed to here have in all likelihood contributed to the subsequent findings of investigative bodies that the evidential sufficiency test was not met.

²⁰⁸ MoD decisions on Article 3 cases (updated 29 August 2018),

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736613/20180828_Article_3_cases_ENGLISH_DJEP_PDF.pdf.

²⁰⁹ MoD decisions on Article 2 cases (updated 29 August 2018),

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736613/20180828_Article_3_cases_ENGLISH_DJEP_PDF.pdf.

²¹⁰ See, MoD SIWG, ‘Systemic Issues Identified from Investigations into Military Operations Overseas: July 2015’,

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/450319/20150727-mod-annual-report-systemic-issues-july-2015.pdf.

²¹¹ IFI, ‘Consolidated Report into the Death of Nadheem Abdullah and the Death of Hassan Abbas Said’, March 2015, para. 3.4.

²¹² Published response of Sir George Newman to question posed by Dr Carla Ferstman in the course of this research project, 7 September 2018,

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/738930/Progress_Statement_7_September_2018.pdf response to question 2(c).

²¹³ *Alseran & Ors v MOD* [2017] EWHC 3289 (QB), 14 December 2017, para. 187.

²¹⁴ *Ibid*, para. 190.

Third, the decision not to pursue an overarching inquiry into abuse allegations has limited the public's access to balanced information. In *Ali Zaki Mousa v SSD* (No. 2), the judges reminded that the purpose of the IHAT inquiry was limited: '[L]ike a police inquiry, [IHAT] has not been an inquiry accessible to the public of the broader issues of State responsibility for the death, including the instruction, training and supervision given to soldiers undertaking such tasks. There are cases where there will be no prosecution, for the reasons we have given, and it is therefore necessary that there be an inquiry accessible to the public. IHAT is neither structured nor staffed to do this.'²¹⁵ The decision to establish the IFI was important for public disclosure purposes, but IFI has not addressed all cases involving allegations of unlawful death and is not mandated to address cases relating to torture or other ill-treatment matters, nor is or was any other public inquiry (other than the narrowly-focused Baha Mousa inquiry).

Fourth, it is also problematic that there has been insufficient reporting to and scrutiny by Parliament concerning the extent to which, and how, the UK's investigative obligations under Articles 2 and 3 of the ECHR were being met. In certain cases, reporting to Parliament has been selective, and calls have been made for officials to clarify or correct faulty evidence. This happened with information provided to the Joint Committee on Human Rights on the prohibition of hooding and on the training of interrogation personnel:

We have yet to receive an explanation from the Ministry of Defence for the discrepancies between the evidence given to the Joint Committee in 2004 and 2006 on the use of prohibited conditioning techniques and the facts which have emerged from the *Payne* court martial and the Aitken report. ... We recommend that, in response to this Report, the Secretary of State for Defence should confirm we will receive a detailed explanation of the discrepancies.²¹⁶

In his written response to the Joint Committee, Lord Goldsmith QC noted:

The RMP and the Army Prosecuting Authority (APA) have strongly expressed the view that it would be inappropriate at this time to release witness statements, associated exhibits and other documents (not given in evidence during the trial) which are being considered as part of the police formal criminal review of the case (*Payne – Baha Mousa*).²¹⁷

Finally, the efforts made by this research team to obtain official information from Government ministries and officials were largely rejected or delayed to the point where they had not yet provided at the time of writing this discussion paper, with minimal exception. Our request to interview the head of the SPA or designate, or to obtain written answers to questions, was refused. A similar request to the SPLI was declined. Freedom of Information Act requests to the MoD which concerned a list and status of cases currently under DSP review, and the status of particular investigations, were delayed and not yet provided at the time of writing this discussion paper, on the basis of the belief that qualified exemptions applied:

we believe the information falls within the scope of the following qualified exemption(s): section 30 (Investigations). As such it is necessary for us to decide whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.²¹⁸

²¹⁵ [2013] EWHC 1412 (Admin), paras. 188-189.

²¹⁶ See, e.g., UK Joint Parliamentary Committee on Human Rights, 'UN Convention Against Torture: Discrepancies in Evidence Given to the Committee About the Use of Prohibited Interrogation Techniques in Iraq', HL 157, HC 527, 15 July 2008, paras. 14-16.

²¹⁷ *Ibid.*, p. 31.

²¹⁸ Response from the Service Prosecuting Authority, dated 20 September 2018; Response from the Directorate of Judicial Engagement Policy, 19 September 2018.

Our request for the list and status of cases currently under SPLI review,²¹⁹ decisions of the DSP not to bring charges in several IHAT cases,²²⁰ as well as the Final Closing Reports for several IHAT cases were delayed and not yet provided when writing this discussion paper for the same reason.²²¹ Similarly, our request to the Foreign and Commonwealth Office for details on the responses of the Government to the ICC Prosecutor on the preliminary examination concerning the situation in Iraq was delayed on the basis of the need to consider whether the public interest in disclosure outweighs the applicable qualified exemption to disclosure, and not yet provided to the research team at the time of writing.²²²

e) Victims' rights in the investigation

Victims of criminal offences have a range of rights during criminal proceedings that States are obliged to safeguard. The victim, or where he or she did not survive, the victim's next of kin, must be involved to the extent necessary to safeguard their legitimate interests.²²³ The Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, requires *inter alia* that Member States 'take appropriate measures to assist victims to understand and to be understood from the first contact and during any further necessary interaction they have with a competent authority in the context of criminal proceedings, including where information is provided by that authority.'²²⁴ Furthermore the Directive requires that Member States ensure that 'victims are notified without unnecessary delay of their right to receive' 'any decision not to proceed with or to end an investigation or not to prosecute the offender'²²⁵ which should include 'reasons or a brief summary of reasons for the decision concerned, except in the case of a jury decision or a decision where the reasons are confidential in which cases the reasons are not provided as a matter of national law.'²²⁶

In accordance with their role in the relevant criminal justice system, victims should have the right to a review of a decision not to prosecute; victims must be notified without unnecessary delay of their right to receive, and that they receive sufficient information to decide whether to request a review of any decision not to prosecute upon request.²²⁷ These rights are consistent with the Ministry of Justice's 'Code of Practice for Victims of Crime'.²²⁸

In *Ali Zaki Mousa v SSD (No. 2)*, the Court determined, referring to the *Al Skeini* case before the Grand Chamber of the ECtHR,²²⁹ that '[t]he investigation must be public and accessible to the victim's family.'²³⁰

Sir David Calvert-Smith commented in his report about the difficulties with victim interviews:

For the UK/MoD/FCO to go to a domestic or international tribunal having unreasonably delayed or, even worse, failed to provide access, when such access was available, to its justice system to the key people, namely victims

²¹⁹ Response from the Directorate of Judicial Engagement Policy, 19 September 2018.

²²⁰ Response from the Directorate of Judicial Engagement Policy, 21 September 2018.

²²¹ Response from the Directorate of Judicial Engagement Policy, 19 September 2018.

²²² Response from the Foreign and Commonwealth Office, dated 20 September 2018.

²²³ See e.g. *Jordan v United Kingdom* (2003) 37 EHRR 52, paras. 106-109; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, para 20; *Al-Skeini v United Kingdom* (2011) 53 EHRR 18, paras. 166-167; *R (Smith) v Oxfordshire Assistant Deputy Coroner* [2011] 1 AC 1, para. 64.

²²⁴ Art. 3(1).

²²⁵ Art. 6(1)(a).

²²⁶ Art. 6(3).

²²⁷ Art. 11.

²²⁸ Ministry of Justice, 'Code of Practice for Victims of Crime', October 2015, https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/OD_000049.pdf.

²²⁹ *Al-Skeini And Others v The United Kingdom* (Grand Chamber), ECtHR, Appl. no. 55721/07, 7 July 2011, para. 174.

²³⁰ [2013] EWHC 1412 (Admin), para. 147.

and eye-witnesses etc. of incidents involving death or ill-treatment, would be impossible to defend. The current situation in which the Mensa process is in abeyance is the biggest single obstacle in the way of completing the IHAT process in time and would be biggest single problem facing the UK government in defending its handling of the issue in either the Divisional Court or an international tribunal.²³¹

At the end of August 2016 when PIL closed down, this effectively ended the legal support available to the vast majority of Iraqi victims which had engaged in the criminal investigation process. For the most part, no other solicitors firm has assumed representation for the majority of victims. Mr. Justice Leggatt, who has judicial oversight of the investigative process through periodic hearings in the *Al-Saadoon* case, did not have the benefit of victim learned counsel submissions post August 2016.²³² In other scenarios, when a claimant firm dissolves, the SRA can step in to preserve the position of the victims, particularly where the matter is urgent or where there are vulnerable victims. They do not appear to have done so following the closure of PIL.²³³

Largely for budgetary and logistic reasons, IHAT and later SPLI, stopped individually informing claimants in Article 3 cases concerning ill-treatment (as opposed to torture) that their investigations were being discontinued. This was reported to Mr Justice Leggatt by learned counsel for the MoD in the course of the *Al-Saadoon* hearings:

... The costs of doing that [individual notification to all claimants] in every single case have simply become too prohibitive. The Iraq-based representatives charge between \$30 and \$50 per letter to be delivered and the sums vastly increase if we are talking about, for example, all the Article 3 cases. So the position that IHAT has adopted, and we hope that this is satisfactory, is that they will continue to write individually in any unlawful killing and serious ill treatment cases subject to full investigation.²³⁴

Prior to this approach, victims whose claims were discontinued were provided with individual written notifications explaining in some detail the decision to discontinue and the basis upon which it was taken. The new approach of website notification provides much more limited information, assumedly making it difficult for victims to understand why the evidentiary threshold was not met or other pertinent information. The various websites provide only cursory information. The IHAT last updated table of completed cases provides grouped information by claim numbers which offers some limited information about the reason for discontinuance. Sketchy information is provided for the more recent decisions to discontinue in 2016, whereas earlier notifications of decisions to discontinue provide more detail and also note in some cases that IHAT investigators had communicated the decision directly to family members.²³⁵ SPLI data is much more limited still. In a document entitled 'Information for Claimants',²³⁶ there is a generic statement at the top reproduced below. Thereafter there is simply a list of numbers, next to which it simply states 'proportionality':

Please use your unique number to find your case. If it is listed below, it has been closed.

CLOSED (proportionality): You made a complaint about the conduct of UK Armed Forces in Iraq. This complaint has been carefully considered by SPLI, an independent investigative unit. It has been decided to close your case, without further action, as there is a lack of evidence of a serious criminal offence. It is also not considered proportionate to investigate further given the length of time that has passed.

²³¹ Sir David Calvert-Smith, 'Review of the Iraq Historic Allegations Team', 15 September 2016, para. 13.8.

²³² See, e.g., *Al-Saadoon & Ors v Secretary of State for Defence & Ors*, Hearing before Mr Justice Leggatt, 8 June 2017, Transcript (on file).

²³³ See, the website of the Solicitors Regulation Authority: <https://www.sra.org.uk/faqs/contact-centre/public/06-interventions/urgent-case.page>.

²³⁴ *Al-Saadoon & Ors v Secretary of State for Defence & Ors*, Hearing before Mr Justice Leggatt, 8 June 2017, Transcript (on file), para. 78; see generally, paras. 78 – 80.

²³⁵ IHAT, untitled and undated document,

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/649525/20171003-IHAT_NEW_master_copy_website_work_completed_table-HQComms_O.pdf.

²³⁶ SPLI, 'Information for Complainants Table' (undated),

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/741041/20180913-SPLI_Information_for_complainants_table_UPDATE.PDF.

CLOSED (Lack of evidence): You made a complaint about the conduct of UK Armed Forces in Iraq. This complaint has been carefully considered by SPLI, an independent investigative unit. It has been decided to close your case, without further action, as there is a lack of sufficient, credible evidence of a criminal offence. This decision also took into the account findings against UK solicitors involved in legal proceedings concerning military operations in Iraq.’

f) Defendants’ rights

Defendants have rights that need to be respected as part of a criminal investigation. Inquiries must respect their dignity and right to be presumed innocent if and until they are found guilty by a court of law. Defendants have the right to know the case against them so that they can fully defend their interests and have the right to be represented by counsel. People suspected or accused of criminal offences who are being questioned have the right to the presence and assistance of a lawyer.²³⁷ They also have the right to remain silent should they so choose, with no adverse inferences made.²³⁸ Soldiers naturally would expect to be supported through any investigative process by the MoD, to ensure their rights are respected.

The situation of army soldiers who have been subjected to Iraq-related interrogations, often numerous times over a span of years, has been difficult and problematic. According to Hilary Meredith, the poor support for service personnel investigated for historic allegations is a key cause of mental health conditions in those affected:

It is hard to comprehend the psychological horrors faced by British soldiers wrongly investigated by IHAT. Throughout the process there was an almost total disregard for their mental welfare. One veteran refused to leave his house because he “lost all faith in anybody outside the walls of his home” as a result of a lack of support from the MoD. Others were left suicidal.²³⁹

Soldiers who have experienced trauma and/or have symptoms linked to PTSD will have certain vulnerabilities which should be taken into account in the manner the interrogations are carried out; this is important not only to avoid exacerbating any existing trauma but because the state of vulnerability can simply require a higher duty of care. To interview individuals who suffer from PTSD or other trauma-related symptoms requires special skill and care, and specific training. Trauma can affect a witness’ ability to recall key events in logical sequence. It can also impact behaviour, speech patterns and body language.²⁴⁰ It is important for investigators to be sensitive to such cues in order to avoid making adverse or incorrect inferences that stem from a traumatised soldier’s reactions to questioning.

Evidence submitted to Parliament sets out that soldiers called upon by investigative bodies have been insufficiently supported by the MoD. The Defence Committee has expressed that:

[w]e are deeply concerned that the MoD’s package of support for service personnel appears to be fragmented, inaccessible and largely unknown. The MoD must, as a priority, devise and publish a single, accessible framework which sets out the MoD’s responsibilities and the support soldiers and veterans can expect to receive. That framework must be widely publicised and understood throughout the chain of command.²⁴¹

²³⁷ *John Murray v The United Kingdom*, (Grand Chamber), ECtHR, Appl. no. 18731/91, 8 February 1996, paras. 59-70.

²³⁸ See generally, International Covenant on Civil and Political Rights, Art. 14.

²³⁹ UK Parliament Defence Committee, inquiry into Mental Health and the Armed Forces, Written evidence submitted by Hilary Meredith, 14 February 2018, VMH0003.

²⁴⁰ Research on the impact of trauma on recall and credibility in other fields may be a helpful comparison. See, for instance, Hannah Rogers, Simone Fox & Jane Herlihy ‘The importance of looking credible: the impact of the behavioural sequelae of post-traumatic stress disorder on the credibility of asylum seekers’, (2015) 21(2) *Psychology, Crime & Law*, 139-155.

²⁴¹ UK Parliament House of Commons Defence Committee, ‘Who guards the guardians? MoD support for former and serving personnel’, HC 109, 10 February 2017, para. 95.

Concerns have been raised about the inordinate degree of scrutiny that soldiers and ex-soldiers have faced – an ‘endless process of investigation and reinvestigation’²⁴² which has been unfair to them and has negatively impacted morale. Concerns have been expressed about use of intimidating and unethical tactics and IHAT investigators approaching suspects and witnesses unexpectedly, outside of the chain of command. The MoD has indicated that over 300 potential witnesses, and seven suspects, were contacted without prior warning. These approaches, often years after the incidents, can cause a lot of anxiety to ex-soldiers trying to move forward with their lives.²⁴³ Ex-soldiers can be particularly vulnerable; ‘in the absence of the chain of command, veterans were “out on their own, on a limb”.’²⁴⁴

There is also legitimate concern that junior soldiers have been somehow scapegoated when they were sent to theatre with inadequate training, particularly on interrogation techniques. Numerous public inquiries have concluded that five banned interrogation techniques were widely used by British service personnel in Iraq between 2003 and 2009. These techniques – hooding, white noise, sleep deprivation, food deprivation and stress positions – were outlawed by the UK in 1972 and breach the Geneva Conventions. During the beginning of the Iraq war, however, training manuals did not mention that these techniques were forbidden. Nor did the manuals formally advocate using these techniques – they simply were not mentioned at all.²⁴⁵ The absence of a comprehensive inquiry into Article 3 cases obscures the role of Government in the areas of planning, training and guidance.

The Defence Committee is considering whether putting in place a statute of limitations for investigations may be the most appropriate way to deal with the real challenges that soldiers and former soldiers have faced in being confronted with multiple and repeated investigations over many years. The research team has submitted evidence to the Committee setting out that to do so would not be consistent with the UK’s legal obligations.²⁴⁶ Instead, we argue, the best route for the Government to pursue would be to increase the capacity and commitment for efficient, transparent and effective investigations that comply with procedural obligations and which are capable of weeding out quickly any spurious or clearly unfounded claims, and strengthening the capacity for robust, timely and transparent investigations where credible allegations are raised. Naturally there will be a mixture of quality in allegations made as there is with all criminal complaints. Strengthening investigative capacity would be the best way to protect soldiers from legal uncertainty and ensure full compliance with the UK’s legal obligations.

III.2 ACCOUNTABILITY FOR SYSTEMIC ISSUES

²⁴² UK Parliament Defence Committee, ‘Statute of limitations – veterans protection inquiry’, ‘scope of the inquiry’, <https://www.parliament.uk/business/committees/committees-a-z/commons-select/defence-committee/inquiries/parliament-2017/inquiry13/>.

²⁴³ UK Parliament House of Commons Defence Committee, ‘Who guards the guardians? MoD support for former and serving personnel’, HC 109, 10 February 2017, paras. 48 -60.

²⁴⁴ Ibid, para. 94.

²⁴⁵ See, e.g., Sir William Gage, ‘The Report of the Baha Mousa Inquiry’, Vol II, HC 1452-11, 8 September 2011; House of Lords House of Commons Joint Committee on Human Rights, ‘The UN Convention Against Torture (UNCAT)’, HL Paper 185-I; HC 701-I, 26 May 2006, paras. 68 – 94.

²⁴⁶ C. Ferstman and T. Obel Hansen, ‘Written evidence submitted by Dr Carla Ferstman and Dr Thomas Obel Hansen’, July 2018, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/defence-committee/statute-of-limitations-veterans-protection/written/87024.pdf>.

The notion of ‘systemic’ implies something which is ‘basic’, experienced by the whole of the organisation or body being analysed as opposed to just a part of it.²⁴⁷ The MoD SIWG has explained its use of the term ‘systemic issues’ as follows:

The term “systemic issues” primarily envisages shortcomings of doctrine, policy, training, or supervision that result in unintentional breaches. It encompasses inter alia situations where an individual has complied with policy and training, but these have been flawed; where policies issued at different levels have been contradictory, leaving individuals unable to determine whether their actions are correct; and where supervision has been insufficient to identify and address such confusion, or failure to understand and apply training correctly. Deliberate acts by individuals in knowing contravention of the law and of doctrine, policy or training are not systemic issues, and are punishable through the Service Justice system.²⁴⁸

The narratives surrounding the alleged crimes committed by UK military personnel in Iraq have focused in part on two differing perspectives. The first perspective is that of the few ‘bad apples’ who overstepped or acted outside the bounds of the law.²⁴⁹ The second perspective – of which there are several variants – is the existence of ‘systemic’ problems which led to or fostered the abuses – institutionalised failures in training, oversight, patterns of abuse, and inadequate investigations or in its second variant (which is connected to the first variant) – that the abuses themselves were systemic.

This second perspective (both variants) is prevalent amongst those who have called for broad-based inquiries capable of uncovering systemic issues to learn from past practice and institute the necessary changes to avoid recurrence.²⁵⁰ It is also prevalent in the ethos and working methods of the SIWG. Additionally, this second perspective is relevant to debates about the jurisdiction of the ICC. The focus of the ICC Prosecutor is on cases of sufficient gravity (for which the scale of abuses is one of a number of relevant criteria) concerning persons who bear the greatest responsibility (this tends to involve investigations of persons higher up the chain of command or political leadership). In the communication to the ICC Prosecutor, ECCHR and PIL stated that ‘what at first appears to be a series of random acts begins to form a clear pattern of systematic abuse’,²⁵¹ which ‘may attach all the way up the chain of command to the Chief of Defence Staff’.²⁵² Thus, the ‘few bad apples’ narrative arguably helps to deflect attention away from systemic issues which may engage the criminal responsibility of those higher up the chain of command as well as the institutional responsibility of the MoD. This also feeds into the argument that the inordinate attention placed on individual soldier abuses is misplaced.²⁵³

The systemic nature of abuses and the chain of command has been raised repeatedly with regards to military operations overseas, in particular in Iraq and Afghanistan.²⁵⁴ The chief legal military adviser in Iraq raised concerns of systemic use of unlawful interrogation methods such as hooding, in 2003,

²⁴⁷Oxford Living Dictionaries, <https://en.oxforddictionaries.com/definition/systemic>.

²⁴⁸ MoD SIWG, ‘Systemic Issues Identified from Service Police and Other Investigations into Military Operations Overseas: August 2018’, Report of the Systemic Issues Working Group, fn 1.

²⁴⁹ For instance, the Defence Committee noted: ‘Baha Mousa’s treatment and subsequent death in detention was an horrific example of a few Armed Forces personnel behaving inhumanely and illegally.’ [House of Commons Defence Committee, ‘UK Armed Forces Personnel and the Legal Framework for Future Operations: Government Response to the Committee’s Twelfth Report of Session 2013–14’, Third Special Report of Session 2014–15, HC 548, 8 July 2014, Q9, p. 7.

²⁵⁰ See, *R (Ali Zaki Mousa and others) v SSD* (No. 1) [2011] EWCA Civ 1334 and *R (Ali Zaki Mousa and others) v SSD* (No. 2) [2013] EWHC 1412.

²⁵¹ ECCHR and PIL January 2014 communication, p. 37.

²⁵² *Ibid.*, p. 169.

²⁵³ See, House of Commons Defence Committee, ‘Who guards the guardians? MoD support for former and serving personnel’ HC 109, 10 February 2017, para. 86.

²⁵⁴ MoD SIWG, ‘Systemic Issues Identified from Service Police and Other Investigations into Military Operations Overseas’, Reports dated July 2014, July 2015, September 2016 and August 2018: <https://www.gov.uk/government/collections/review-of-systemic-issues-arising-from-military-operations-overseas-index>.

concerns which were then passed up to ministerial level in March 2003.²⁵⁵ It was not until September 2003 that new operating directions were issued, which explicitly stated that the use of hooding was banned.²⁵⁶ Apparently, a similar order had been given by the General Officer Commanding 1 (UK) Armoured Division in Iraq during April 2003 but this direction was lost when responsibility was handed over to 3 (UK) Armoured Division in July 2003.²⁵⁷

The degree to which it has been accepted that there might be systemic issues requiring attention has evolved over time. Some of the evolution has occurred as a result of the findings of criminal investigations which were passed on to the SIWG for its consideration, as well as civil court judgments. For instance, in 2013, the High Court held in *R (Ali Zaki Mousa) v Secretary of State for Defence* (No. 2), that ‘there might have been systemic abuses and that such abuses may have been attributable to a lack of appropriate training’.²⁵⁸ In its 2018 report, the SIWG concluded that ‘[i]n light of the Court’s findings [in *Alseran & Others v Ministry of Defence*, 2017], the SIWG considered that there was sufficient evidence to conclude that assaults in detention had occurred, and may have been systemic’.²⁵⁹

Much of the evolution, however, stems from the detailed findings of Sir William Gage as part of the Baha Mousa Inquiry. He determined that there was:

a systemic failure within the MoD that had, in practice, allowed knowledge of the 1972 Directive [which prohibited the usage of the Five Techniques] and the Heath Statement to fade even amongst intelligence staff and, more surprisingly, had permitted knowledge of the current interrogation policy which only dated back to 1997 to have been almost completely lost. To this extent [...], the MoD did not have a grasp on, or adequate understanding of, its own interrogation policy [...].²⁶⁰

Sir William Gage considered that the ‘main fault for the inclusion of inappropriate training and/or exclusion of appropriate material [was the result of] a systemic failure over a number of years’,²⁶¹ in particular, ‘failures:(1) to have in place adequate doctrine to which the branch should teach; (2) to recognise the proper significance of aspects of the Geneva Conventions, such as the prohibition on insults, even though I accept that key Geneva Convention provisions were taught on the course; and (3) to have a proper legal assessment of the teaching on the courses.’²⁶² Furthermore, he noted that ‘the central features of this systemic failure were a wholesale lack of MoD doctrine in interrogation’.²⁶³ Sir William Gage also found that ministerial correspondence was ‘inaccurate to suggest that hooding had only been applied on a small number of occasions’.²⁶⁴

In the Report of the Baha Mousa Inquiry, Sir William Gage gave 73 recommendations to rectify the shortcomings that led to the death of Baha Mousa, which aimed to ‘ensure better and clearer accountability for the welfare of captured personnel’.²⁶⁵ They focus on training of soldiers who deal

²⁵⁵ See Baha Mousa Inquiry, ‘Summary of Proceedings: Tuesday 16 March 2010, Nicholas Mercer’, pp. 4-6, http://webarchive.nationalarchives.gov.uk/20100613012811/http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_150310/summaryofproceedingswc150310.pdf.

²⁵⁶ The Intelligence and Security Committee (ISC) Report, ‘The Handling of Detainees by UK Intelligence Personnel in Afghanistan, Guantanamo Bay and Iraq’, March 2005, Amended version of the Standard Operating Instructions on the Policy for Apprehending, Handling and Processing Detainees and Internees, Annex A, Chronology.

²⁵⁷ ISC Report, *ibid.*, para. 30.

²⁵⁸ [2013] EWHC 1412 (Admin) (24 May 2013), para. 176.

²⁵⁹ MoD SIWG, ‘Systemic Issues Identified from Service Police and Other Investigations into Military Operations Overseas: August 2018’, para. 7.1.7.

²⁶⁰ Sir William Gage, ‘The Report of the Baha Mousa Inquiry’, Vol I, HC 1452–I, 8 September 2011, para. 7.221.

²⁶¹ Sir William Gage, ‘The Report of the Baha Mousa Inquiry’, Vol III, HC 1452–III, 8 September 2011, para. 318.

²⁶² Sir William Gage, ‘The Report of the Baha Mousa Inquiry’, Vol II, HC 1452–II, 8 September 2011, para. 6.348.

²⁶³ Sir William Gage, ‘The Report of the Baha Mousa Inquiry’, Vol III, HC 1452–III, 8 September 2011, para. 318.

²⁶⁴ Sir William Gage, ‘The Report of the Baha Mousa Inquiry’, Vol II, HC 1452–II, 8 September 2011, para. 8.443 (4).

²⁶⁵ *R (Ali Zaki Mousa) v Secretary of State for Defence* (No. 2) [2013] EWHC 1412 (Admin) (24 May 2013), para. 208.

with detainees, the proper recording of events during detention, and the responsibilities within the chain of command for prisoners.²⁶⁶ The Government accepted 72 of the 73 recommendations,²⁶⁷ rejecting the recommendation to impose a blanket ban on the ‘harsh’ technique or shouting in the face of the detainee during ‘tactical questioning’.²⁶⁸

The SIWG, chaired by Peter Ryan, is the principal MoD body responsible for identifying relevant systemic issues and ensuring that effective corrective action is taken.²⁶⁹ Since 23 October 2012, it assesses any systemic issues arising from the armed forces,²⁷⁰ by considering whether the evidence from a criminal investigation has disclosed any systemic or potential systemic issues.²⁷¹ Rather than establishing criminal accountability, the purpose of systemic issues investigations has been to map out failures and to learn lessons. The UK Government refers implicitly to the work of SIWG in its 2017 report to the UN Committee Against Torture, setting out that ‘a robust process is in place for identifying, reviewing, and correcting areas where doctrine, policy and training have been insufficient to prevent practices or individual conduct that could breach the UK obligations under international humanitarian law, and the UKG continues to publish annual reports detailing this work.’²⁷² A part of SIWG comprises the Review Group – previously the 2* Detention Steering Group²⁷³ – whose task is to ‘study the evidence uncovered in the course of a Service Police investigation or judicial process – and, in the case of a public inquiry, any findings and/or recommendations that the Chairman may make’²⁷⁴ and to request ‘additional information from subject-matter experts as necessary’.²⁷⁵ The systemic issues are recorded on the Systemic Issues Master Register of the Directorate of Judicial Engagement Policy.²⁷⁶

As the SIWG does not possess its own investigative capacities, it relies on the Service Police – IHAT and SPLI – and public inquiries for evidence to determine the factual situation and causes of alleged systemic issues.²⁷⁷ Previously, the MoD would conduct a review of IHAT’s report on each concluded case, and present all issues relating to training, policy, and other matters to SIWG.²⁷⁸ Since SPLI has taken over, the process and workflow are less clearly spelled out. However, regarding low-level ill-treatment allegations, the 2018 SIWG Report notes that since the reporting period 2016-2017, the Review Group and SIWG ‘have had to proceed without the benefit of [the] evidential basis as the Service Police had discontinued most of the allegations of ill-treatment considered during this reporting period without a full investigation.’²⁷⁹ Therefore, they have not been able to form ‘any view as to whether the alleged ill-treatment actually occurred or even whether the allegations were accurately recorded.’²⁸⁰ The SIWG has instead focused on reviewing the current policies in relation to the behaviour described in the allegation.²⁸¹

²⁶⁶ Ibid.

²⁶⁷ House of Commons Defence Committee, ‘UK Armed Forces Personnel and the Legal Framework for Future Operations: Government Response to the Committee’s Twelfth Report of Session 2013–14’, Third Special Report of Session 2014–15, HC 548, 8 July 2014, p. 7.

²⁶⁸ Sam Marsden and John Fahey, ‘Liam Fox rejects key inquiry finding’, *The Independent*, 8 September 2011.

²⁶⁹ MoD SIWG, ‘Systemic Issues Identified from Service Police and Other Investigations into Military Operations Overseas: August 2018’, para. 2.1.

²⁷⁰ *R (Ali Zaki Mousa) v Secretary of State for Defence* (No. 2) [2013] EWHC 1412 (Admin) (24 May 2013), para. 89.

²⁷¹ MoD SIWG, ‘Systemic Issues Identified from Service Police and Other Investigations into Military Operations Overseas: August 2018’, para. 3.2.

²⁷² UN Committee Against Torture, ‘Sixth periodic report submitted by the United Kingdom of Great Britain and Northern Ireland to the UN Committee against Torture under article 19 of the Convention pursuant to the optional reporting procedure, due in 2017’, UN Doc. CAT/C/GBR/6, 29 January 2018, para. 224.

²⁷³ MoD SIWG, ‘Systemic Issues Identified from Service Police and Other Investigations into Military Operations Overseas: July 2014’, 2.

²⁷⁴ Ibid.

²⁷⁵ MoD, ‘Systemic Issues Identified from Service Police and Other Investigations into Military Operations Overseas: July 2015’, 2.

²⁷⁶ *R (Ali Zaki Mousa) v Secretary of State for Defence* (No. 2) [2013] EWHC 1412 (Admin) (24 May 2013), para. 89.

²⁷⁷ MoD SIWG, ‘Systemic Issues Identified from Service Police and Other Investigations into Military Operations Overseas: July 2015’, 1.

²⁷⁸ MoD SIWG, ‘Systemic Issues Identified from Service Police and Other Investigations into Military Operations Overseas: July 2014’, 2.

²⁷⁹ MoD SIWG, ‘Systemic Issues Identified from Service Police and Other Investigations into Military Operations Overseas: August 2018’, para. 3.4.

²⁸⁰ Ibid.

²⁸¹ Ibid.

Moreover, during 2016-2017, the MoD changed the approach for identifying systemic issues for less serious allegations ill-treatment.²⁸² While previously the Review Group considered every case to identify any systemic or potential systemic issues, since the 2016-2017 reporting period it has implemented a process that ‘mirrors the “problem profiles” approach, which [...] IHAT adopted’.²⁸³ In practice, this means identifying issues ‘within those cases taken as a group’ and requesting an opinion of the relevant subject-matter experts of that ‘broad issue rather than of each manifestation’.²⁸⁴ Hence, most allegations of ill-treatment are not examined individually. The unavailability of an evidentiary basis from ill-treatment cases due to them being discontinued and the implementation of the adjusted approach to the identification of systemic issues arguably coincides with the political pressure leading up to the closure of IHAT.

Systemic issues are also addressed in the work of the IFI. In early 2018, the MoD requested the IFI to resume wider investigation into systemic issues in the investigation into the death of Saeed Radhi Shabram Wawi Al-Bazooni.²⁸⁵ The systemic issues were first identified by Sir George Newman in the Jabbar Report, in which he noted: ‘it is not presently clear to what extent details of the state of affairs up to the 8th of May 2003 were communicated to London. This in turn raises questions about the extent of the knowledge of the chain of military command in Iraq as to what was happening on the ground.’²⁸⁶

The implementation of many of the 72 recommendations set out in the Baha Mousa inquiry report that were accepted by the Government is recorded and reviewed in the reports of SIWG, and in 2013, the High Court in *Ali Zaki Mousa (No. 2)* noted that the great majority of the recommendations had been implemented.²⁸⁷

Some systemic issues pre-dating the Baha Mousa Inquiry Report, such as an implied death threat to a captured person, banging a tent pole against a table, invading the detainees’ personal space, blowing on their necks, and employing the so-called harshing technique, including shouting in their ears,²⁸⁸ have not been the subject of an inquiry for the reason that MoD considers that ‘the systemic issues evidenced by these incidents had been addressed by the extensive changes to policy, training, and monitoring as part of the implementation of the [Baha Mousa] recommendations’.²⁸⁹ On certain systemic issues, such as the ‘need to prevent the improper use of blindfolds’ and the ‘need to ensure that the treatment of captured persons complies with recognised norms’, the SIWG has referred to Sir Thayne Forbes’ findings in the Al-Sweady Inquiry, in which he ‘had decided against making any recommendations in relation to this issue, accepting that it had been the subject of recommendations by the Baha Mousa Inquiry that have been implemented by MOD.’²⁹⁰

In *R (Ali Zaki Mousa) v Secretary of State for Defence (No. 2)*, the court held that while it was important to implement lessons learnt, there was no necessity to order a public inquiry because ‘considerable changes have already taken place in relation to policies relating to detention and questioning since the deaths covered by this application occurred’.²⁹¹ According to the Court, this has

²⁸² Ibid.

²⁸³ Ibid, para. 3.3.

²⁸⁴ Ibid.

²⁸⁵ ‘Confirmation of appointment and terms of reference for fatality investigation into the death of Saeed Radhi Shabram Wawi Al-Bazooni’, 15 February 2018,

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/696522/confirmationofappointmentandtermsofreference.pdf.

²⁸⁶ IFI, ‘Consolidated Report into the Death of Ahmed Jabbar Kareem Ali’, Cm 9324, September 2016, para. 7.10.

²⁸⁷ [2013] EWHC 1412 (Admin) (24 May 2013), para. 208.

²⁸⁸ MoD SIWG, ‘Systemic Issues Identified from Service Police and Other Investigations into Military Operations Overseas: July 2015’, 6, issue 40.

²⁸⁹ Ibid.

²⁹⁰ Ibid. 4, issue 9 and issue 15.

²⁹¹ [2013] EWHC 1412 (Admin) (24 May 2013), para. 208.

been illustrated by the implementation of most of the recommendations set out in the Baha Mousa Report, and with a view of possible recommendations stemming from the Al-Sweady inquiry, which was ongoing at the time of the *Ali Zaki Mousa (No. 2)* decision.²⁹²

The SIWG is a crucial instrument for addressing guarantees of non-recurrence, but the MoD has repeatedly adopted the position that for ‘the lessons learned and implemented’, systemic issues ‘reflect a historic position’.²⁹³ Consequently, no further measures – such as criminal prosecutions – have arisen from the findings of systemic abuse by SIWG or IFI. Arguably this undermines the effectiveness of the policy changes and other measures that have appropriately been put in place to avoid repetition and ignores the deterrent value of criminal prosecutions. This sets a troublesome precedent for the accountability within the military chain of command and ministerial oversight of the army, leading to a few junior soldiers being ‘scapegoats’ for – at least on some occasions – following orders, whereas those giving the orders and other senior commanders responsible for creating an environment where systematic abuses may occur escape liability.²⁹⁴

²⁹² *Ibid*, paras. 208-209.

²⁹³ Letter from the UK Delegation to the Council of Europe to the Department for the Execution of Judgments of the Council of Europe, ‘Subject: *Al Skeini v United Kingdom* Submission from the EHRC’, 14 December 2015, <https://rm.coe.int/16804a44d2>.

²⁹⁴ See, House of Commons Defence Committee, ‘Who guards the guardians? MoD support for former and serving personnel’ HC 109, 10 February 2017, para. 86.

IV. FINDINGS AND RECOMMENDATIONS

The UK has presented an outward positive attitude to the investigations into crimes committed in Iraq by its military, and has established several investigate mechanisms, inquiries and other legal mechanisms to address these claims. Yet, despite thousands of claims of death and abuse, criminal accountability has so far been minimal, to say the least. Much of the information and evidence that has been made public points to attempts to ‘manage’ or even circumvent accountability and create an illusion of transparency, but with little actual substance to that effect.

Whether the lack of accountability has as underlying rationale to shield soldiers, commanders and Government officials from legal scrutiny or is simply caused by poorly managed and ineffective investigations, the fact remains that the UK has so far not managed to thoroughly and transparently examine the alleged crimes by its troops, including issues of command responsibility. Despite obligations under both domestic and international law to do so, the UK can therefore not be said to have conducted the necessary and warranted investigations into allegations that are of an extremely serious nature.

Rather than creating obstacles to accountability and taking aim at the lawyers – and by extension the victims of alleged abuses – for pursuing legal claims, we argue that the UK Government should, as a matter of urgency, be pursuing work to increase the capacity for efficient, transparent and effective investigations that comply with its obligations under domestic and international law. Such investigations must be capable of protecting both the interests of victims and soldiers, including by weeding out quickly any spurious or clearly unfounded claims and strengthening the capacity for robust, timely and transparent investigations where credible allegations are raised.

In the following we highlight some specific findings relating to the mandate, structure and operations of legal processes in the UK covering the Iraq claims.

Whereas domestic and international law require investigations into allegations concerning wrongful deaths, torture and other forms of ill-treatment to be independent and impartial, our research findings point to some significant challenges. The independence of UK investigative bodies examining the Iraq claims – in particular IHAT/SPLI – has been brought into question over time by numerous credible sources, including UK courts. Although some notable improvements took place concerning structural and personal independence following orders by UK courts, our research highlights a range of persistent challenges to the independence of UK investigatory mechanisms. For one, public statements made by Government officials commenting on the utility of Iraq investigations in general as well as the credibility of the information – and the providers of information – in particular has seriously impacted the prospects for independent and impartial investigations. What is more, the assistance functions the MoD has in investigatory processes, coupled with reports that the presence and actions of MoD officials with respect to these ostensibly independent bodies, appears to have impacted investigators’ perceptions of what was expected of them – and, by extension, possibly the outcome of some investigations. Additionally, the fact that the ‘reputational risks’ to the armed forces associated with investigations is seen as a factor to be taken into account in decision-making by some investigative bodies is of principle concern, even if there is nothing in our research that suggests such considerations have directly impacted any specific investigations to date.

Next, there is a requirement under law that investigations must be sufficiently rigorous so as to be capable of leading to the truth and where appropriate, to the prosecution of the suspects. Our research observes that inefficiencies in the investigative process of investigative bodies is likely part of the explanation for what has materialised as an unreasonably lengthy process. Our research suggests that

investigators have, at least in certain periods, been prevented from interviewing soldiers. It also points to difficulties securing direct witness evidence. Further, the use of irrelevant or overly stringent evidentiary presumptions aimed at weeding out allegations have led to a disproportionate emphasis on the cost implications of investigations, excessive attention to whether investigations would highlight issues deemed to be of ‘ongoing importance’, and a presumption that cases brought by specific law firms are based on flawed or false evidence. It is also of concern that the scope of investigations has been limited in several respects, including with respect to examining whether liability reaches up in the chain of command and in terms of narrowly constructed investigations that focus on only certain types of violations.

The UK is under an obligation to ensure that investigations are reasonably prompt to safeguard the interests and rights of both the accused person and victims. Up to 15 years have passed since the alleged crimes in Iraq took place, and yet only very few direct perpetrators – and not a single commander or senior official – have been prosecuted. Our research – supported by the findings of UK judges who have expressed concern that the country may not be effectively discharging its investigative obligations under human rights law – suggest that structural issues are at least partially to blame for the substantial delays in Iraq-related investigative processes.

Although some limitations to public transparency in on-going investigations can be accepted, the open and transparent pursuit of justice is a key element of the rule of law. Our research points to a range of concerns relating to transparency in investigations. These include in particular insufficient publicly available information relating to the status of ongoing criminal investigations, the frequent failure by the MoD to preserve important records, and insufficient reporting to and scrutiny by Parliament concerning the investigative processes. Although public inquiries and the work of IFI should be lauded for having contributed to some amount of transparency including around systemic issues, the decision taken early on by UK courts not to pursue an overarching inquiry into the Iraq allegations has limited the public’s access to balanced information. It is illustrative of the significant challenges relating to transparency concerning these matters that the various efforts made by this research team – relying on Freedom of Information Act requests and otherwise – to obtain official information from Government ministries and officials has by and far been rejected or delayed. This means that important information relating to the structure and progress of investigations, UK Government bodies’ engagement with the ICC and other key issues which are clearly of public interest have been unavailable to us in the context of drafting this discussion paper.

Victims of criminal offences and their families have a range of rights during criminal proceedings, including a right to be involved in the process to the extent necessary to safeguard their legitimate interests, but investigative mechanisms in the UK addressing the Iraq claims has not managed to fully give effect to these principles. Importantly, since the closure of the law firm PIL in August 2016, legal support for most victims who have provided evidence to IHAT/SPLI effectively ended. It is also problematic that IHAT/SPLI stopped individually informing claimants in Article 3 cases concerning ill-treatment that their investigations were being discontinued.

Defendants have rights that need to be respected as part of a criminal investigation, including a right to be presumed innocent if and until they are found guilty by a court of law, a right to know the case against them so that they can fully defend their interests, a right to be represented by counsel, a right to be present and assisted by a lawyer when questioned, and a right to remain silent should they so choose. Our research suggests that the situation of soldiers who have been subjected to Iraq-related investigations has often been difficult and problematic, in part due to insufficient support by the MoD. There are legitimate concerns that soldiers on the ground have been scapegoated for following orders and/or having received inadequate training, particularly on interrogation techniques.

In summary, our research raises serious concerns about the adequacy of domestic investigations into alleged violations by UK soldiers during the Iraq war and occupation. As such, the positions and measures taken by UK authorities have often proven inadequate – and sometimes even detrimental – to ensuring accountability for those allegedly responsible for serious violations, involving in particular detainee abuse and unlawful deaths. The main bodies responsible for criminal investigations – IHAT and later SPLI – have faced serious obstacles conducting effective investigations, partly due to structural constraints and political opposition – and in some cases reported interference. It is regrettable that soldiers and victims alike have been negatively impacted by the continuing uncertainty caused by the lack of finality of investigations. The Government’s position should have been neutral and detached in order to preserve and foster the independence and efficiency of the investigation process. In reality, it has proven to be politically loaded and gives the impression that it is aimed at *avoiding*, rather than *promoting*, legal scrutiny, including the opening of a full ICC investigation. In light of the developments discussed in this paper, it is questionable whether UK authorities have the willingness to remedy the challenges needed for ensuring a genuine justice process.

ANNEX 1: TIMELINE OF ACCOUNTABILITY FOR ALLEGED CRIMES IN IRAQ

| | |
|--------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 4 October 2001 | UK deposits instrument of ratification to the ICC Statute. |
| 1 July 2002 | ICC jurisdiction over war crimes, crimes against humanity, and genocide committed on UK Territory or by UK nationals begins |
| 20 March 2003 | Armed conflict in Iraq begins with two rounds of airstrikes and deployment of ground troops |
| 7 April 2003 | UK forces take control of Basra |
| 1 May 2003 | US declares an end to major combat operations |
| 8 May 2003 | US and UK Governments notify the President of the Security Council about their obligations as occupying powers |
| 30 June 2004 | Occupation officially ends when an Interim Government of Iraq assumes full authority, informs Security Council of consent to presence of multinational forces |
| September 2005 | Seven British soldiers suspected of murdering an Iraqi civilian, Nadhem Abdullah on 11 May 2003, face court martial in Germany. This is the first time that UK soldiers in Iraq have been charged for the alleged murder of an Iraqi civilian. They are cleared of all charges due to insufficient evidence and because, the judge explained, ‘most of the Iraqi witnesses have exaggerated their evidence’ |
| 2006 | ICC Prosecutor declines to open an investigation of British abuses in Iraq because the number of war crimes alleged is too small to justify ICC action |
| 30 December 2008 | Multinational forces withdraw from Iraq at expiration of mandate provided for by UN Security Council Resolution 1790 |
| 1 January 2009 | Service Prosecuting Authority is formed |
| 19/20 January 2009 | The High Court hears the case brought by Khadim Hassan against the Secretary of State for Defence seeking judicial review of the detention and treatment of his brother, Tarek Hassan, who was allegedly detained by British soldiers, hooded, beaten, and whose body was eventually found dumped in the desert wearing plastic handcuffs commonly used by US forces and with 8 bullet holes in his body |
| 25 January 2009 | The High Court hands down a decision, based on the House of Lords decision in <i>Al-Skeini</i> , ruling that the ECHR did not extend to protect Tarek Hassan |
| 31 March 2009 | British forces begin formal withdrawal from Southern Iraq |

| | |
|-------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 15 June 2009 | British Prime Minister announces inquiry into British involvement in Iraq |
| March 2010 | IHAT is set up |
| 2 March 2010 | ECtHR releases the decision for <i>Al-Saadoon and Mufdhi v the UK</i> , holding that the applicants were subject to inhuman and degrading treatment contrary to Article 3 of the Convention |
| 7 July 2011 | ECtHR releases the <i>Al-Skeini</i> and <i>Al-Jedda</i> decisions |
| 31 October 2012 | The Supreme Court affirms a decision issuing a writ of appeal for Mr. Ramatullah (<i>Secretary of State for Foreign and Commonwealth affairs v Ramatullah</i>) |
| 24 May 2013 | High Court rejects contention that IHAT is not independent in <i>R (Ali Zaki Mousa and Others) (2) v Secretary of State for Defence</i> , but suggests it needs a new approach for dealing with its large case load |
| 10 January 2014 | ECCHR and PIL submit an Article 15 communication to the ICC Prosecutor alleging UK responsibility for war crimes in Iraq from 2003 to 2008 |
| 13 May 2014 | ICC Prosecutor announces that the preliminary examination of the situation in Iraq, previously concluded in 2006, is re-opened |
| 16 September 2014 | ECtHR finds no violation of Article 5 in Tarek Hassan's case; holds that his capture and detention were consistent with the powers available to the UK under the Third and Fourth Geneva Conventions and was not arbitrary |
| 7 April 2015 | UK Government submits a comprehensive response to the allegations in the January 10 communication to the ICC Prosecutor |
| 29 September 2015 | PIL submitted a second Article 15 communication expanding the list of alleged crimes |
| January 2016 | Head of IHAT, Mark Warwick says there is significant evidence to put a strong case before the SPA to prosecute British soldiers who have served in Iraq |
| 12 May 2016 | <i>Ministry of Defence v Iraqi Civilians</i> decided. Claims by 600+ Iraqis against the UK Government are dismissed on procedural grounds |
| June 2017 | IHAT is officially terminated and replaced with the SPLI |
| November 2017 | Office of the ICC Prosecutor announced in its annual report on preliminary examinations that the UK/Iraq examination has proceeded to phase 3, where the Prosecutor focuses on issues of admissibility |

ANNEX 2: A SUMMARY OF APPLICABLE LEGAL FRAMEWORKS

1. UK DOMESTIC LAW

a) UK military law

It is beyond the scope of this discussion paper to address comprehensively the complex legal regulation of British armed forces. However, it is useful to provide here a brief overview of key legal instruments and the role played by various bodies in enforcing the rules.

In the UK, the *Armed Forces Act*, as introduced in 2006 and most recently amended in 2016,²⁹⁵ is the key legal instrument of military law. It is however supplemented by other statutory instruments, including the *Reserve Forces Act 1996* (UK), the *Courts-Martial (Appeals) Act 1968* (UK) and instruments issued by the Secretary of State under statutory authority, such as the *Army Custody Rules 2000* (UK) (S.I. 2000, No. 2368). Additionally, subordinate legislation in the form of regulations and orders, such as the *Custody and Summary Dealing (Army) Regulations 2000* (UK) issued by the Defence Council, apply to the armed forces.²⁹⁶

As a key principle of UK military law, all service personnel are subject to ordinary UK criminal law, meaning that when they serve in the UK they have the same status as any other UK citizen in terms of how they are treated if they commit an offence under civilian law.²⁹⁷ The *Armed Forces Act* provides that ‘it is an offence for a person subject to service law, or a civilian subject to service discipline, to do something which is an offence under the criminal law of England and Wales or would be such an offence if done in England or Wales.’²⁹⁸ The MoD observes that the ‘Service Justice System reflects UK civilian law as closely as possible but it goes further still: high standards of behaviour are required by the Armed Forces at all times and wherever they serve. These are standards that are distinctive to the armed forces and that demand certain conduct that would not be tolerated in civilian employment such as absence without leave or disobeying a lawful command.’²⁹⁹ In some situations, civilians may be subject to military law.³⁰⁰

The main purpose of introducing the *Armed Forces Act 2006* was to replace the three separate systems of service law with a single, harmonised system governing all members of the armed forces, while maintaining key elements of the discipline, in particular a jurisdiction for Commanding Officers (COs) to deal with less serious offences, whereas more serious offences must be tried by court martial. Most provisions of the Act are based on existing provisions, but updated and modified to ‘achieve harmonisation between the Services.’³⁰¹ The 2006 Act has removed the power of COs to deal with serious cases.

²⁹⁵ Armed Forces Act 2006; Armed Forces Act 2016 (c. 21). The amendments in the 2016 Act are mostly minor, relating to the handling of drug offences and, more importantly for this discussion paper, also allows the service police to refer certain cases directly to the DSP for a charging decision rather than via the CO. Further, the 2016 Act authorises the DSP to grant immunity from prosecution, in certain circumstances, to offenders in return for information or evidence they may have (mirroring the civilian criminal justice system). See BBC, *Military law in action—the Armed Forces Act 2016*, 23 June 2016.

²⁹⁶ Gerry Rubin, ‘Why military law? Some United Kingdom Perspectives’, (2007) 26 (2) *The University of Queensland Law Journal* 353.

²⁹⁷ MoD, ‘An Overview of the Service Justice System and the Armed Forces Act’, (undated) <http://webarchive.nationalarchives.gov.uk/20111018123424/http://www.mod.uk/NR/rdonlyres/0D289346-3BAA-4446-9164-4600458D1CE9/0/AnOverviewoftheServiceJusticeSystemandtheArmedForcesAct.pdf>.

²⁹⁸ Section 42 *Service Personnel Act 2006*.

²⁹⁹ MoD, ‘An Overview of the Service Justice System and the Armed Forces Act’, (undated).

³⁰⁰ See further *Service Personnel Act 2006*. See also Gerry Rubin, ‘Why military law? Some United Kingdom Perspectives’, (2007) 26 (2) *The University of Queensland Law Journal* 353, pp. 354-55.

³⁰¹ See Explanatory Notes to Armed Forces Act 2006.

According to the MoD, some of the key principles of the Armed Forces Act are that service law should ‘be fair and be seen to be fair’; ‘be conducive to the expeditious application of justice’; ‘be efficient and simple to use – it should not overburden Commanding Officers’; ‘reinforce the link between command and discipline’; ‘be “transportable” anywhere in the world’; ‘be compliant with the ECHR’; and ‘provide for consistency in treatment within single and joint Service environments.’³⁰²

In summary, the Act creates specific offences and provides for the investigation of such offences, the arrest, holding in custody and charging of individuals accused of committing an offence, and for them to be dealt with summarily by their CO or tried by court-martial.³⁰³

Concerning trials of military personnel, the previous system was based on *ad hoc* courts martial being set up to deal with particular cases, whereas the *Armed Forces Act* provides for a standing court martial, referred to as the ‘court martial’. The court martial may sit in more than one place at the same time, and different judge advocates and service personnel will make up the court for different trials.³⁰⁴ The court martial, seen as ‘a compliant court within the meaning of the ECHR’, comprises a civilian judge advocate and a panel of 3, 5 or 7 Service members depending on the seriousness of the offence charged. Service members will be predominantly of the Service of the accused.³⁰⁵

The *Armed Forces Act* also provides that more serious cases must be notified to the service police and passed directly to the DSP, who is independent of the military chain of command, for a decision on whether to prosecute. In other cases the CO will consider whether to deal with the matter summarily, or to refer the case to the DSP with a view to proceeding to a trial by the court martial. The DSP is the sole authority mandated to take the decision whether to prosecute in cases before court martial.³⁰⁶

Military personnel facing charges which the CO intends to deal summarily have a right to elect trial by the court martial, or, if they agree to be dealt with summarily and the charge is found proved, to appeal to the Summary Appeal Court. A person convicted by the court martial will be able to appeal to the court martial Appeal Court. Besides the Summary Appeal Court (SAC), the *Armed Forces Act* establishes the Service Civilian Court (SCC), to replace the existing Standing Civilian Courts. The Act also provides the merger of the two offices of Judge Advocate General and Judge Advocate of the Fleet, and establishes a single court administration officer for the court martial, the SAC and the SCC.³⁰⁷

The Act establishes that the punishment available on conviction depends on those available for the corresponding civilian offence. A sentence of imprisonment, or a fine, must not exceed the maximum sentence that could be imposed for the corresponding civilian offence, although service personnel may face other sanctions such as dismissal with disgrace.³⁰⁸

The *Armed Forces Act* imposes duties on COs to investigate ‘allegations of service offences, of circumstances which indicate that a service offence may have been committed and of other circumstances that may be prescribed’, and provides that ‘if a CO becomes aware of certain

³⁰² MoD, ‘An Overview of the Service Justice System and the Armed Forces Act’.

³⁰³ See Explanatory Notes to Armed Forces Act 2006.

³⁰⁴ *Ibid.*

³⁰⁵ MoD, ‘An Overview of the Service Justice System and the Armed Forces Act’.

³⁰⁶ See Explanatory Notes to Armed Forces Act 2006.

³⁰⁷ *Ibid.*

³⁰⁸ Section 42 *Service Personnel Act 2006*.

allegations or circumstances, he must ensure that the service police are aware of them.’³⁰⁹ The Act further provides that where a service policeman considers that there is sufficient evidence to charge a person with a Schedule 2 offence (defined as “serious disciplinary offences, such as mutiny and desertion, and serious criminal offences, such as murder, manslaughter and certain sexual offences”), he must refer the case to the DSP. Where the service policeman considers that there is sufficient evidence to charge the person with a service offence, but the circumstances do not require a reference to the DSP, he must refer the case to the person’s CO.³¹⁰

The SPA, regulated by the *Armed Forces Act*, was formed on 1 January 2009 (with the incorporation of the Navy Prosecution Authority, Army Prosecuting Authority and Royal Air Force Prosecuting Authority). The role of the SPA is to review cases referred to it by the Service Police or Chain of Command and to prosecute appropriate cases at court martial or Service Civilian Court. The SPA will also act as respondent in the Summary Appeal Court and represent the Crown at the court martial Appeal Court. The DSP and the SPA act under the general superintendence of the Attorney General and remain fully independent of the Military Chain of Command. However, as a government funded organisation it receives its funding as part of the defence budget.³¹¹

The SPA is composed of service lawyers who are independent of the chain of command and who are organisationally separate from the brigade or divisional military lawyers who advise commanders at that level on prosecutions or on operational matters relating to the law of armed conflict. If the SPA decides that no court martial should take place, for example because it is seen to not be in the ‘service interest’ or because the SPA considers that there is a reasonable chance of a conviction, the alleged offender cannot face other sanctions.³¹²

The SPA’s mission statement reads as follows:

The Service Prosecuting Authority provides for the independent, efficient and consistent consideration of criminal cases and offences contrary to military discipline. It will initiate prosecutions where justified and conduct fair and thorough proceedings in the service courts of first instance and the service appellate courts, whilst liaising effectively with the police and dealing with prosecution witnesses and victims of crime with care and sensitivity. Whilst maintaining independence from the service chain of command, the Service Prosecuting Authority fulfils its functions in support of operational effectiveness of the Armed Forces throughout the world.³¹³

At the time of discussing amendments of the *Armed Forces Act* in 2016 in the House of Lords, some criticism was raised relating to the court martial system arising out of the handling of Iraq claims. Lord Thomas of Gresford (LD) proposed ‘that serious offences of murder, manslaughter and rape, and serious sexual offences, should be tried in our ordinary Crown Courts and no longer by court martial – the system that is under attack’.³¹⁴ Further, Baroness Jolly questioned the independence of Service Police: ‘Service police forces are institutionally unable to offer the necessary independence in cases involving allegations of serious sexual assault and rape, especially in cases where both the victim and alleged perpetrator are service personnel, as there is a risk they may know those involved. Service police may have been trained, but they do not have the expertise and experience to investigate the most serious offences. In its report, HMIC has raised a number of concerns on this matter. Should

³⁰⁹ Part V, Chapter I (paras. 243; 246) *Service Personnel Act 2006*.

³¹⁰ Section 116 *Service Personnel Act 2006*.

³¹¹ See <http://spa.independent.gov.uk>.

³¹² See further Gerry Rubin, ‘Why military law? Some United Kingdom Perspectives’, (2007) 26 (2) *The University of Queensland Law Journal* 353, p. 358.

³¹³ http://spa.independent.gov.uk/test/about_us/index.htm.

³¹⁴ House of Lords, Part of *Armed Forces Bill*, Second Reading, HL Deb, 11 February 2016, c2368.

not allegations of sexual assault and rape involving members of the Armed Forces always be investigated by civilian, rather than service, police forces?’³¹⁵

b) 2005 Inquiry Act

The 2005 Inquiry Act is intended to provide a comprehensive statutory framework for inquiries set up by Ministers to look into matters of public concern. It gives effect to proposals contained in a Government consultation paper, dated 6 May 2004 entitled ‘Effective Inquiries’, which itself arose out of a memorandum, submitted to the House of Commons Public Administration Select Committee as part of its ‘Government by Inquiry’ investigation.³¹⁶ The power to establish an inquiry rests with any Minister.³¹⁷

With respect to criminal liability, section 2 of the Inquiry Act 2005 provides that: ‘an inquiry panel is not to rule on, and has no power to determine, any person’s civil or criminal liability.’ The explanatory notes clarify that an inquiry ‘must not purport to do so’, noting that ‘there is often a strong feeling, particularly following high profile, controversial events, that an inquiry should determine who is to blame for what has occurred’ but ‘inquiries are not courts and their findings cannot and do not have legal effect.’³¹⁸ The aim of inquiries is ‘to help to restore public confidence in systems or services by investigating the facts and making recommendations to prevent recurrence, not to establish liability or to punish anyone.’³¹⁹ A public inquiry is unable to recommend individuals for prosecution but has the power to grant certain forms of immunity from prosecution.

The remit of the inquiry must be set out by the Minister in the terms of reference before the setting-up date. The inquiry chairman is required to do what he considers reasonable to ensure public access to evidence.³²⁰ Further, the general exemptions for the records of statutory inquiries in the Freedom of Information Act 2000 do not apply since an inquiry is not a public authority for the purposes of that Act.³²¹ Once an inquiry is completed, its records are generally held by a public authority.³²² Sections 19 and 20 of the Act clarify that there may be circumstances in which part or all of an inquiry must be held in private.

2. INTERNATIONAL LAW INCORPORATED INTO UK LAW

Relevant legislation relating to the UK armed forces includes the *Geneva Conventions Act 1957*, which criminalises grave breaches of the Geneva Conventions by any person of any nationality acting within or outside the UK; the *Human Rights Act 1998*, which incorporates the ECHR into UK law; the *International Criminal Court Act 2001*, which incorporates the ICC Statute into UK law; and section 134 of the *Criminal Justice Act 1988*, which criminalises acts of torture committed by a public official or person acting in an official capacity, whatever his or her nationality, and has domestic and extra-territorial application.

³¹⁵ *Ibid.*, c2411-c2412.

³¹⁶ Inquires Act 2005, Explanatory Notes, para. 3.

³¹⁷ *Ibid.*, para. 6.

³¹⁸ *Ibid.*, para. 8.

³¹⁹ *Ibid.*, para. 8.

³²⁰ Inquires Act 2005, Explanatory Notes, para. 34.

³²¹ Inquires Act 2005, Explanatory Notes, para. 36.

³²² Inquires Act 2005, Explanatory Notes, para. 36.

a) International humanitarian law

The *Geneva Conventions Act 1957*,³²³ last amended by the *Geneva Conventions and United Nations Personnel (Protocols) Act 2009*,³²⁴ implements specific provisions of the 1949 Geneva Conventions, such as those concerning grave breaches and obligations concerning certain legal proceedings including those relating to protected prisoners of war. Even if the *Geneva Conventions Act 1957* includes in its four schedules each of the four Geneva Conventions, the Conventions in their entirety are not generally incorporated into UK law.³²⁵

The *1957 Geneva Conventions Act* was amended by the *Geneva Conventions (Amendment) Act 1995* which adds each of the 1977 Additional Protocols as schedules. The amendment incorporates into UK law the grave breach provisions of Additional Protocol I, Articles 11(4) and 85 (2, 3, and 4). The amendment was passed before British ratification of the two Additional Protocols, and section 7 of the Act requires that the Protocols ‘shall for the purposes of this Act be construed subject to and in accordance with any reservation or declaration [made].’ Upon the UK’s ratification, the Government made declarations relating to Additional Protocol I (28 January 1998) and these are set out in the *Geneva Conventions Act (First Protocol) Order 1998*, Statutory Instrument No. 1754.³²⁶

Besides incorporated treaty law, rules of customary international law, including those relating to humanitarian law, form part of UK domestic law under certain circumstances. Whereas the UK as a so-called dualist State operates with the principle that international treaties have effect in domestic law only if they are incorporated by an Act of Parliament, it is generally accepted, as eminent scholar Sir Ian Brownlie has stated that ‘customary rules are to be considered part of the law of the land and enforced as such with the qualification that they are incorporated only so far as is not inconsistent with Acts of Parliament or prior judicial decision of final authority.’³²⁷ Accordingly, UK courts can apply customary international law, including rules of humanitarian law, even in the absence of previous parliamentary sanction.³²⁸ As Lord Mance has observed, customary international law, ‘once established, can and should shape the common law, whenever it can do so consistently with domestic constitutional principles, statutory law and common law rules which the courts can themselves sensibly adapt without it being, for example, necessary to invite Parliamentary intervention or consideration.’³²⁹

The UK’s ministerial code previously referred to an ‘overarching duty on Ministers to comply with the law including international law and treaty obligations’, but this was changed in October 2015 to refer more simply to ‘the overarching duty on Ministers to comply with the law’ without any reference to international law or treaty obligations. However, commentators have noted that the reference to comply with the law includes international law binding in the UK legal system and the previous formulation did not require Ministers to put international law above any other rule of law.³³⁰ Accordingly, both incorporated treaty rules and customary international law governing humanitarian law form part of the common law and UK law requires ministers to act consistently with its requirements, subject to the caveats mentioned above.

³²³ Geneva Conventions Act 1957, 1957 c. 52 (Regnal. 5 and 6 Eliz. 2).

³²⁴ Geneva Conventions and United Nations Personnel (Protocols) Act 2009, 2009 c. 6.

³²⁵ See *Cheney v Conn (Inspector of Taxes)* [1968], 1 All England Law Reports 779, p.782.

³²⁶ ICRC, National Implementation of IHL, <https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/6fa4d35e3025394125673e00508143/8a4aace5c2dc9f88c1256b6d00303244?openDocument>.

³²⁷ Ian Brownlie, *Principles of Public International Law*, OUP, 2003 (6th ed), p. 41.

³²⁸ See e.g. F. A. Mann, *Foreign Affairs in English Courts*, in Oxford Scholarly Authorities on International Law, 1986.

³²⁹ UK Supreme Court, *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, para. 150.

³³⁰ See Dapo Akande and Eirik Bjorge, ‘The United Kingdom Ministerial Code and International Law: A Response to Richard Ekins and Guglielmo Verdirame’, UK Constitutional Law Association, 10 December 2015, <https://ukconstitutionallaw.org/2015/12/10/dapo-akande-and-eirik-bjorge-the-united-kingdom-ministerial-code-and-international-law-a-response-to-richard-ekins-and-guglielmo-verdirame/>.

In *Hassan v United Kingdom*, the Grand Chamber of the ECtHR reviewed the deprivation of liberty of a young Iraqi male by British armed forces during the phase of active hostilities in Iraq, which besides issues relating to extraterritorial application of the law raised issues concerning the relationship between international humanitarian law and human rights law. In its judgment of 16 September 2014, the ECtHR ruled that by reason of the co-existence of the safeguards provided by international humanitarian law and the ECHR in time of armed conflict, the grounds of permitted deprivation of liberty found in both bodies of law should, as far as possible, be accommodated and applied concomitantly.³³¹ Accordingly, as De Koker notes, the judgment is noteworthy in that it states explicitly for the first time the Court's view that the interaction between humanitarian and human rights law is not governed by the *lex specialis* principle, but rather these bodies of law supplement each other in the context of armed conflicts, including in Iraq.³³²

b) International human rights law

The *Human Rights Act 1998* incorporates the ECHR into UK law.³³³ The ECHR is the only human rights treaty that has been domesticated fully into UK law.

Section 3(1) of the *Human Rights Act 1998* establishes that 'so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect to in a way which is compatible with Convention rights.' Section 6(1) provides that it is 'unlawful for a public authority to act in a way that is incompatible with Convention rights'; Section 7(1) gives persons the right to bring proceedings in UK courts against a public authority alleged to have breached Convention rights; and Section 8(1) establishes that UK courts may grant such relief or remedy as they find 'just and appropriate'.

As mentioned elsewhere in this discussion paper, the jurisprudence of the ECtHR has had a significant impact on UK military law, the understanding of the UK's obligations abroad and the legal resolution of the Iraq claims. Here, it suffices to mention the following:

With respect to the court martial system, the ECtHR ruling in *Findlay v United Kingdom* meant that the absence of full judicial powers on the part of the judge advocate were incompatible with Article 6 of the ECHR concerning the right to fair trial.³³⁴ As Rubin notes, the 1996 Act corrected that position and further abolished 'the anomalous situation that the convenor of a court martial was the complainant CO's own superior (his brigade or divisional commander).'³³⁵

In *Al-Skeini v United Kingdom*, the ECtHR rejected the UK Government's argument that the Convention had no extraterritorial application and held that as an occupying power the UK had exercised effective authority and control over individuals killed in the course of security operations in Iraq and thus was bound by the Convention. The Court also ruled that the UK Government had a duty under Article 2 of the Convention to investigate allegations of deaths and ill-treatment involving British service personnel in Iraq. The ECtHR found that all six deaths fell within the jurisdiction of the UK under Article 1 of the Convention because of the exceptional circumstances deriving from the UK's assumption of authority and responsibility for security in South East Iraq, as an occupying power from 1 May 2003 to 28 June 2004. Accordingly, the Court held that the obligation in Article

³³¹ *Hassan v United Kingdom*, ECtHR, Appl. no. 29750/09, 16 September 2014.

³³² See further Cedric De Koker, 'Hassan v United Kingdom: The Interaction of Human Rights Law and International Humanitarian Law with regard to the Deprivation of Liberty in Armed Conflicts', (2015) 31(81) *Utrecht Journal of International and European Law* 90.

³³³ Human Rights Act 1998, 1998 c. 42.

³³⁴ *Findlay v United Kingdom*, ECtHR, Appl. no. 22107/93, 25 February 1997.

³³⁵ Gerry Rubin, 'Why military law? Some United Kingdom Perspectives', (2007) 26 (2) *The University of Queensland Law Journal* 353, p. 356.

2 of the Convention to investigate deaths applied, including an obligation to take all reasonable steps to ensure an effective and independent investigation. The ECtHR held that there had been a breach of the procedural obligation under Article 2 of the Convention to carry out an adequate and effective investigation into the deaths of the relatives of the first, second, third, fourth and fifth applicants, but did not find a violation in respect of the sixth applicant as a full, public inquiry relating to his death was nearing completion at the time of its judgment.³³⁶

In *Al-Saadoon and Mufdhi v the United Kingdom*, the ECtHR held that the Iraqi applicants had been subject to inhuman and degrading treatment under Article 3. The case concerned whether the transfer by the UK of the applicants who were in the custody of UK troops in Iraq to Iraqi authorities for trial would violate the applicants' ECHR rights, specifically the non-refoulement principle previously established by the Court, because there was serious risk of them being subjected to the death penalty.³³⁷

Similar cases have arisen in relation to allegations against other armed forces, which were part of the occupation of Iraq. For instance, *Jaloud v The Netherlands* concerned the investigation by The Netherlands authorities into the circumstances surrounding the death of an Iraqi civilian who died of gunshot wounds in April 2004 in an incident involving Netherlands Royal Army personnel. The ECtHR held there had been a violation of Article 2 in failing to carry out an effective investigation: records of key witness statements had not been submitted to the judicial authorities; no precautions against collusion had been taken before questioning the Netherlands Army officer who had fired at the car carrying the victim; and the autopsy of the victim's body had been inadequate. The complaint about the investigation into the incident – which had occurred in an area under the command of an officer of the armed forces of the United Kingdom – fell within the jurisdiction of The Netherlands, and the Court noted in particular that The Netherlands had retained full command over its military personnel in Iraq.³³⁸

c) International criminal law

Because this discussion paper addresses relevant international criminal law concepts and provisions elsewhere, this section only provides for a cursory overview of the domesticating Act in the UK.

The UK ratified the ICC Statute on 4 October 2001, thereby providing the ICC with jurisdiction over the statutory crimes of war crimes, crimes against humanity and genocide committed on British territory or by British nationals abroad as of 1 July 2002, and taking upon itself other duties set out in the ICC Statute, including with respect to cooperating with the Court.

Before ratification, the UK adopted the *International Criminal Court Act 2001*.³³⁹ The Act addresses issues relating to how British authorities must process ICC requests for arrest and transfer (Part 2); other forms of assistance (Part 3); enforcement of sentences and orders (Part 4); definitions of ICC Statute offences and other key definitions, including of command responsibility (Part 5); and general provisions relating to interpretation of the Act (Part 6). The *International Criminal Court Act 2001* creates more than 60 substantive offences in UK criminal law and explicitly criminalises ancillary offences of aiding, abetting, counselling, procuring, inciting, assisting another, attempting, conspiring to commit, or concealing the commission of any of the substantive offences.³⁴⁰ Under the

³³⁶ *Al-Skeini and Others v the United Kingdom* (Grand Chamber), ECtHR, Appl. no. 55721/07, 7 July 2011.

³³⁷ *Al-Saadoon and Mufdhi v the United Kingdom*, ECtHR, Appl. no. 61498/08, 2 March 2010.

³³⁸ *Jaloud v the Netherlands* (Grand Chamber), ECtHR, Appl. no. 47708/08, 20 November 2014.

³³⁹ *International Criminal Court Act 2001*.

³⁴⁰ See further Kate Grady 'International Crimes in the Courts of England and Wales' [2014] *60th Anniversary Commemorative Edition of the Criminal Law Review* 142.

International Criminal Courts Act 2001 British service personnel can be tried for war crimes before courts martial.

Section 65 of the Act establishes criminal liability of commanders and other superiors ‘for offences committed by forces under his effective command and control’ or ‘authority and control’ on the basis of negligence (i.e. that the commander knew or ought to have known about the offences and ‘failed to take all necessary and reasonable measures within his power’ to prevent such conduct or to have the conduct investigated and prosecuted. There are however some notable differences between the treatment of command responsibility in the ICC Statute and the *International Criminal Court Act 2001*. Command responsibility is regarded as a *sui generis* form of liability in the ICC Statute, but as Gready observes, the domesticating Act in the UK considers it a form of secondary participation where commanders are instead held liable for aiding, abetting, counselling or procuring the commission of the offence.³⁴¹ Commentators have noted ‘[q]uite how conduct which could amount to “turning a blind eye” to the commission of a crime can amount to aiding, abetting, counselling or procuring the offence is moot but seems inconsistent with existing English law.’³⁴²

Concerning complementarity, some commentators have noted that ‘the Act seems to have been designed to achieve a conservative compromise, maintaining as much domestic law and procedure as possible, whilst incorporating the minimum of the ICC Statute necessary to achieve complementarity’.³⁴³

³⁴¹ Ibid.

³⁴² Ibid.

³⁴³ Ibid.