

## IRAQ/UK

### *Procedural History*

172. The situation in Iraq/UK has been under preliminary examination since 13 May 2014. The Office has received a total of 32 communications or additional submissions pursuant to article 15 in relation to the situation in Iraq/UK.
173. On 10 January 2014, the European Center for Constitutional and Human Rights (“ECCHR”) together with Public Interest Lawyers (“PIL”) submitted an article 15 communication alleging the responsibility of UK officials for war crimes involving systematic detainee abuse in Iraq from 2003 until 2008.
174. On 13 May 2014, the Prosecutor announced that the preliminary examination of the situation in Iraq, previously concluded in 2006, was re-opened following submission of further information on alleged crimes within the 10 January 2014 communication.

### *Preliminary Jurisdictional Issues*

175. Iraq is not a State Party to the Statute and has not lodged a declaration under article 12(3) accepting the jurisdiction of the Court. In accordance with article 12(2)(b) of the Statute, acts on the territory of a non-State Party will fall within the jurisdiction of the Court only when the person accused of the crime is a national of a State that has accepted jurisdiction.
176. The UK deposited its instrument of ratification to the Statute on 4 October 2001. The ICC therefore has jurisdiction over Rome Statute crimes committed on UK territory or by UK nationals from 1 July 2002 onwards.

### *Contextual Background*

#### *UK military operations in Iraq from March 2003 until July 2009*

177. On 20 March 2003, an armed conflict began between a United States (“US”) and UK-led coalition, and Iraqi armed forces, with two rounds of air strikes followed by deployment of ground troops. On 7 April 2003, UK forces took control of Basra, and on 9 April, US forces took control of Baghdad, although sporadic fighting continued. On 16 April 2003, the Coalition Provisional Authority disestablished the Ba’ath Party of Iraq, resulting in the removal of Ba’th leadership from positions of authority within Iraqi society.
178. On 8 May 2003, the US and UK Governments notified the President of the UN Security Council about their specific authorities, responsibilities, and obligations under applicable international law as occupying powers under unified command. The occupying States, acting through the Commander of Coalition

Forces, created the Coalition Provisional Authority (“CPA”) to act as a “caretaker administration” with power, *inter alia*, to issue legislation until an Iraqi government could be established.

179. On 8 June 2004, the UN Security Council adopted Resolution 1546 stipulating that the occupation would end and the Interim Government of Iraq would assume full responsibility and authority for Iraq by 30 June 2004. This transfer of authority, however, took place two days earlier, on 28 June 2004, when the Interim Government, created by the Governing Council, assumed the control of Iraq and the CPA consequently ceased to exist. Thereafter, the Multinational Force-Iraq (“MNF-I”), including a large contingent from the UK, remained in Iraq pursuant to UN Security Council authorisation and the request of the Government of the Republic of Iraq. At the expiry of this mandate on 30 December 2008, foreign forces still present in Iraq remained with the consent of the Iraqi government.
180. UK military operations in Iraq between the start of the invasion on 20 March 2003 and the withdrawal of the last remaining British forces on 22 May 2011 were conducted under the codename Operation Telic (“Op TELIC”).

*Relevant developments at the domestic level*

181. At the domestic level, the conduct of British troops during Op TELIC generated a wide array of proceedings before civilian and military authorities, including court martials, civil and criminal cases, as well as judicial and public inquiries.
182. In March 2010, given the large volume of allegations of criminality received, the Ministry of Defence (MoD) established the Iraq Historic Allegations Team (“IHAT”), a specialised unit made up of Royal Navy Police officers and ex-civilian police detectives, to ensure that credible claims are properly investigated and the facts established. Based on its official figures, IHAT received a total of around 3,400 allegations of unlawful killings and ill treatment between 2010 and the end of June 2017.
183. Alleged crimes by UK forces in Iraq have also formed the subject of two public inquiries initiated by the MoD between 2008 and 2009 to examine, respectively, the death in UK custody of an Iraqi civilian, Baha Mousa in September 2003 (“Baha Mousa inquiry”) and allegations of unlawful killings and ill treatment arising from the so-called “Battle of Danny Boy” in May 2004 (“Al-Sweady inquiry”). In both cases, alleged victims were represented jointly by PIL and Leigh Day, two leading UK human rights law firms specialised in the work with Iraqi complainants.
184. In 2016, PIL and Leigh Day were referred by the Solicitor Regulation Authority (“SRA”) to the Solicitors Disciplinary Tribunal (“SDT”) over their conduct during the Al-Sweady inquiry. The inquiry had notably found that no prisoners had been murdered or that their bodies had been mutilated, and that the most

serious claims alleged against UK forces were “deliberate lies, reckless speculation and ingrained hostility”.

185. In February 2017, by then PIL lead counsel, Phil Shiner, was found guilty by a SDT panel of 12 professional misconduct charges and struck off as a solicitor. PIL had collapsed in August 2016 after the Legal Aid Agency (“LAA”) revoked its contract with the firm for breach of its “contractual requirements” unrelated to the disciplinary proceedings. On the other hand, on 9 June 2017, the SDT found all allegations against Leigh Day and its solicitors unproven.
186. On 10 February 2017, the Defence Sub-committee of the UK Parliament issued the final report of an inquiry set up in April 2016 (“IHAT inquiry”) on the issue of the UK Ministry of Defence’s support for former and serving military personnel subject to judicial processes, and, in particular, on the work of IHAT. The report notably criticised the IHAT for alleged inefficiency and lack of professionalism and pressured the MoD to cut the IHAT’s expenditure by closing it down and instead to provide the financial and other support to those UK servicemen under investigation.
187. On the same day of the release of the inquiry’s report, amid concerns of political interference, the Defence Secretary announced the closing of IHAT ahead of the originally scheduled time frame by 30 June 2017, citing IHAT own forecasts that the unit’s caseload was expected to reduce to around 20 investigations by the summer 2017.
188. IHAT was permanently shut-down at the stipulated date of 30 June 2017. As of 1st July 2017, its remaining investigations were reintegrated into the service police system and taken over by a new investigative unit known as the Service Police Legacy Investigations (“SPLI”).

#### *Examination of the information available*

189. In accordance with established practice and article 15(2) of the Statute, the Office 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.
190. 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.

191. 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.

### *Subject-Matter Jurisdiction*

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

### *Alleged crimes committed in the UK custody*

193. PIL and ECCHR have alleged that the UK personnel committed systematically and on a large scale war crimes of torture and related ill-treatment against at least 1071 Iraqi detainees pursuant to “the UK Government’s deliberate policy of abuse of Iraqi detainees in the period from March 2003 through December 2008 on the territory of Iraq”. PIL and ECCHR have further alleged that the British personnel committed 52 cases of unlawful killings against persons in their custody during the same period in Iraq.
194. On the basis of the information available, including some of the allegations brought to its attention since 2014 and considered credible, the Office reaffirms its previous conclusion that there is 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 in the context of the armed conflicts in Iraq 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)).

### *Alleged crimes committed outside the UK custody*

195. The Office was seized with a limited number of allegations that the UK armed forces also committed acts of killings in the course of their military operations involving air strikes and ground supporting combat operations. The Office analysed the same allegations in the context of the preliminary examination of the situation in Iraq in 2006 and then concluded that there was no reasonable basis to believe that these acts alleged amounted to war crimes within the jurisdiction of the Court.

196. The new information available does not alter the previous determination that, in the absence of information indicating intent to kill or target civilians or civilian objects, or cause clearly excessive civilian injuries, 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. While additional incidents were brought to the Office's attention, the factual information provided does not constitute a reasonable basis to believe that the British armed forces intended to target civilians in these incidents.

### *Admissibility Assessment*

197. In light of the preliminary conclusions reached in respect of jurisdictional aspects, the Office is undertaking an assessment of admissibility. As set out in article 17(1) of the Statute, admissibility requires an assessment of complementarity and gravity. In line with its prosecutorial strategy, the Office will assess complementarity and gravity in relation to the most serious crimes alleged to have been committed and those most responsible for those crimes. The Statute does not stipulate any mandatory sequence in the consideration of complementarity and gravity. The Prosecutor must be satisfied as to admissibility on both aspects before proceeding.

### *OTP Activities*

198. During the reporting period, the Office has focussed its activities on a comprehensive factual and legal assessment of the information available, including a rigorous independent evaluation of all article 15 communications in light of the new information and recent developments that occurred at the domestic level. In the course of this process, the Office engaged with key stakeholders, in particular the senders of the article 15 communications and the UK government, as well as conducted a number of other analytical activities.
199. As part of its close scrutiny of relevant developments at the national level, the Office conducted its third mission to the UK from 13 to 14 February 2017. The mission enabled the Office, *inter alia*, to gather further contextual and other information on the disciplinary proceedings against Phil Shiner, including the views of PIL's associates, and to receive 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.
200. Following the mission, the Office received additional updates and pieces of information from the UK Government, IHAT and from article 15 senders PIL and ECCHR. The Office has furthermore exchanged views on issues pertaining to the preliminary examination with other relevant actors, including NGO representatives and scholars.

201. The Office conducted a comprehensive review of all information available comprising, *inter alia*, new media articles and publications, recent case-law from the European Court of Human Rights, relevant findings by domestic authorities, such as IHAT and the Iraq Fatality Investigations (“IFI”), as well as hearings before the UK Parliament Defence Sub-committee.
202. The Office further received and considered information on relevant national proceedings conducted by the UK authorities, in particular with respect to the incidents of criminalities identified. In so doing, it maintained regular contact with the appropriate interlocutors, including the Service Prosecution Authority and IHAT, senior staff of both agencies, and other relevant State officials. The transition between IHAT and its successor, the SPLI, has also been closely scrutinised by the Office, notably to gauge the effective continuity between the two entities in terms of corporate knowledge, procedures, expertise, and judicial oversight. The Office is grateful to the UK authorities for their ongoing cooperation in the course of this preliminary examination.

### *Conclusion*

203. Following a thorough factual and legal assessment of the information available, the Office has reached the conclusion that there is a reasonable basis to believe that members of the UK armed forces committed war crimes within the jurisdiction of the Court against persons in their custody. The Office’s admissibility assessment is ongoing and is intended to be completed within a reasonable time frame.