

Defence Committee

Oral evidence: Statute of Limitations—Veterans Protection, HC 1224

Tuesday 8 Jan 2019

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Members present: Dr Julian Lewis (Chair); Leo Docherty; Mr Mark Francois; Johnny Mercer; Mrs Madeleine Moon; Ruth Smeeth; John Spellar, Phil Wilson.

Questions 173-370

Witnesses

[I](#): Martyn Day, Senior Partner, Leigh Day.

Examination of Witness

Witness: Martyn Day.

Chair: Good morning, and welcome to this, the third evidence session of the Committee's inquiry into the question of how service personnel can better be protected from the possibility of investigation and reinvestigation for events that happened many years—often decades—in the past.

The session is a very specific one. We are going to take evidence from Mr Martyn Day—welcome, Martyn—the senior partner at, and co-founder of, Leigh Day associates. I think, Martyn, you would be the first to concede that you have been involved in some fairly controversial cases of this sort. We are not here to re-fight any of those battles. What we hope to do today is draw on your expertise as someone who has used the current legal framework, to get a better idea of what the problems are from the point of view of trying to deal with war crimes that need to be dealt with while avoiding the possibilities of the process being abused. We feel that the evidence from your perspective would be particularly valuable.

We do not propose to go through specific cases, with one exception, in the latter part of our questions: the al-Sweady case. I think everybody agrees that that is a case in which things went wrong and things happened that should not have. We would particularly like your perspective on that.

Q173 **Phil Wilson:** There are currently legacy investigations into Operation Banner in Northern Ireland, Operation Telic in Iraq and Operation Herrick in Afghanistan. Do you have any concerns about those investigations?

Mr Martyn Day: When you are looking at historic issues such as the ones you just mentioned, Mr Wilson, you have to look at them from various different sides of the equation. You, on the Committee, have said that you are very much focused on the serviceman's point of view, and I totally understand and respect that, but obviously there are lots of sides to the equation in any of these investigations. As lawyers, our interest is primarily in acting for the victims, or the alleged victims, of the events that have taken place, so we are looking at it slightly from two different sides of the same issue, in terms of the telescope.

We have represented servicemen who have brought claims in relation to events that have happened to them while they have been British Army members. We have also acted in cases where people have taken on the military, whether it is the Iraqis, people from Kenya or whoever. From my general perspective, the crucial thing is to look at it from both sides. I take Northern Ireland as a good example of that. Just to look at it from the serviceman's view is far too narrow. You need to look at it from the wider perspective and the society generally out there, not least of which is obviously the victims.

Q174 **Phil Wilson:** So you think these investigations are pursued from too narrow a perspective?



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Martyn Day: In terms of your Committee, I would certainly say that. From what I have read so far, I am surprised you have not had more people coming forward to talk from the victim's perspective as to how they perceive things in Northern Ireland. I can't really speak to you much about that because it is not an area that I particularly got involved in, but certainly from what has happened in relation to Iraq, which I am much more experienced with, learning and understanding the victim's perspective is very important. That would be a great help to the Committee, I would think, in terms of understanding how to move things forward.

Q175 **Phil Wilson:** Setting aside the Committee's perceived approach to all of this, do you have any concerns about the investigations themselves?

Martyn Day: I'll start with Iraq and I'll move on to Ireland, if I can. There is no question but that what happened in terms of Iraq was a disaster for the military and for the local communities in Iraq. Trying to learn the lessons as to what happened both in terms of us as a British society and also in terms of individuals is critical. The mechanisms with which we have been able to try and look at that have not worked. To make a couple of points as background to what I want to say on this, you will recollect that back in 2003 the decision was made by Parliament to allow British troops to go into Iraq to bring about democracy, the rule of law and human rights. Very unfortunately, for reasons that are not at all clear, once people were detained the military decided to get involved in the five techniques.

You may be aware of the five techniques when people are taken prisoner: people are hooded; they are put into stress positions; they experience sensory deprivation of their eyes and ears; they are deprived of sleep, and deprived of food and water. That was a decision the military took; when anybody was taken prisoner in Iraq, that is what they were going to do. It had been banned by Ted Heath back in 1972, but for some reason the military decided not to follow that ban and they introduced the techniques straightaway. The significance of it was that it led to a position where, when the British troops went into Northern Ireland, whenever they picked up a detainee, the way they dealt with the detainee was through the five techniques, trying to soften them up for their interrogation. That meant that for the Iraqi society, particularly in Basra—this is from our experience with our clients who talked to us a lot about what happened—whereas when the British troops went in, there was enormous support for Britain going in to bring about democracy, the rule of law and human rights, when it actually came to it, that didn't happen, not for a single second, and the Iraqis were treated in a humiliating way. As a result, the people of Basra turned against the British Army. I say all that as a backdrop. We need to learn those lessons. We need to understand what has happened and we need to make sure that we never make the same mistakes in the future.

The difficulty that I have in terms of the way the investigations have been conducted so far is that some of those lessons have been learnt, but by no means all of them.



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Q176 Chair: With respect, you have explained the reasons why you think it is important that these matters should be investigated, but you have not yet told us what the downsides are, particularly in relation to the passage of time. We would appreciate it if you would indicate them, because you know the strengths of your own case, but as someone who fights these causes consistently, you must also know its weaknesses. We ask you to share with us and with the public what you regard as the greatest difficulties. From the point of view of somebody like yourself who is concerned that victims or alleged victims must be represented, what are the biggest difficulties that you have found in your professional life with trying to represent people without allowing the process to be abused? What are your biggest problems in trying to tackle these cases?

Martyn Day: The greatest issue is that the initial investigation, conducted often by the Royal Military Police, has to be seen to be independent, transparent and detailed. One of the great problems for Iraq has been the failure of the Royal Military Police to achieve that. Reading the transcript of your session with Colonel Collins, I see that he made the same point: he also felt that the Royal Military Police were not up to the job of carrying out those investigations.

I say that because it seems to me that your concerns about servicemen totally tie into that debate. I totally respect the point that a number of you have made from time to time that it is really problematic to expect servicemen to go through one investigation after another, often giving the same evidence, with all the trauma that that can bring about. I totally respect that point, but that means that you need to have a proper, detailed, independent investigation—

Chair: At the time.

Martyn Day: At the time. The courts have held that the Royal Military Police is not that body. I am not talking about smaller grades of injury or assault; I am talking about the more serious offences. Personally, I did not really support what IHAT got up to; I agreed with you when you recommended that it should be closed down. What was needed in the early days, following each of the perhaps 50 to 100 serious events that took place in Iraq, was for an independent body to come in immediately, while the evidence was fresh, to conduct interviews with and investigations of the people involved.

Q177 Chair: I want to go back to Phil, but let me ask you one more thing first. You said, very frankly, that you are not an expert on Northern Ireland. The key point has emerged at an early stage that a lot of these problems would be avoided—correct me if I am putting words in your mouth that are not accurate—if alleged abuses of prisoners were investigated adequately at the time. In the context of Northern Ireland, we are in a situation where 30, 40 or more years have gone by since the alleged offences occurred. Given the importance of these matters being investigated accurately at the time, as you have just stressed, what is your professional view about the prospect of seriously being able, 40 years after an event, to get to the truth in the absence of any compelling



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new evidence?

Martyn Day: I think there are two sides to that question. First, can we as a society learn and understand the lessons from what has happened in the past? Secondly, will there ever be enough evidence to individually prosecute individual soldiers?

Chair: So long after the event.

Martyn Day: So long after the event. I am totally of the view—it is true for Iraq, true for Afghanistan and true for Northern Ireland—that there has to be a proper investigation to get to the bottom of what has happened, for us as a society to learn the lessons from it and move on. A crucial question is whether that will ever result in sufficient evidence being put forward to lead to individual prosecutions in Ireland. To finish the point before Mr Mercer comes in, we see from Iraq that, despite the fact that there was a series of investigations, the number of people who were successfully prosecuted, as far as I remember, were perhaps on the fingers of one hand. That doesn't say a great deal for the quality of the prosecution process in Iraq. It perhaps also reveals the difficulties of actually successfully prosecuting people so long after the event.

Q178 **Chair:** What would your advice be, in terms of a situation like Northern Ireland—not specifically Northern Ireland—where 30 or 40 years have gone by? I would have thought that most people would feel uneasy, to put it mildly, about long-retired, elderly, sometimes infirm service personnel being put through the process they are being put through at the moment, where there is probably zero prospect of any new evidence coming forward. Do you not feel uneasy about what has been happening in that situation, because of your emphasis earlier on the importance of proper investigations being carried out at the time?

Martyn Day: Without any question, the longer the time goes on, the less the chances of a successful prosecution. In preparing for this, I read somewhere—maybe even in your discussions—that the Germans have a system of statute of limitations that ties into the lower-grade injuries and assaults that can take place. I think it is up to a year's sentence. For any case that involves a soldier that is up to a year, there is a statute of limitations—I think it is 10 years. That seems to me to be a very good idea—a variant on that theme. There is a massive difference between killings, very severe torture and abuse, and lower-grade things. I feel, as a lawyer, that one has got to be pragmatic about the lower-grade things.

As I said earlier, I felt that IHAT got it wrong, and I think you were absolutely right to have it closed down. I felt that when it comes to alleged murder and the most serious of damage, it is very difficult to say that soldiers should be treated any differently to any other people in society. In the end, albeit I totally accept what you say—that the prospect of successfully prosecuting any of them is small—in terms of our principles of human rights, decency and a democratic society, I simply do not think that for those sorts of very serious events you can call for a statute of limitations.



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Q179 **Johnny Mercer:** Hi, Martyn. Thanks for coming in. You made the point there that you don't think soldiers should be above the law. Can you name any individual who thinks that they should be?

Martyn Day: I am saying that if you have a statute of limitations just for soldiers, which I understood was one of the things being considered—

Q180 **Johnny Mercer:** It is one of a number of different things being considered. It is not something that has been gone for. This line that soldiers are subject to the law—everybody knows that. Everybody who serves knows that. I don't quite understand why it keeps coming up as a campaign line that we think soldiers should be subject to the law. It's like saying the sky is blue. Everybody agrees that that is the case.

Martyn Day: Maybe I have misunderstood the remit of your Committee, but I thought that one of the issues you are looking at—

Q181 **Johnny Mercer:** To be fair, I think you have misunderstood a lot about the remit of the Committee. This Committee is not down on one side or other of the argument. Clearly, we have an interest in justice above everything else, both for victims, when things have gone wrong, and for those who serve. The problem we have at the moment is the lack of balance in the process. You made claims such as that what happened in Basra was a complete breakdown, and that law, order and human rights were not protected. It has been found that those claims were "wholly without foundation and entirely the product of deliberate lies, reckless speculation and ingrained hostility". Why do you keep heading down that track when you have been very publicly shown to have made a lot of this—or at least been lied to but made a lot of this stuff up? What is the agenda? What do you want to do?

Q182 **Martyn Day:** Are you trying to suggest that I have made it up?

Johnny Mercer: Well, I know that you have been dishonest, yes, but in this respect—

Martyn Day: Sorry? Sorry, can you just repeat that?

Johnny Mercer: Yes. You have been dishonest throughout this process.

Martyn Day: Well, I'd like you to go and repeat that outside this building.

Q183 **Johnny Mercer:** That's no problem whatsoever. You have known for a long time that those individuals in the Al-Sweady case were part of the Mahdi Army—that documentation was found in your possession. My problem is that you come here and make these allegations that suddenly the British went into Basra and all hell broke loose, and no one cared about human rights and everyone was very disappointed—and it is a complete work of fiction. You have been found out very publicly, and yet you continue going down that rabbit hole. I'm just really interested as to why you keep doing that.



Martyn Day: Okay. You have just raised two or three big questions. The first issue is what happened in Basra. You have talked about there being lots of fraudulent claims. The claims that are being brought forward by the clients that we represent—around 1,000 people—are to do with exactly what I have just been talking about: the five techniques. There are hardly any claims that are outside the five techniques, so the very decision that the military took to adopt those five techniques, which the courts have found to be illegal and to be the same humiliating treatment that the Geneva convention said that we should never be involved in—that is what the claims are. The ASI case that you were talking about is totally different. It is different in the sense that that was not a claim. That was a series of allegations that were being made by Iraqis. I just remind those of you not totally following it all that what had happened with the ASI, which you will obviously come back to later on, Dr Lewis—

Q184 **Chair:** Yes; I don't want us to get too detained on that. I must let you respond to this point, though.

Martyn Day: I just need to be clear that everyone has understood what had happened. There had been a battle in Majar in May 2004. The Mahdi Army had ambushed the British forces, and there was a big battle. After the battle, nine people were picked up from the fields around and taken back to British Army headquarters. They were hooded and made to wear blacked-out goggles. They say that overnight they heard the sound of screaming and shots. The next day, 20 dead Iraqis were delivered back to the Iraqi community. The Iraqi doctors who did the post-mortems said that they had been, basically, murdered.

That was the backdrop to it all. The allegations eventually emerged, and I called for a public inquiry because it seemed to me that it was very important that we as a society came to terms with whether those allegations were true or false—whether they were right or wrong. To go back to your point, Mr Mercer, the court decided that those nine detainees probably did think, at the time that we were interviewing them, that their colleagues had been murdered. The British Army say that, very unusually, they had taken the bodies from the battlefield and into the army camp, dead. The great difficulty that arose was that the key piece of evidence was the photographs that were taken of the dead bodies when they arrived in the British Army camp. Unfortunately, the Major who took the photographs put them on to his laptop, and then ended up throwing the laptop into the channel when the investigators came to try and find the photographs. He was then asked a second time, and he did that a second time. Now, you will not be surprised to hear that that led everybody else to the view that it was entirely suspicious that those key photographs had been thrown twice into the English channel.

As a result, the Ministry of Defence agreed that there should be an inquiry into the events that had taken place. During the course of the inquiry, the exact timing of the photographs was established, and it became clear that what the Iraqis had heard was not the killing of other Iraqis, but was other matters. That was when the Chair of the inquiry decided that the allegations were totally unfounded, and that the British Army had actually



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done a very good job. So those claims were not claims by me, Mr Mercer; they were claims by the Iraqis that we represented. We had asked for there to be an inquiry in order to present their case.

Q185 **Johnny Mercer:** You have a duty as a solicitor to try and assimilate whether or not these things are within the realms of possibility or could have happened based upon all the evidence.

Martyn Day: This had been through the court. The court had been through it. The Ministry of Defence decided that it would agree that there should be an inquiry to get to the bottom of what had happened.

Chair: We don't want to get too drawn into the granular detail of specific cases, but we will come back to the Al-Sweady thing. I hope to try and get lessons out of it and recommendations that you would make in order to avoid such a damning outcome of an inquiry, as I am sure you would concede that it was. We will come back to that later, if we may.

Q186 **Mrs Moon:** Mine is a very simple and basic question. You talked about the length of time between events and successful prosecution. Would you agree that the length of time also means that there is less chance of lessons being learned? That is the crucial issue about early inquiries. There are two issues here. One is justice, which is very important, but there are also issues with lessons being learned in terms of the rules of engagement and the behaviour of personnel. It is not just the issue of successful prosecution; it is the successful learning of lessons that alter behaviour or reinforce behaviour that is also a critical issue. Would you agree?

Martyn Day: I totally agree. We acted for the Kenyan Mau Mau veterans. They were the freedom fighters of Kenya back in the 1950s. We were asked to act for them 10 or 15 years ago. We called for there to be an investigation into what had happened. We carried out investigations ourselves. We brought in two historians from Oxford and Harvard who were able to conduct investigations. The importance of that was that it enabled a proper review of what had actually happened all those years ago, which led to William Hague apologising to the Mau Mau in Parliament only three or four years ago.

The crucial point was that even though it had been 50 years since the events of the '50s and '60s, sufficient evidence was available to enable us and the courts to review what had gone on and see that what had been said at the time about the terrible things that the Mau Mau had done was totally dwarfed by the terrible things that the British colonial regime had done. The point I am making is that even if many, many years have passed, we can learn big lessons as a society from events. As you were fairly saying, Mrs Moon, that is different from whether we can actually find the evidence for an individual prosecution. Those are two sides—

Q187 **Mrs Moon:** I don't think that was exactly what I was saying. My concern is twofold. One is that if time goes on and you have repeat attempts to prosecute individuals, as we have found to be the case in the north of Ireland, often you have fewer successful prosecutions and lots of people



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are put through the trauma of investigations repeatedly and often needlessly. My concern is that in focusing on the constant re-prosecution, we miss the opportunity for lessons to be learned. My question was whether there is an issue of lessons that need to be learned being lost with the focus on seeking prosecutions. That was what I was trying to point out.

Martyn Day: That is a very fair point; apologies if I did not fully answer it the first time. If you look at the Iraq fatalities inquiry team, it is a good response to your point. I do not know whether you are aware, but Sir George Newman has been put in charge in Iraq of taking responsibility for the death cases. On his website, he says that before any of his reviews start, he goes to the Attorney General and gets agreement that there should not be any prosecution relating to any evidence given up by any particular soldier or anyone else before they give evidence. He feels that that has allowed him to get to the bottom of things. He particularly says, "Look—my job is not to look for prosecuting evidence; it is to try to get to the bottom of these events to try to see what has actually happened." That is an important point, for the reasons you are saying. It is important that we can have people come to give evidence in an open way, but at the same time they will obviously be balancing in their own mind whether, if they say too much, they will be prosecuted. I think the IFI was actually a good example of where that can work in a system.

Q188 Chair: This is a particularly crucial point, because you said that you have looked at some of our previous work and our previous reports, and so on. You will have seen that we have said consistently that we think that a truth recovery process has a key part to play. Are you basically saying to us that the reason why you feel it is necessary so zealously to pursue individual soldiers so long after the event is to learn lessons, which could possibly be learned better by a truth recovery process that would investigate matters later that had not been investigated adequately at the time, and which would be better equipped to get to the bottom of what had really happened because everyone taking part in the process would know that they were immune from prosecution? Is that what you are saying to us?

Martyn Day: I think that is part of what I am saying but, again, there is a balance here to be struck. It remains very difficult, if someone has in their family a son or a brother who has been murdered in a situation, to turn to them and say, "Look, we're going to investigate, but there is never any chance that the people who did it will ever be prosecuted." I think that is quite a tough message for anybody to give out.

Q189 Chair: Let me refine it a bit more in order to try to reach a point of convergence. We are talking about doing this only after many years have elapsed. Given what you conceded earlier—the more years that elapse the more likely it is that a prosecution will fail—if one is concerned about the lack of information about what has happened and the inability to draw lessons, isn't the answer to this to try to use the combination of a statute of limitations coupled with a truth recovery process, and isn't this what Mandela did rather successfully in South Africa?



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Martyn Day: I think he did. Clearly, if you were having this discussion with the groupings within Northern Ireland at this precise moment and they were to come back and say, "Look, we've talked to the victims' families and they feel"—for all the reasons Mrs Moon is saying—"that actually what is crucial to them is to get to the bottom of what has happened, and they would be prepared to accept that the price to be paid for that openness is people not being prosecuted," then I think that is fair enough. That would be a societal decision that I think would be fair enough.

However, I think you have to involve the families. I think to say to them that you are making that sort of decision would be totally wrong, but if you involve them in the discussion, and for all the reasons we are saying I can totally see, using the IFI as an example, how having that does allow people to come out and be much more open, that may be a decision that they would be prepared to take. But, as I say, I think you would have to have that conversation with the families.

Q190 **Mr Francois:** It is an interesting line that we are on. Martyn, thank you again for coming in. You made the point that you do not specialise in Northern Ireland cases, and we have taken that on board, but you also made the point that the further you are away from any alleged incident, in terms of years, practically—not least because of issues of human memory—it is more difficult to bring a successful prosecution. Common sense must support that.

You have also said that soldiers should not be treated differently from anybody else, but in the Northern Ireland context, of course, they are, because the crucial difference in Northern Ireland—this is why many veterans feel so strongly about this—is that, as part of the Good Friday agreement, Tony Blair arranged that hundreds of alleged IRA terrorists would be given so-called letters of comfort to assure them that they would not be subsequently prosecuted for alleged terrorism offences.

In the case of the alleged Hyde Park bomber, when he produced one of those letters, the judge collapsed the trial because he said it was an abuse of process. The veterans do not have any of these letters but the alleged IRA terrorists, who they were often fighting, do. How can that be treating them equally?

Martyn Day: Again, I am very hesitant to get too drawn into the detail, because it is just not my sphere.

Mr Francois: No, but it is a question of principle.

Martyn Day: In terms of the principle, my understanding is that the discussions that have been held within the Stormont House agreement have suggested that the maximum that those people who are being investigated by the historic investigative group could suffer—I have forgotten the name of that group, but whatever it is called—whether they are a paramilitary or a former soldier, is two years. That seemed to me quite a sensible sort of compromise in terms of the discussion we are



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having: if in the end you are party to this, the most you could actually go down for is two years. That seemed to me to be a sensible sort of balance.

Now, to be frank, I don't really fully understand the relationship between that two-year period, which I had understood was applied to everybody, whether paramilitary, soldier or whoever, and Tony Blair's supposed amnesty. I am not clear about that.

Q191 **Mr Francois:** Well, it wasn't a general amnesty; it was letters of comfort for alleged IRA terrorists. That was part of the deal struck with Sinn Féin-IRA. As I understand it, you are right, in that it has been effectively agreed that anyone who is prosecuted under that process would be given a maximum sentence of two years imprisonment—except, if you are an alleged terrorist and you have a letter of comfort, you have a maximum sentence of zero, because you can't be prosecuted, because you have one of these letters.

If you are a veteran in your 70s and you are successfully prosecuted, you could still have to face two years in prison. If you are an alleged IRA terrorist who murdered somebody, you have no risk of prison at all. My point is, how can that possibly be equitable?

Martyn Day: All I can say is that from the bits I have read, the two-year thing seemed to be pretty solid. As far as I understand it, the letters of comfort—

Mr Francois: Yes, but pretty solid for one side.

Martyn Day: Well, as far as I have understood it, it would apply to the soldiers as much as the paramilitaries.

Q192 **Mr Francois:** But the paramilitaries have got letters of comfort, so it doesn't apply to them. That is my point.

Martyn Day: You are more expert on the point than me. The bit I have read did not suggest to me that the letters of comfort were worth a great deal to those people, but apologies if I have got that wrong.

Q193 **Mr Francois:** Remember that the Hyde Park bomber's trial collapsed because of one of these letters, so you can't say they have no legal effect, because the trial was stopped. How many of those alleged terrorists, who have a letter of comfort, have ever been successfully prosecuted for terrorist offences?

Martyn Day: I have absolutely no idea. Sorry.

Q194 **Mr Francois:** The answer is none. So how can one possibly argue that they don't have any legal effect, when no one who has had one has ever been prosecuted?

Martyn Day: I totally relate to the idea, in all of this— Let's put it more widely. Reference was made to Nelson Mandela's truth and reconciliation process in South Africa. I think you are right. It feels to me that whatever is true for the paramilitaries and whatever is true for the soldiers should apply equally across the board. That should generally be true in society.



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As we were saying earlier, we shouldn't treat the soldiers any better, but we certainly shouldn't treat them any worse.

Q195 **Mr Francois:** Following on from what you have just said, would you agree that to continue as the Government propose—with the alleged terrorists having letters of comfort and veterans being liable for up to two years—would be iniquitous and wrong?

Martyn Day: I have two points. One is that these are matters of negotiation within a society and therefore it is very important that all parts of the society are there. In general principle, it would seem to me that whatever the treatment is for the paramilitaries and for the soldiers, it should be absolutely the same. By way of principle, that should be the bottom line.

Q196 **Mr Francois:** So the soldiers should have letters of comfort too.

Martyn Day: Again, I hesitate to get—

Mr Francois: But that would be equivalent, wouldn't it?

Martyn Day: If, in the end, the agreement is two years across the board, the two years should apply across the board—paramilitary as well as soldier.

Chair: It does. We know that. The question is about if one side has an additional safeguard, namely the letters of comfort, and the other side doesn't, then obviously one side is more susceptible to serving the two years than the other.

Q197 **Mr Francois:** You are saying, in principle, that both sides should be treated equally.

Martyn Day: In principle, I agree.

Q198 **Phil Wilson:** Your firm has developed a reputation for pursuing claims against the UK Government and service personnel. When you are instructed to bring such cases, what are your main considerations? Are you ever concerned about the implications of your work for national security, or for military effectiveness?

Martyn Day: I cannot think of any cases brought by us where the issue of national security has been of any great significance. The vast majority of claims that we are bringing or have brought relate to people who were prisoners at the time of the alleged abuse. That is nothing to do with national security; it was to do with how we treat prisoners once we take them into custody. Going back to my point about the five techniques, that has underpinned the vast majority of the claims we pursue. There should be no difference in how we treat people, be they a combatant or a civilian who has been taken prisoner. We treat them with respect. We do not humiliate them. No case handled by us in relation to this sort of work has anything to do with national security.

Q199 **Mrs Moon:** I wonder whether you can help me with some questions about the Human Rights Act and the European convention on human rights, and



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the part they have played in your firm's cases against the Ministry of Defence and individual soldiers. How important have they been in facilitating your being able to take cases against both the Ministry of Defence and individual soldiers? Some witnesses to our inquiries suggested that in future we should derogate from the European convention ahead of military conflicts. What is your feeling about that?

Martyn Day: First of all, we never sue soldiers—never.

Mrs Moon: Individual soldiers?

Martyn Day: We have never been involved in suing individual soldiers. We only ever sue the Ministry of Defence or the Government in general terms; we never sue individuals. The only difference is that once we sued Jack Straw and Sir Mark Allen in relation to Colonel Belhaj, who had been rendered by Britain to Libya. Those two individuals had been much involved, and Colonel Belhaj was determined that they should be on the claims sheet. Apart from that particular circumstance, we never sue individuals, particularly individual soldiers. We sue the Ministry of Defence. What was the second part? The Human Rights Act.

Q200 **Mrs Moon:** How important have they been in facilitating your capacity to take a prosecution?

Martyn Day: Mr Justice Leggatt is one of the key judges involved in the Iraqi case. He was put in charge of the Iraq cases, and we have about 600 cases still to be resolved. It was decided that four of them would be looked at as test cases, as example cases to consider—in terms of what happened in Iraq—the question, “How do the courts deal with it?”

In his findings of December 2017, Mr Justice Leggatt said that these four test cases—these individual Iraqis—had been treated in a humiliating way by the British Army, and that that was in breach of the Geneva conventions to which we have long been signatories. The Human Rights Act, in that sense, simply followed on from what the Geneva conventions were saying. For us, although we do use the Human Rights Act in the sense of it being part of the claim, the treatment meted out by the British Army during the course of the Iraqi conflict was actually in breach of the Geneva conventions, because the two things were synonymous in terms of how we expect our troops to treat detainees.

Q201 **Mrs Moon:** Have you ever had a case where the Human Rights Act or the European convention on human rights have been the critical legal statute against which a successful prosecution has been held?

Martyn Day: There is no question but that the Human Rights Act is of assistance. However, as I say, one goes back to the fundamental point that how we treat people is covered by lots of different bits of law—the Geneva conventions as well as the Human Rights Act—but that we should treat people with respect and not humiliate them when they become prisoners is a rather fundamental tenet of anything to do with British law, whether common law or anything else.



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There are certainly sides to the Human Rights Act that were a benefit, in terms of some of the technical issues. I shall not bore you too much with the detail, but in terms of limitation, the way that the Human Rights Act worked was a benefit in bringing those cases, but that is more in terms of the technical issues than the fundamental principle of how we have actually treated people.

You asked about derogation. When we went into Iraq, this Parliament passed a motion saying that Parliament supported sending British troops into Iraq to bring about democracy, to bring down Saddam Hussein, to bring about the rule of law and to protect people's human rights. I totally supported the British going into Iraq, and I totally supported the military taking that step at the time. I still feel that it was the right step to take, but how on earth could we ever contemplate saying, "We are going in for those purposes," and then turn round and say, "Well, actually, we are going to derogate from the Human Rights Act, because we think we may not be treating people in the way that we would treat them here"? I think the two things are anathema. If we are moving into a country to assist it in taking those sorts of steps, what on earth would we be saying if we then said, "Well, actually, in doing it, we are going to derogate from the Human Rights Act"?

Q202 Mrs Moon: I just need to come back to a point. You said that the Geneva convention has been the important issue—the failure to comply with the Geneva convention—and that the Human Rights Act has been helpful in terms of some additional components, but basically it is the Geneva convention. Am I right in understanding that?

Martyn Day: The Geneva convention goes to the heart of how you treat prisoners on the ground. The Human Rights Act basically gives another framework, but to a very similar sort of standard.

Q203 Mrs Moon: Have you ever had a case where it has simply been on the basis of the Human Rights Act or the European convention that a successful prosecution has been made against the MoD, as opposed to the Geneva convention-plus?

Martyn Day: The answer is yes, in the sense that we plead the Human Rights Act because it is a specific British statute. In the claim form, that is how we plead it. However, in terms of the standards that the court is applying, the Geneva conventions very much tie into the same sort of standards that you would expect with the Human Rights Act. I am sorry if that is a lawyer's answer.

Q204 Chair: Before Madeleine continues, may I clarify a point? You said that you had looked at some of the previous evidence that we have been given, and you will have seen that we had some expert legal advice that suggested that it has been the application of human rights laws to the battlefield, which has been facilitated by the Human Rights Act, that has been responsible for this great upsurge in legal activity. By contrast, previously—under the law of armed conflict, which is obviously part and parcel of the Geneva convention regime—questions of proportionality and



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standards of what might be regarded as unavoidable civilian casualties in a conflict situation were more realistic. How do you respond to that? Do you say that the translation of the Human Rights Act from the UK to the battlefield, enabling people in other countries to sue in British courts, really has not been a decisive change?

Martyn Day: I would say it was total nonsense. With the Human Rights Act, in terms of how it has worked here, the courts have totally shied away from any involvement with the battlefield. There is not a single case that I am aware of where the courts have said, "We are going to get involved in the battlefield, in terms of decisions that are made on the battlefield."

The closest one gets is in some cases that we took on behalf of widows of people who had been killed on the battlefield. We were saying that the soldier had not been given the technical support that they needed in terms of weaponry—one was a Hercules helicopter; the other was a Challenger tank that we said that the British Army should have provided. One was attacked through friendly fire; the other was—

Mr Francois: The Hercules is a plane, not a helicopter.

Martyn Day: Sorry—a Hercules plane. The case was basically that there was more that the Ministry of Defence and the British Army could have done to protect those soldiers, in terms of the equipment they were given at the time. The question of the court was, "Should we get involved in those?" It felt that we should, because decisions were taken not on the battlefield but by the Ministry of Defence about the sort of equipment they provided to servicemen.

That was as close as it got. The courts made it absolutely clear that, whether you are talking about the Human Rights Act, the Geneva convention or anything else, they will not get involved in issues to do with combat. They totally respect the point that you guys and others have made already that, in the end, they do not want to be there second-guessing soldiers or putting burdens on soldiers in relation to what the law is at the time of combat.

Q205 **Chair:** You said that you never sue soldiers or individuals, with the one exception of Jack Straw. Why do you draw the line at suing individuals? Why do you only go after the state? Do you feel that there is a good moral reason for not going after the individuals?

Martyn Day: I am not saying one can say "never"—

Chair: I think this is a fairly straightforward question. You have specifically said, "We never sue individuals; we only go after the MoD, the state or whatever it is." There must be a straightforward reason for that. Why do you not go after individuals? Do you think it is wrong?

Martyn Day: I am saying that we never have. I do not want to say that we will never. It is very, very unlikely.

Q206 **Chair:** Why do you think it is so unlikely? Is it because you have—as I



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suspect you have—some sort of moral objection to doing that?

Martyn Day: Both moral and legal. Moral in the sense of people are part of the British Army; the Army should take responsibility for their actions. If they make mistakes, the Army should remain responsible for the actions of their soldiers. Legally, what is the point in suing some major or colonel down the line?

Q207 **Chair:** I get the point; that is what I thought you would say. How do you feel about the authorities in Britain arresting individual soldiers 40 years after the event in the way that they have been?

Martyn Day: But that is very different, isn't it? One is me acting on behalf of somebody suing a particular soldier for events that have taken place—say, individually suing the people who killed Baha Mousa. In a criminal prosecution, which obviously I would not be taking—it would have to be the prosecuting authority—you would say that there is sufficient evidence to say that, beyond reasonable doubt, that particular soldier had committed a criminal offence.

Q208 **Chair:** How likely do you think it is that 40 years after the event, those conditions are fulfilled for soldiers to be arrested in the way they have been?

Martyn Day: As we have discussed, and as Mr Francois said, the further the time goes on, the less chance there will be. But it is very unlikely that it will be nil. Again, it is a balance in that discussion in Ireland in particular, because that is very much what you are looking at, with the communities to say whether this has reached the stage where the chance of prosecution is so small that there is any benefit of having the open style investigation in the way that Mrs Moon said.

Q209 **Chair:** With respect, you are flying two different standards, because you just said there is very little chance that it will be nil, but you know perfectly well, because you said it a few moments earlier, that the question is not, "Is there any chance at all?" but, "Is there a chance that somebody can be convicted beyond reasonable doubt?" That means that you need to have a lot higher than nil before you should be prosecuting anyone, doesn't it?

Martyn Day: I am saying that when you put all the evidence together, the prosecutor has to say, "What is my chance of succeeding in this prosecution? What is my chance of getting over that 90% hurdle beyond reasonable doubt?" I am saying that the chances of that happening become ever smaller as time goes on. Certainly, after 40 or 50 years, the chance of that actually happening is very small indeed, but it is not likely to be absolutely nil. It is likely to be very small.

Q210 **Mrs Moon:** I want to come back to something that you suggested in the evidence that you have given, about the MoD's corporate responsibility for the actions of individual service personnel. Do you think that the Government should take corporate responsibility in civilian courts for criminal behaviour of service personnel?

Martyn Day: Let us just be clear about your terms.

Mrs Moon: You said that you only take prosecutions against the MoD, not against individuals.

Martyn Day: There are two important, separate things. One is civil claims brought in relation to compensation for someone who has been beaten up, assaulted or whatever. You bring an individual compensation claim on behalf of that person. We would only bring that against the Ministry of Defence. The outcome of that is compensation. Alternatively, you have an individual prosecution against an individual soldier, colonel, or whoever it may be. You may want to come to this point: I saw that when Ms Meredith—another lawyer—gave evidence to you a little while ago, she suggested that actually, corporate manslaughter may be a route that you might want to recommend. I looked into that idea myself, and I thought that it was a good idea because it is surprising, in a way, that the Ministry of Defence is excluded from that as a possibility. It seemed to me that that was not a bad idea in terms of making sure that there is at least the potential for the prosecuting authority to say, "Look, we are going to go after you," about the people responsible for some of the decisions made that went so badly wrong.

Mrs Moon: That is helpful. That was exactly where I was seeking to go. Thank you.

Q211 **Leo Docherty:** Can we just get something very clear? In terms of cases brought against British soldiers in Iraq and Afghanistan, is it your judgment, and are you saying, that the Human Rights Act makes no difference whatsoever, and that all of these prosecutions and this long catalogue of legal pursuit would have occurred under the Geneva conventions and the law of armed conflict?

Martyn Day: I think that the moment the British Army decided to adopt the five techniques, there were always going to be hundreds and hundreds of claims brought against the British Army. That was the key moment. As a lawyer, the Human Rights Act undoubtedly helps for some technical reasons that I explained to Mrs Moon, but the fundamental principle than you cannot treat people in that way has been a part of British law for a long time, and well before the Human Rights Act, the European convention on human rights and the rest of it.

Q212 **Leo Docherty:** Okay. The five techniques aside, have the European convention on human rights and the Human Rights Act been critical in any other cases?

Martyn Day: It has been very important in the technical sense, as I said before about limitation. The way limitation operates with the Human Rights Act has given us more opportunity to bring the claims in terms of the amount of time that has been taken.

Q213 **Leo Docherty:** So it is an enabler.

Martyn Day: Exactly. That is a good word. It has been a good enabler for those claims in terms of that technical issue of limitation. In terms of the



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fundamental principle of how people are treated, it has not made a great deal of difference.

Q214 **Mr Francois:** Just a few words about your company, Martyn. You are the senior partner, so you oversee the work of the firm. How many people do you employ?

Martyn Day: Just short of 500.

Q215 **Mr Francois:** You are the senior partner. How many partners are there?

Martyn Day: Forty-five.

Q216 **Mr Francois:** Okay. What profit did you make last year?

Martyn Day: As a firm?

Mr Francois: Yes.

Martyn Day: I am not telling you that.

Q217 **Mr Francois:** Why not?

Martyn Day: Why should I? What has that got to do with this conversation?

Q218 **Mr Francois:** I, as an elected representative whose salary is published on a website, want to know how much money your firm makes out of this kind of activity.

Martyn Day: You are a public person, in that sense. I am not.

Q219 **Mr Francois:** Yes, but you are a lawyer who makes a lot of money out of this.

Martyn Day: Out of what?

Q220 **Mr Francois:** I would like to know how much money your company made last year.

Martyn Day: Well, you are not going to be told.

Mr Francois: I do not think that is very transparent.

Martyn Day: This is the organisation that makes the laws. I am from a private law firm. There is no requirement on me to make my figures public, so I won't.

Q221 **Mr Francois:** I will try again. Because of the controversial area in which you work—if it was not controversial, you would not be here today—I think that the public, and my constituents, would like to know how much money your firm earns, but you refuse to tell us.

Martyn Day: It is not information that I am passing on. That is nothing to do with your inquiry—

Q222 **Mr Francois:** Well, I think that is a poor show.

You do not need to tell us the total figure, if you do not want to give that



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information, but what proportion of your profit did you make from legal aid? How much of your business is accounted for by legal aid, paid for by the British taxpayer?

Martyn Day: I haven't got the figure off the top of my head, but it would be something around 4% or 5%—that sort of figure.

Q223 **Mr Francois:** Okay, so it is a relatively small proportion.

Martyn Day: A pretty small proportion.

Q224 **Mr Francois:** Okay. Of your 45 partners, how many have ever served in the armed forces?

Martyn Day: I haven't asked them, actually.

Q225 **Mr Francois:** Okay, but do you know incidentally of anyone who has?

Martyn Day: Not that rings a bell, but I don't know whether anyone is in the TA, or something like that.

Q226 **Mr Francois:** Okay, but you are not aware of anyone who has ever served in the armed services.

Martyn Day: Not that anyone has ever said to me, no.

Q227 **Mr Francois:** More than 2,000 companies in the United Kingdom have signed the corporate covenant, as it is known, which means that in principle they support the work of the armed forces and honour what they do for their country. Has Leigh Day signed the corporate covenant?

Martyn Day: To be frank, I have never even heard of it.

Mr Francois: Well, 2,000 companies must have heard of it, because they have signed it, including a large number of FTSE 100s. You have never heard of it?

Martyn Day: Never heard of it.

Q228 **Mr Francois:** Maybe you should get out more.

Let us talk about the cycle of investigation and reinvestigation. Presumably that is something you are prepared to discuss.

Martyn Day: Yes, of course.

Mr Francois: I am not a lawyer, but in layman's terms I understand the principle of double jeopardy, which basically meant that you could not be tried twice for the same offence. Some years ago, as you know, Parliament changed the law, partly, I think, after the outcry about the Stephen Lawrence case, to say that in exceptional circumstances—I am paraphrasing—where compelling new evidence emerged, you could try again. You could have a second trial, but in exceptional circumstances; I think that is broadly correct, isn't it? So the norm is that you cannot try someone twice, unless exceptional evidence emerges. Some of these veterans, however, have been tried multiple times, or investigated multiple times—some of them six or seven times over for exactly the



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same incident. If the public cannot be tried more than once unless there is exceptional new evidence, do you think it is fair that people have been investigated multiple times without exceptional new evidence?

Martyn Day: I totally agree that it is terrible. I totally agree with you—

Mr Francois: Terrible?

Martyn Day: Yes. I think it is. For all the reasons that you have said now, and those in previous discussions, the idea that someone has to go through this four or five times is very poor—on the part of the system, and in terms of the process.

It is important that you distinguish between double jeopardy in two prosecutions, as against two investigations. You are perhaps alluding to the fact that you can have a number of investigations. But I agree, it is pretty poor that we have forced so many servicemen to go through this process so often, because the investigations in the early days were so poor. I agree with you.

Q229 **Mr Francois:** All right. What do you think that we can do now, bearing in mind that we are where we are? With the HIU, the Government are proposing to go back to 1969.

Martyn Day: Are you talking about Ireland?

Mr Francois: Yes. That would be going back 50 years. If you think that it is iniquitous that people can be investigated again and again—I think you have just said that—and bearing in mind that we are where we are, what do you think we could do to prevent people from being investigated yet a further time?

Martyn Day: To be clear, I said it is terrible for the individuals that they have had to go through what they have gone through. That is slightly different from using the word “iniquitous”.

As far as I understand it in Northern Ireland, the process of investigation that took place in the early days, in previous times, was very poor. What is being suggested now is that a much more detailed and open investigation should be carried out. I totally respect exactly what you are saying. It is pretty tough for those servicemen to have to face that. However, the other side of that are the families, the victims and what they have had to face for the past 40 or 50 years. One is trying to balance the interests of the servicemen against the interests of the families and of society more widely.

I am not going as far as to say that it is so terrible that it should not happen. I am saying it is bloody tough on them to have had to face what they have faced, but there are wider questions afoot, in terms of whether one should try, as a result of that, to give them some sort of amnesty, or whatever one wants to call it—in terms of your statute of limitations, or whatever.

Q230 **Mr Francois:** You say it is bloody tough but, to be honest, that is not a



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lot of comfort to Lance Corporal Tommy Atkins, who is being investigated for the fourth time. We have even got a Chelsea Pensioner now who is being investigated. If I stopped 100 people walking down Rayleigh high street in my patch and said, "Do you think it is right that they are even going after Chelsea Pensioners?" I am pretty confident I could tell you what 99 of them would say.

Martyn Day: Are you saying that you would say this more normally across society? Are you saying that where some event took place 50 years ago that was nothing to do with the military, 50 years is too long and we shouldn't waste resources by prosecuting people?

Q231 **Mr Francois:** If there was absolutely compelling new evidence, there would be a stronger reason to investigate it. But if you are basically going over the same ground again and again, I think that is iniquitous, yes.

Martyn Day: I want to be clear that I am no expert, but the difficulty, as I understand it, is that what is being said is that the initial investigations were so poor that it is not just going over the same grounds; it is trying to go through the grounds in far more detail, in a far more thorough way.

Q232 **Mr Francois:** I do not agree. Originally, for the first few years, the investigations were carried out by the Royal Military Police. In the early 1970s, that changed, and they were investigated from outside the armed forces by the Royal Ulster Constabulary.

The Sinn Féin/IRA agenda, which is highly politicised, is, of course, to say that those investigations were not done properly. They would say that, wouldn't they? It is also in their political interest, because they want to change the narrative about what happened in Northern Ireland, to try to make the British Army out to be as evil as possible—in effect, some kind of army of occupation, as they try to argue it. Is it not also the case that a large number of these cases, where families complain or ask for things to be looked at again, are in reality being done because Sinn Féin put them up to it, in the real world?

Martyn Day: That is much more of a political question than a legal question.

Q233 **Mr Francois:** It is a real-world question, if you want. Isn't that actually what goes on in practice?

Martyn Day: I can only repeat what I have already said. I can totally relate to the idea that being reinvestigated for the individual serviceman must be extremely tough and really upsetting. I totally relate to all that. However, at the same time, you have got people who have had their loved ones killed 40 or 50 years ago and they have never had a proper answer as to what exactly happened. That is equally tough.

Q234 **Johnny Mercer:** Can I come in on the money point that Mark raised a couple of times? If you are not going to tell him how much money your company makes, can you at least indicate how much you have made out of fees and various claims relating to Iraq?



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Martyn Day: Yes. The last figure that I was given, which was a short while ago—not very recently, but in the last two or three months—was about £11 million.

Johnny Mercer: Have you ever been to Iraq?

Martyn Day: No.

Q235 **Mr Francois:** How vulnerable is the current system, in your opinion, to abuse and false allegations?

Martyn Day: In terms of what, in particular? Are we talking about Ireland or Iraq?

Q236 **Mr Francois:** I am talking about the whole system. You can have Ireland, Iraq or Afghanistan—the whole process.

Martyn Day: I think we have actually got a very good system in this country for reviewing claims. The judicial process, in terms of cross-examination, is a very good one. I am a great believer in the rule of law, and I think that it is a very good system for filtering out poor, weak, exaggerated or fraudulent claims. It is not perfect—things will always peek through—but by and large, I think it is a pretty good system.

Q237 **Mr Francois:** Another law firm—not yours—went bust after earning millions and millions of pounds in taxpayers' money from legal aid. That is what it particularly concentrated on; that was its little earner—or big earner. It practised for years until it was discovered, via a court case, that it had been making a lot of it up. A lot of it was completely fabricated. The firm had trawled Iraq for people, and said to them, in effect, "Say this happened. You will get some money and we will get some money." It did it for years. You say that we have a very good system, so how, at a cost of millions of pounds of British taxpayers' money, was this firm allowed to get away with that for so long, if the system is as good as you claim?

Martyn Day: To be clear, Mr Shiner was found guilty of two significant offences. First, he was approached by "Panorama" back in 2007, which had heard about the allegations surrounding the Al-Sweady and Danny Boy events. The team approached him and asked whether he was aware of those cases going on. At the time he was not, as I understand from the evidence in the tribunal. He then got his agents on the ground to go and find those people, and the regulator charged him with touting for more than six or seven clients that they brought in. Later, when the regulator started to investigate them in 2015, he tried to hide what had happened. He tried to hide the touting, paying the agents on the ground lots of money. That was discovered by the regulator. Once he had done that, he was always going to be struck off. Those were his two offences.

There is no proposition as far as I am aware—unless you have more evidence or knowledge than me—that some wide-scale fraud was going on. He was not pursuing individual claims. We are the ones pursuing civil claims against the MOD. The MOD has been reviewing those claims, and we have been in discussions with it. We have resolved 330 of the 350



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cases so far—we have been bringing claims. Phil Shiner was bringing judicial reviews against the failure of the Government to take various different steps. That is what legal aid was being used for.

Q238 Chair: Briefly, do you accept that many of the people on whose behalf claims were brought were lying to you and had made up those claims, or had been actual fighters and were claiming to be civilians? Was it not established by the Al-Sweady inquiry that huge numbers of lies had been told and that the alleged offences were false?

Martyn Day: The Al-Sweady inquiry established that the nine detainees who had been taken into the British Army camp that night lied when giving evidence to say that they had heard people being murdered. The judge said that, with everything else that was going on, by the time they got to giving evidence to the inquiry they could not have had that view. He therefore said that he was clear that they had lied by the time they got to the inquiry. That is totally different to the hundreds and hundreds of individual claims that have been brought and are entirely to do with the harshing, hooding and the other five techniques that were involved with the British Army.

Chair: I do not want to depart from what I said originally and we do not want to be re-fighting things in too much granular detail, but it seems to me that you are trying to minimise the impact of the Al-Sweady inquiry. I was rather hoping that you would put your hand up and say—not about yourself—that the judgment showed that something was seriously wrong. I will just give you a couple of quotes from the Al-Sweady report. We were hoping that you would then be able to advise us on how these sorts of unacceptable situations could be prevented, but you seem to be trying to play down the significance of the result.

The quotes that we have, which I am sure you will be familiar with, are that the report concluded that while “the conduct of various individual soldiers and some of the procedures being followed by the British military in 2004 fell below the high standards normally to be expected of the British Army” and that “certain aspects of the way in which nine Iraqi detainees...were treated by the British military...amounted to actual or possible ill-treatment”, the key point is that the vast majority of the allegations made against the British military, including without exception all of the most serious allegations, were “wholly and entirely without merit or justification.” Do you accept that that was the case? In that case, do you not accept that there is a bad situation here that ought to be prevented from arising again as a result of people lying and making up false claims?

Martyn Day: I do not think I am saying anything different to that. We totally accept what the judge found.

Q239 Chair: You accept that what I have just read to you is correct.

Martyn Day: Absolutely, but one should be wary about moving from the decision about that group of nine detainees and the inquiry chair’s determination that they had lied very significantly, as against Iraqis more



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widely. I am trying to say that there is no relationship between that and what we have seen. We represent 1,000 individual claimants, and we are satisfied that the great majority of those cases are genuine cases. We have been in discussions with the Ministry of Defence; we have resolved a significant number already, and we are in talks about other cases. To test this, as I mentioned to Mrs Moon earlier, the Ministry of Defence took some example cases to Mr Justice Leggatt for him to review. He found in our favour—in favour of the claimants—in each of those cases.

Again, although I know you are getting a bit bored with it, it goes back to the five techniques, which is the critical point. All of those four cases were fundamentally about the fact that we as a military had adopted the five techniques, and the claims were tied to the fact that we had used the five techniques. The Army accept that that is what it did, and as a result, we end up having to pay hundreds of people compensation.

Q240 **Chair:** Did Phil Shiner deserve to be struck off?

Martyn Day: Absolutely.

Q241 **Chair:** Why?

Martyn Day: As I say, he tried to hide his tracks, and that is not the operation of a decent solicitor.

Q242 **Mr Francois:** Bearing in mind the millions of pounds that his firm earned out of this business, and bearing in mind the tremendous amount of suffering that those innocent soldiers were exposed to as a result of claims that were without foundation, do you believe Phil Shiner should go to jail?

Martyn Day: That is a total debate without any sort of—I do not know the evidence to say where a crime has been committed. There may be; I do not know.

Q243 **Mr Francois:** He was struck off, so he did not do the right thing, did he? Bearing in mind the millions of pounds that he defrauded and the misery that he caused, do you, as a practising lawyer in the same field of work—if only to protect the reputation of others—think that he should have gone to jail? A lot of people do.

Martyn Day: We have long since moved away from posses that went out lynching people. In the end, where is the evidence to suggest that wholesale fraud was conducted in relation to his cases? It is not my job to come and defend Phil Shiner; invite him to come and give evidence if you want to hear from him. As far as I am aware, I have not seen that. The cases that he brought were judicial reviews of decisions that were being made by the Defence Secretary at the time. He brought a series of claims, a lot of which were successful, and therefore it was not the legal aid—in the end, the Ministry of Defence itself has to pay out, rather than the legal aid authorities. Undoubtedly, it is from the public purse, but you would have to take that up with him, not with me.

Q244 **Mr Francois:** So you do not think he should go to jail.



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Martyn Day: I have not seen the evidence to suggest that anything he has done could be determined to be criminal. That is not to say that there is not any out there, but I have simply not seen anything that would suggest that.

Q245 **Chair:** It was unethical but not criminal, as far as you know.

Martyn Day: The way he held himself out in terms of the decision he made to try and hide what had happened is not the operation of a solicitor in our world.

Q246 **Mr Francois:** What about the millions of pounds in taxpayers' money?

Martyn Day: He was operating as a lawyer for years and years and years. I do not understand what your point is. He was bringing cases. A lot of those cases were successful. There is nothing to suggest, that I have seen, that any of that was to do with criminal behaviour or whatever. Again, I am not the prosecutor, I am not investigating him and it may be there is evidence I am not aware of.

Q247 **Mr Francois:** The SRA investigated this very thoroughly and found that he had done something very seriously wrong. You do not lightly strike off a lawyer any more than you lightly strike off a doctor or any other professional. They very rarely ever strike off a lawyer, but they struck him off. He made a great deal of taxpayers' money out of behaving like this, and I think—and many people think—there should be some recompense. At the very least, he should pay the money back.

Martyn Day: Every week, lawyers are struck off by the SRA and the tribunal. As I have said, Mr Shiner was struck off for trying to hide the truth as to what exactly had happened. That was why he was struck off, quite rightly.

Q248 **Chair:** May I just ask one tail-end bit from earlier? What do you actually do as a firm to weed out false claims?

Martyn Day: Generally?

Q249 **Chair:** Specifically in the context of these controversial cases.

Martyn Day: The Iraqi cases generally or Al-Sweady particularly?

Q250 **Chair:** No, the Iraqi cases generally.

Martyn Day: What do we do to review them?

Q251 **Chair:** Yes. When you had a large number of potential cases that you could have brought—you said you had brought hundreds of them, I believe, is that right, several hundred?—what did you do to try and weed out the ones where you say, "No, we're not going to touch this one"?

Martyn Day: Our job is, from the word go, to review each case as it comes in, to say, "Is this a strong enough case to win?" There are two sides to that: do we believe what the person is telling us? That will be a lot of things. We have now gained a lot of knowledge about how things worked during the course of the Iraq war, the occupation phase and the



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rest of it. We know quite a lot about what was going on. We would look to say, "Does the story this person is telling us chime with what we understand from all the other bits of evidence that we have already had?" At the same time, we talk to the client about how they give their evidence to us. Are they likely to be believed or their evidence accepted if they ever had to go to court? You are gauging that all of the time.

A crucial point here is that I am their lawyer. They approach me to present their case. We clearly have a role: we do these cases under the no-win, no-fee scheme so we do not want to be taking on cases that we are not likely to win. The crucial thing for us is that we are presenting their case for the MOD review initially and eventually the courts. We do our own screening process first off, but it has to be clear: we are not the judge, we are not the final decider. If, in the end, we process the case and progress it, and if the Ministry of Defence says it is going to fight the case, it goes to trial and the judge makes the final decision whether or not it is a good case.

Q252 **Mr Francois:** Very roughly, what proportion have you turned down?

Martyn Day: Of the first 350 that have been reviewed with the MOD, 20 have been not progressed and 330 have succeeded. We have got about 625 left that we are in the process of reviewing now. I would have thought that something like 150 of those 625 will not be progressed. That sort of ballpark.

Q253 **Leo Docherty:** How many cases do you have in relation to Afghanistan pending?

Martyn Day: Only about 15 to 20.

Q254 **Mr Francois:** You turn down, broadly, or you think you turn down, very roughly, 20% to 25% of cases.

Martyn Day: It would be about 170 out of nearly 1000, so about 20%, give or take.

Mr Francois: I said a rough number.

Q255 **Johnny Mercer:** You said in your evidence that these people approach you. Can you explain to us how someone in southern Iraq, who has been struck by a rifle butt by Private Smith, works his way to Leigh Day?

Martyn Day: Yes. This became an issue for Mr Justice Leggatt when he was looking at the cases: how do people get to us? That is quite an important issue in terms of limitation, and as a result we asked quite a few clients, before anything to do with Phil Shiner and the touting issue arose. It was an issue for us, because it actually ties into the whole legal debate about limitation. The answer is that word spreads around. People got to know us—

Q256 **Johnny Mercer:** Sorry—so someone in southern Iraq had heard of Leigh Day, and they came to approach you?



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Martyn Day: They had usually heard of the agents on the ground, and that they were all—

Q257 **Johnny Mercer:** Right—so who are these agents on the ground? Explain to us who Mazin Younis is.

Martyn Day: Right. What happened—just to go back, to try to explain who he is—was that Phil Shiner first approached us in 2006 to ask whether we would take on the civil claims for compensation on behalf of Iraqis. He is, or was, a public law specialist. He was bringing the public law claims—the judicial reviews, and all that—but he was not a specialist in civil claims, so he asked if we would take on those cases. He was a well-respected figure—he was made the Law Society’s lawyer of the year the following year—so we knew of his work.

Chair: Sorry, can we just pause for laughter at that point? Do carry on.

Martyn Day: All right. He was a respected figure in the legal world at that moment, and at—

Q258 **Johnny Mercer:** I am so sorry, Martyn, but time is short. Can I just ask you to get slightly quicker to the point? Can you tell me who this guy Mazin Younis is, and how a young Iraqi hears about Phil Shiner or Leigh Day?

Martyn Day: Okay. When Phil Shiner came to us, he said that he had two people on the ground: one was Mazin Younis, and the other was a chap called Abu Jamal who worked with Mazin Younis. The two guys were on the ground, cases would come to them and, as I say, they were referred on to Phil Shiner and he would then refer them on to us to deal with the civil claims. That is how the process worked. As far as people were telling us, they had heard of these two guys and they would then approach them—particularly Abu Jamal, who was in Basra all the time. They would take their cases along to him, and he would then refer them on.

Q259 **Johnny Mercer:** Have you seen his recent interviews in which he said he made a lot of this up?

Martyn Day: I do not think he said that. Wasn’t it another chap who said he had made it up?

Q260 **Johnny Mercer:** Another one who worked for him.

Martyn Day: It was another chap, whose name I have now forgotten. He said some of that.

Q261 **Johnny Mercer:** Okay. What was your precise relationship with these individuals who were going round Iraq? They were paid. Did you contribute to that payment at all?

Martyn Day: I think Mr Shiner funded their office.

Q262 **Johnny Mercer:** But they were given an allocation per case. That is in the public domain at the moment, from Phil Shiner. Did you contribute to that at all? Did Leigh Day contribute to the cost of these two agents in



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any way?

Martyn Day: Well, there are two separate things. The cost—

Johnny Mercer: No, no—it is a simple question.

Q263 **Mr Francois:** Did you pay them, or didn't you?

Martyn Day: Yes.

Q264 **Johnny Mercer:** You paid them to go round Iraq and scoop up claims that you could bring against British soldiers.

Martyn Day: We paid them for—

Q265 **Johnny Mercer:** No, no, no. It is a really simple question. I understand what you are doing in terms of moving around the language and so on, but it is a really simple question. Did you pay those agents to go around and collect claims against British soldiers in Iraq—yes or no?

Martyn Day: No.

Q266 **Johnny Mercer:** So what did you pay them to do?

Martyn Day: Well, as I was explaining to you, they provided cases initially to Phil Shiner. Phil Shiner then referred them on to us. We did not pay any money initially to them directly. However, we did get them to do work for us. One of the great difficulties of Iraq, for the reasons that we have said before, was that we could not go into Iraq to interview the clients, so we had to get them out to the neighbouring countries. We needed to get them out, so we needed to use people like Abu Jamal—

Q267 **Johnny Mercer:** I am so sorry to interrupt you, Martyn, but you are kind of talking us out of time here. I asked you previously, "Did you pay these individuals?", and you said yes.

Martyn Day: Yes, we did.

Q268 **Johnny Mercer:** But I asked you just then and you said no. Which is it?

Martyn Day: No, no, no. You said to me, did we pay them—

Q269 **Johnny Mercer:** No, I am very clear what I said to you: did you pay for people to go around and collect claims against British soldiers? Not directly, but did you pay into these two agents who were going round and collecting claims against British soldiers?

Martyn Day: You asked me if we paid them to collect claims.

Q270 **Johnny Mercer:** That's a really simple question. I am asking you that now. What's the answer?

Martyn Day: What I am explaining to you is that we paid them—

Q271 **Johnny Mercer:** I don't need you to explain anything to me. Why don't you just answer the question?



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Martyn Day: Well, I did answer the question, exactly. The question you asked I have just answered for you.

Q272 **Johnny Mercer:** You have given me two different answers. You said, "Yes, we paid them," and, "No, I didn't pay them." So which is it?

Martyn Day: Because you gave me two different questions.

Q273 **Johnny Mercer:** You are very clever at this, and I respect it—I absolutely respect it. In some ways I do not blame people like you who exploit the system, the MoD and what goes on, the different scenarios of warfare and things like that. I do not blame you for it, because you are making money out of it. The reason you do not go after individual soldiers, I would suggest, is simply that there is no money in it for you. But it is a very simple question whether or not you paid agents to go around Iraq and collect claims against British soldiers, whether directly or indirectly, through Phil Shiner or Mazin Younis or any of those individuals. Yes or no?

Martyn Day: We did not pay them to go around Iraq to collect cases, no.

Q274 **Johnny Mercer:** What did you pay them for?

Martyn Day: What we did pay them for was where they referred cases on to us. If cases came to them that they then referred on to us, we then paid them for that.

Q275 **Johnny Mercer:** What are you paying them for, then?

Martyn Day: For the fact that they are referring on the cases.

Q276 **Johnny Mercer:** Right. So you are paying them for some sort of service?

Martyn Day: Yes.

Q277 **Johnny Mercer:** Yes?

Martyn Day: Yes.

Q278 **Johnny Mercer:** Okay, so you are paying them for some sort of service to collect claims against British soldiers in Iraq?

Martyn Day: To refer on cases to us, yes.

Q279 **Mr Francois:** So it was like an introduction fee?

Martyn Day: It was a referral fee—exactly a referral fee.

Q280 **Johnny Mercer:** Okay. I am not entirely sure whether that is different from collecting cases. If you are paying people to be referred—

Martyn Day: We are not allowed, either ourselves or through our agents, to go out touting for cases. The important difference is that we did not ever pay them to go around touting for cases. What we did pay them for was where cases came to them and they referred them on to us. We would pay them for those cases.

Q281 **Mr Francois:** How did those cases just happen to come to them?



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Martyn Day: That is what I am saying. That is the information that we were getting from the clients—word got out that in particular Abu Jamal was available in Iraq. Basra is a relatively small place; the information was passed around. As more and more people became aware, that information was passed around and they went and approached Abu Jamal and he referred them on to us.

Q282 **Johnny Mercer:** What was your percentage take-home on each one of these claims? You have made £11 million. What percentage of a claim actually went to these individuals?

Martyn Day: We don't work on a percentage.

Q283 **Johnny Mercer:** How does it work, then?

Martyn Day: We get paid hourly rates.

Q284 **Johnny Mercer:** For the layman, if an individual makes a claim in Iraq, how much money will go to that individual and how much will line your pockets?

Martyn Day: The way it worked in our system here, certainly at that stage before the new LASPO legislation—the Legal Aid, Sentencing and Punishment of Offenders Act 2012—came into place in 2012-13, was that the client would get all the money that was awarded to them by the courts or by the MoD in the agreements. They would get every penny. We would then have a discussion separately with the MoD about costs, and that would be dealt with by the normal hourly rate process. It would necessarily go through the court costing process to review.

Q285 **Johnny Mercer:** How much was one of these referral fees that you talk about?

Martyn Day: Again, it depends on the timing, but in rough terms about one quarter of what our costs were was provided initially to Phil Shiner. It was a more complicated arrangement with the other two referrers.

Q286 **Johnny Mercer:** And how common is it for this sort of scenario to exist? Do we have people in Afghanistan now driving around on behalf of Martyn Day, looking for people to come forward and make a claim against soldiers?

Martyn Day: When LASPO came into force in 2012-13, it outlawed referral fees, so there have been no more referral fees in injury cases for about the last four or five years.

Q287 **Mr Francois:** So what you were doing was legal then but is illegal now?

Martyn Day: You could not do it now, exactly.

Q288 **Johnny Mercer:** It is illegal now, is it?

Martyn Day: You could not do it now.

Q289 **Johnny Mercer:** Because, perhaps, it is wrong?



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Martyn Day: There was a big debate in society, in and out all along, about whether you could have referral fees. It has been a massive debate in society for a long time—in the legal world, anyway.

Q290 **Johnny Mercer:** We are talking about the Al-Sweady inquiry now, which cost nearly £31 million and concluded that the most serious allegations levelled against service personnel were “wholly without foundation and entirely the product of deliberate lies, reckless speculation and ingrained hostility”—ingrained hostility that I can feel again today. Do you regret any of your firm’s involvement in this at all?

Martyn Day: The Iraqis came to us with a complex story that was very believable in terms of—

Q291 **Johnny Mercer:** Believable?

Martyn Day: Yes, believable in terms of what had actually happened.

Q292 **Johnny Mercer:** That British soldiers would execute Iraqi civilians is, in your view, believable?

Martyn Day: Yes. This came in the aftermath of Baha Mousa, where he had just been murdered.

Q293 **Johnny Mercer:** Do you think there is an underlying problem with the values and ethos in the British Army that would allow that sort of thing to happen?

Martyn Day: Sorry?

Johnny Mercer: Do you believe that there is an underlying problem with the values and ethos in the British Army that would allow that sort of thing to happen?

Martyn Day: There has been so much experience of when things have gone wrong in the military. I return to the Mau Mau point from the 1950s and 1960s that I was making earlier, where hundreds if not thousands of people were killed by British military and colonial forces.

Q294 **Johnny Mercer:** But I am asking you a very specific question about Iraq. This is what you do time and again—flower the issue and avoid the question. The question is: do you think my generation of soldiers who fought in Iraq and Afghanistan have such a problem with values and standards that the idea of executing soldiers was a genuine possibility to you?

Martyn Day: Yes.

Q295 **Johnny Mercer:** Why did it take so long during your pursuit of these poor guys who went through this Al-Sweady inquiry—whose lives you completely destroyed, with apparently absolutely no concern whatsoever? Why did you not bring it to public attention earlier than when it came out in 2014 that these people were part of the Mahdi Army? You knew that in 2007. Why did that not come out?



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Martyn Day: We did not know that that was true. It was an accusation that they had always rejected.

Q296 **Johnny Mercer:** No, no—you had paperwork in your company's possession.

Martyn Day: We had one piece of paper that had been given to us in 2004 by a *Daily Telegraph* journalist that was in Arabic and that seemed to suggest that they were within the Mahdi Army—that is true. That was a piece of paper that we had not understood the significance of when it was first given to us in 2004—not least because we did not end up being instructed by anybody until 2007.

Q297 **Johnny Mercer:** The Al-Sweady inquiry, which you obviously do not have a lot of time for, said that you became aware of that during 2007. Is that rubbish as well?

Martyn Day: We became aware that we had the piece of paper; we did not become aware of the significance of it.

Johnny Mercer: So this idea that there is a list of enemy combatants—

Q298 **Chair:** Sorry, but on that point how can you become aware that you have a piece of paper without being aware of the significance of it? Do you mean that because it was in Arabic you knew you had a piece of paper and you did not know what was on it, or that you did know what was on it?

Martyn Day: The document was filed at a time when the issue about whether the detainees were part of the Mahdi Army or not was not a significant one in the case.

Q299 **Chair:** Did you know what was on the piece of paper?

Martyn Day: The sense of it was not clocked by anybody who actually understood what was going on as a significant factor. It was filed and then was just left on the file.

Q300 **Chair:** Yes, but you did say earlier—I just want to clear up this small point; it is a very straightforward point and it is not as if everything is hinging on it. It is simply that you did say earlier that it was a piece of paper that was in Arabic, but by the time that you became aware of it you knew what its contents were, didn't you?

Martyn Day: The document had been seen by one or two people within the firm. Its significance was not cottoned; it was filed. I am not trying to hide from the fact that it was a mistake. It was a mistake on our part. I totally accept that.

Q301 **Chair:** I just do not understand why you are resisting this, Martyn. You say it was seen by a couple of people—in other words, they knew what was on it but they did not appreciate the significance.

Martyn Day: Exactly—sorry, yes. Absolutely.

Chair: Thank you. That is all I wanted to get to. Carry on, Mr Mercer.



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Q302 **Johnny Mercer:** How much money have you been paid by the MoD? Do they pay your fees? What is your relationship like with them?

Martyn Day: That was the £11 million figure we were talking about earlier.

Q303 **Johnny Mercer:** So all that comes from fees, expenses and things like that?

Martyn Day: Yes, barristers' fees.

Q304 **Johnny Mercer:** And your staff travelling out to Iraq? Have your staff been to Iraq?

Martyn Day: No; we tended to see people—

Q305 **Johnny Mercer:** None of your staff has ever been to Iraq.

Martyn Day: No.

Q306 **Johnny Mercer:** Okay. None of your staff—you, nobody—has ever been to this country where you alleged this stuff went on?

Martyn Day: In fact, thinking back, there was one occasion when one of our staff visited Basra, yes.

Q307 **Johnny Mercer:** One occasion.

I will finish here. You will be unaware of this—I can tell you are unaware of it, from the way you are so aggressive in your defence. Do you have any concept of the lives that you have ruined, of some of the finest people in this country who have gone on operations? You have accused me of coming from a generation of people who could well have committed murder on operations.

Martyn Day: I did not say “could well”; I said “could”.

Q308 **Johnny Mercer:** Are you proud of your role?

Martyn Day: My role is to represent people who say—

Q309 **Johnny Mercer:** I am fully aware of what your role is because I have seen these people. I have served on operations. I have seen these people come to camp with dead children and say that I have done it. I am fully aware of what your role is. I am asking you if you are proud of the lives that you have ruined in this country.

Martyn Day: That is a very pejorative term. I am proud—

Johnny Mercer: So you still cannot answer that either.

Martyn Day: I am proud of the system that we represent: the rule of law. The rule of law means that at times soldiers will have to come to give evidence, which is tough for them, as it is tough for anybody else—

Johnny Mercer: It has been found by courts in this country to be “wholly without foundation and entirely the product of deliberate lies, reckless speculation and ingrained hostility”. You are deluded, Martyn. You are



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absolutely deluded.

Q310 **Mr Francois:** You have a firm of people who, as far as you know, have never served in the armed forces. You have said that on one occasion somebody, you think, from your firm once went to Basra—presumably not on holiday.

Martyn Day: No.

Q311 **Mr Francois:** So you have very little actual familiarisation on the ground with the country in which all these offences are alleged to have taken place. That is true, isn't it?

Martyn Day: Yes.

Q312 **Mr Francois:** When these people were flown to the UK so that you could interview them and prepare their cases, who paid for that?

Martyn Day: We did. We actually flew them out to Istanbul or Damascus at the time. Neighbouring countries, where we were able to get them out to, is where we would interview them, rather than here.

Q313 **Mr Francois:** Right. Did you subsequently reclaim the costs of that from the MoD as part of your costs?

Martyn Day: Yes.

Q314 **Mr Francois:** Does your firm have something against the British armed forces?

Martyn Day: No, not at all. I totally support the British Army. I believe—

Johnny Mercer: You said we are capable of murder.

Martyn Day: I think a lot of people are capable of murder, in lots of circumstances.

Q315 **Mr Francois:** Sorry—just so I have heard you, and for the record, you said that you totally support the British Army.

Martyn Day: I do. That is why I supported them going into Iraq back in 2003. I totally support them, and that is why it is so important that we learn the lessons to make sure that they do not make the big mistakes that they made this time round.

Q316 **Mr Francois:** Have you ever visited a British military establishment?

Martyn Day: Yes.

Q317 **Mr Francois:** When?

Martyn Day: I can't remember—a few years ago now. I went to Aldermaston.

Q318 **Mr Francois:** Aldermaston?

Martyn Day: It is a good 10 or 15 years—



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Mr Francois: Aldermaston is a nuclear plant.

Martyn Day: Sorry—not Aldermaston. Where is the main— *[Interruption.]*

Q319 **Mr Francois:** Aldershot?

Martyn Day: Aldershot, sorry, yes—a good long time ago.

Mr Francois: You must really remember it very well, because you cannot even remember the name of the place where you went.

Martyn Day: It was about 15 years ago.

Q320 **Mr Francois:** Right. Do you realise why a lot of veterans do not like you?

Martyn Day: There are a lot of people around the world who do not like me. We do a tough job. We act for people in tough circumstances. We bring claims. We are not there to be liked; we are there to do our job. You go and see Shell—they do not like me much, either—or BP.

Q321 **Mr Francois:** Lastly—and then I think Leo wants his go—are you proud of what you do?

Martyn Day: It is vital to our society that we have people who are prepared to stand up and take on these sorts of cases, despite all the grief that they are going to get—whether from your Committee, the media or whoever—and it is crucial to the rule of law and to our system. Otherwise, in my view, it would be a very sad country. So yes, I am very proud of what we do.

Q322 **Mr Francois:** I will have one last go, then. Have you ever actually met many of the veterans that your company has persecuted?

Martyn Day: That my company has—sorry, I did not catch that.

Mr Francois: Persecuted. Have you actually met any of the veterans who have been at the receiving end of the cases that you have brought?

Martyn Day: Over the last 30 years, we have acted for thousands and thousands of veterans.

Mr Francois: But you personally?

Johnny Mercer: Yes or no? It is really not hard.

Mr Francois: Have you actually met any of them? You either have or you have not.

Martyn Day: Are you saying the people who are related to the cases—

Mr Francois: The people who were in the dock.

Martyn Day: No.

Mr Francois: Never?

Martyn Day: Never.



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Mr Francois: I don't know how you sleep at night—I really, really don't.

Q323 **Leo Docherty:** Following the Al-Sweady case, Phil Shiner, obviously, was struck off and you and your colleagues were kept. What is your understanding of the different outcomes for yourself and Phil Shiner?

Martyn Day: As I say, the two primary reasons why Mr Shiner was struck off were, first, that he touted for those Al-Sweady inquiry clients back in 2007 and, secondly, that he then tried to cover his tracks by reaching agreement. That is why he was struck off.

Q324 **Leo Docherty:** Has the experience of the Al-Sweady case changed anything that you will do in the future?

Martyn Day: No—not in any sort of fundamental way, no. In the end, we are there to represent people in this sort of position and we will carry on doing it.

Q325 **Leo Docherty:** So this could happen again in a future deployment?

Martyn Day: What could happen again, sorry?

Q326 **Leo Docherty:** If, for example, British troops were deployed on combat operations anywhere in the world, something similar to the Al-Sweady case could happen again, in your view?

Martyn Day: There is always the potential for allegations to be made in relation to the operation of the Army, whether to do with deaths, serious abuse or what have you. That is always possible. Let us hope not, but it is certainly possible.

Q327 **Leo Docherty:** But the conduct of your firm and your approach would be the same?

Martyn Day: Yes. Obviously, there are some detailed lessons that we have learned—not least, in terms of how we review documents. But in terms of the principle of it, being prepared to represent people in developing world countries where the British Army goes in and potentially has allegedly caused harm and damage, we would certainly take the same steps.

Q328 **Mr Francois:** Why were the rules against touting changed by the Government?

Martyn Day: Not against touting—touting has always been the same. You are not allowed to knock on somebody's door and say, "Would you like to be my client?" That has been the same for ever. We were talking about referral fees, which is a rather different point.

Q329 **Mr Francois:** Just so we are clear, who policed the two guys that you had working for you in Iraq? Who policed them to make sure that they weren't touting? How do you know that they didn't go and knock on someone's door?

Martyn Day: That is obviously very difficult. When we reached an agreement with them in terms of how the referral arrangement would be,



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we set out with them in great detail exactly what the rules within which they operated would be, including no touting. When we then interviewed a lot of the clients, one of the questions we were asking a lot of them, to do with limitations, was, "How did you actually come to us?" There was never any suggestion that they were being touted.

Q330 **Mr Francois:** But if only one of your staff ever went to Iraq, once—once—how could you be sure? You may have told these people, "This is what you're supposed to do and this is what you're not supposed to do", but how were you sure that they were abiding by that?

Martyn Day: There are never any total guarantees, but the best route to that was through the process of reviewing with the clients exactly how they had come to us.

Q331 **Mr Francois:** But the clients had come to you on a no-win, no-fee basis. They had nothing whatsoever to lose; they were taking a punt. If you won the case, they got quite a bit of money; if you didn't win the case, it was no skin off their nose.

Martyn Day: That's true.

Mr Francois: They didn't come off any worse. Someone could have come up to them in a bazaar, bar or whatever, and said, "Look, why don't you chance your arm, say that this happened to you, say that you came to me, make these allegations? You could probably get a lot of money for very little work. We will fly you to Istanbul, interview you and fly you back and you won't pay for it." How is anybody to know that that didn't take place?

Martyn Day: That is exactly the same as the position here—

Q332 **Mr Francois:** But that would be touting, wouldn't it?

Martyn Day: It would be touting, absolutely. There is no absolute guarantee—you can't absolutely guarantee—

Q333 **Mr Francois:** So it may well have gone like that?

Martyn Day: It is not impossible. All I can say is that we took steps to try to make sure it was not happening. We never saw any evidence to suggest that it was happening—

Q334 **Mr Francois:** Of course—you never went there. You weren't auditing. My point is that, in terms of good practice, you did not send anybody out there, other than possibly once, to audit how these people were operating. You took it all completely on trust, because it was in your interest to do so. You never sent anybody out there to check on what these guys were doing, did you?

Martyn Day: But how are you suggesting—what would we actually have done when we were in Basra?

Q335 **Mr Francois:** You could have sent people out there to accompany them to see how they worked.



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Martyn Day: But if, in your scenario, this was all, "I'll come and knock on your door, but for goodness' sake don't tell the lawyers," and I have sent somebody out to go and be with them, why on earth would they be going round knocking on people's doors?

Q336 **Mr Francois:** Well, they could not have done that. Let us say you sent someone for a month, and let us say that they did not go and knock on anybody's door because they had someone watching them, and let us say that relatively few people came through the door in that period, you would have known that there was a difference, wouldn't you? You laugh, but that is true, is it not?

Martyn Day: No.

Q337 **Mr Francois:** I put it to you that you did not send anybody out to monitor the process because you did not want to know. All you cared about was the fact that you had a steady flow of work coming your way, and you were not really too fussed about how it came to you.

Martyn Day: No.

Q338 **Chair:** Can I ask a technical point? You said at the time that the people who were out there gathering these cases in—to put it neutrally—were found and employed by Mr Shiner. Did you have a duty, as a solicitor, to do any sort of audit or check yourself on the reliability of these agents, given that you knew that touting was not allowed?

Mr Shiner comes to you and says, "I've got these two people. They are getting the business and I'll refer them to you." Are you simply saying that it was up to Mr Shiner and he was the only one with the responsibility to verify that they were not doing precisely what Mark has been describing, or did you have a responsibility in that respect as well?

Martyn Day: In large terms, within our world, we would be allowed to leave that to Mr Shiner. He is referring cases on to us, and there is an anticipation—as a lawyer, you would not start thinking to yourself that another lawyer was a dodgy so-and-so, unless there was a good reason to anticipate that.

Mr Francois: He was an award-winning lawyer, as you have told us.

Martyn Day: Absolutely.

Mr Francois: Up to the point when he was struck off.

Martyn Day: Well, he was an award winner in 2007.

Q339 **Chair:** In that case—it is the principles we are after really, not the individuals—are you saying that he had a duty, which he did not discharge, to ensure that his agents on the ground were not touting?

Martyn Day: As far as I have understood it, the regulator reviewed his operation as part of the whole process. I do not think, as far as I know, that there was ever any charge against him for touting beyond what I have just been describing in terms of the ASI group.



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Q340 **Chair:** In that case, Martyn, is that not a flaw in the system, exactly as Mark has been spelling out? Let us assume for a moment that Mr Shiner himself had not been struck off and all the rest of it, so you could actually have two perfectly respectable firms here, but is there not something wrong with a system whereby they are then using agents locally who they have no means whatever of checking up on as to whether those people are encouraging people to manufacture false charges? Is there not something wrong with that? I think that is the point you were making, Mark.

Mr Francois: Yes, exactly. Where were the controls to prevent it?

Martyn Day: One has to appreciate that Basra was not the sort of place to go to—

Chair: I understand why you did not go, but should that not raise a raging question mark in your mind about the appropriateness—

Mr Francois: I think the soldiers who were killed there probably knew that.

Chair: I know you are getting two questions at once. Is it not a massive red warning signal, if the place is not safe enough to go to, that your procedures are not safe enough to bring such cases?

Martyn Day: All I can say is that, when we reached the referral agreement with the local people on the ground, we spelt out for them how the system had to work, and when we interviewed our clients, we asked them how they had come to us. The same questions were put directly in the course of Mr Justice Leggatt's investigation, and he again came to the view that no touting had happened.

Q341 **Chair:** Do you not accept that that is a potential weakness in the system, irrespective of your own specific case?

Martyn Day: Well—

Chair: That is not asking for very much. Surely you can accept that.

Martyn Day: It depends what you mean by a weakness.

Q342 **Chair:** Do you not agree that if you have got a situation—forget that you were involved at all; just detach yourself from the facts of this particular case—where there is a country that is so dangerous that you feel with perfect justification unhappy about going there yourselves, is it not blindingly obvious that there is a weakness in the system if you rely on agents locally when you have no way whatever of knowing whether or not they are encouraging people, often living in pretty poor circumstances, to make up claims that could get them a lot of money on a no-win, no-fee basis? Isn't that an obvious weakness in the system?

Martyn Day: I accept that it is a more difficult scenario for the reasons that you have set out, yes.

Chair: I'll take the last word as a yes. Okay. I think that's as far as we can



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take it. Ruth, you have been so patient.

Q343 Ruth Smeeth: Mr Day, before I move on to my questions I want to make it very clear to you, because I think you have completely misjudged the Committee, that we do care about the victims; of course we do, but we also have a duty of care to British civilians and military personnel and their role in conflict, and then what happens to them and their families on their return over the next, in some cases, 40, 50 and 60 years, and the ongoing issues for their mental health. One of the things that I have found horrifying about your evidence thus far—I say this as chair of the all-party group for the armed forces covenant—relates to the role that we all have as British citizens to support the people who put on a uniform to protect us wherever that may be. I suggest you go and look at the covenant when you return to your office this afternoon and I look forward to seeing you sign up to it.

In terms of the existing legal arrangements for claims against service personnel, from Northern Ireland, Iraq and Afghanistan, what reforms do you think need to be made for the alleged victims but also to protect service personnel?

Martyn Day: Sorry, you are asking a very wide question.

Q344 Ruth Smeeth: In terms of the legal framework that your company operates in, what works, what doesn't work, and what do we need to change?

Martyn Day: Starting off with Iraq and what has and hasn't worked there, there is no question that IHAT did not work. As I said earlier, I think you are right to look for it to be knocked on the head. It just didn't work. It was far too many cases to look at. It was too unfocused and the rest of it, so I think you were right to do what you did. As far as the IFI, the fatalities investigation, is concerned, it does seem to be working. It only has perhaps a dozen cases that it is looking at. It has got that detailed review, so that seems to be a process that is actually working. In terms of the Royal Military Police, for the reasons I have given before, the crucial thing is that if the military ever get involved in subsequent events, the RMP should not be involved where there is a serious incident, whether it is an alleged death or abuse or whatever. There is a series of different things that in my view have worked and not worked. There isn't one easy answer, but the crucial starting point is that you must have a proper, independent, decent investigation. That is the best route to ensure that the servicemen—

Chair: At the time.

Ruth Smeeth: At the time.

Martyn Day: Yes, at the time. That is the best route to ensure that the servicemen are not continually being investigated.

Q345 Ruth Smeeth: Is there a domestic legal framework that currently operates, whether it is the police and what happens with the police complaints commissioner? Is there any other legal framework that



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operates within the UK that you would want to see replicated within the military?

Martyn Day: The police are a good example. Again, I am not an expert on that sort of thing, but, as far as I have understood it, if there is a serious incident, the people involved are immediately suspended or put to one side and a totally separate body comes in to investigate. That should be looked at. We proposed at the time of ASI that Scotland Yard should be brought in for these sorts of things. They said that they did not have the resources, but there needs to be a body like that that comes in and is totally independent of the military.

Q346 **Ruth Smeeth:** So that would be your answer. That is the reform you would seek.

Martyn Day: One of the key reforms, yes.

Q347 **Ruth Smeeth:** Are there any other reforms?

Martyn Day: As I said earlier, I thought Hilary Meredith's proposition in terms of corporate manslaughter was a good one. I think it would be good for the prosecutor to have that in their array of things that they could potentially use in a prosecution. It would ensure that the people who are actually making these big decisions are potentially held to account, so I thought that was quite a good idea. As I said earlier, I thought that the German idea of having a statute of limitations for lower-grade assaults and offences is quite a sensible one. I think it brings us back to the big issue, which in terms of Ireland is where you have got the deaths, and I still feel that that is a very difficult line to be drawn, in terms of ever having a statute of limitations, for any part of society, including the military, whatever the period is. I think it is very difficult to have a limitation period.

Q348 **Ruth Smeeth:** Just from a human point of view, do you really think that someone who is 75 or 80, who was wearing a uniform 50 years before, should receive a letter, potentially for the third or fourth time, asking them to be investigated? What would you advise someone who received one of those letters?

Martyn Day: It depends on all the circumstances. I totally respect the point. You may be saying that you are criminal lawyer, which I am not, but you may be saying, "Well, don't answer it," but then you have got duties that apply, as well as to a citizen, in terms of being investigated, because in the end, if you refuse to answer you can always be arrested. So there are difficult balances to be struck with all of it. I am not disagreeing that it is pretty tough and it is pretty tough on those servicemen, but in terms of that balance with society, where the allegations are so serious, then I would very much hesitate with the idea that you could ever bring about a statute of limitations, when it includes the issue of potential killings.

Q349 **Chair:** Even though, as you have acknowledged yourself, in the particular circumstances of Northern Ireland it is already the case that no one will serve more than two years of any sentence? How satisfied do you think



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someone will be? You said that a family will be distraught that no one has paid the price for what happened, even 50 years after the event. You have acknowledged as well that it would be very difficult, so far after the event, to get a successful prosecution, but even if you do get a successful prosecution the sentence cannot be more than two years in jail. How is that going to fulfil the grief of the families concerned?

Martyn Day: I think there is a balance in society to strike in these sorts of incidences. That seemed to me a sensible balance to strike, when it is two years across the board: you are not favouring one particular section against another. That seemed to me sensible.

Q350 **Chair:** But given that only a tiny minority—if any—are likely to be convicted after this long process, which is itself traumatic, and it is all this just to get a two-year sentence, when we also know that people on one side of this particular scenario have been given additional letters of comfort that mean they are not going to be prosecuted, do you really not think that under those specific circumstances, where so many compromises have already been made, it would be simply sensible to say that the time has come to draw a line, provided that we couple it with the truth recovery process that will best enable the truth to come out? Wouldn't that be a sensible outcome?

Martyn Day: The difficulty is, in this discussion, I don't know what sort of information is available to the investigative team, to say if your point a good one or not.

Q351 **Chair:** They haven't managed to convict anybody or bring a case for 50 years and you think there is going to be some real killer fact?

Martyn Day: As I understand it, the investigations that were carried on in the past were pretty weak.

Mr Francois: According to the IRA.

Martyn Day: As far as I understood it, that was actually said by the Inspectorate of Constabulary—that is my understanding. If that is right then clearly you would want to have proper investigations.

Q352 **Ruth Smeeth:** Just moving on slightly, we have people deployed in over 40 theatres at the moment. Are you undertaking any cases anywhere else, other than Iraq and Afghanistan?

Martyn Day: Not that come to mind, no.

Q353 **Mr Francois:** You said earlier, towards the beginning of your piece to me, that you thought there was some merit in the system that they are now using for some legacy Iraqi cases, where people can give evidence without fear of prosecution, in order to try and assist getting to the truth of what happened.

Martyn Day: Yes.

Q354 **Mr Francois:** Okay. Given the fact that the IRA on-the-run effectively cannot be prosecuted because of the letters of comfort, do you think



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there is any merit in trying to adopt that procedure for the whole of the legacy investigation? In other words, people could be interviewed and the families could hopefully find out what happened, but anyone giving evidence would know from the outset that they were not going to be prosecuted. Do you think there is any merit in trying to go down that path?

Martyn Day: It is certainly possible. The issue for me is that you would need to talk to the families and the families' lawyers. For the reason we were discussing earlier, it may well be that if you are trying to get to the bottom of exactly what happened, that is the best route to achieve that, because people will be far more open about what happened. If you go down a prosecution route, it is far less likely. I would be wary of saying what the families are going to say about that, because they may feel very strongly about the potential for prosecutions, or they may not. That is an important discussion that whoever is relevant potentially needs to have with the families. There is a balance between all the various interests. On your earlier point, Ms Smeeth, about my understanding of the Committee's role, that is totally fair. I had read something that somebody said; I must have misunderstood it. That is totally fine. Obviously, it is important that you look at the balance in society between the various different interest groups. It is really a tough area.

Q355 **Chair:** Martyn, on the point about the families, in the end society has to take a view. It could well be the case that some families just want to know the truth, and therefore would adopt the truth recovery process, and some families would say, "No, I would rather stick with the prosecution." In the end, society has to decide where the balance lies. What we are trying to say is that, given all the compromises that have been made in relation to the Northern Ireland situation and the imbalance between the levels of protection afforded to one side, rather than the other, surely the approach of a statute of limitation, coupled with a truth recovery process, is an equitable one.

Martyn Day: I accept what you say.

Q356 **Chair:** I know that if I was one of the families and I was asked, "What would you feel like?" my answer would be that my family were largely annihilated in world war two because they were Jewish and I want the perpetrators caught, but if all the compromises had been done in that situation, I think I know where the greater good would have lain. I accept your point that individual families might not be reconciled to it, but in the end society has to take an overall view. Isn't it a reasonable overall view that we could have a statute of limitations coupled with a truth recovery process?

Martyn Day: I accept what you say. If in the end you had that conversation with—goodness knows—1,000 families or whatever it was, and a very significant proportion said, "Actually, we would rather go down the IFI-type route and forget the prosecutions," for the reasons we have discussed, even if a small fraction said, "We can't live with that; we want



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prosecutions,” that would be fair. As you say, in the end society has to make a decision.

Chair: Mark has a question about the MoD team.

Q357 **Mr Francois:** I do, but before we lose this, let me say this. We haven’t agreed on much today—I think people will probably conclude that. On this thing about talking to the families, I think you may have a point, but isn’t there another group of families who need to be consulted—the families of the veterans? For them to see a loved one have to go through this process—particularly if they are in their 70s or even their 80s—is agonising. It has a very detrimental effect on their family and their children as well. If we are going to talk to the families of the victims—I can see some merit in that—would it not also make perfect sense to talk to the families of the veterans and ask what their views should be? Shouldn’t they be taken into account? You have said that both the alleged terrorists and the veterans should be given equal treatment—you were clear about that—so I suppose, going by your point, you would even have to talk to the families of the alleged terrorists, but wouldn’t it be right to talk at the very least to the families of the veterans, because you can argue they have a very important stake in this process, too? Would that not also be equitable?

Martyn Day: You are treading on a very sensitive area in terms of our society, aren’t you?

Q358 **Mr Francois:** I realise that. I’m just saying that those families are impacted massively as well.

Martyn Day: It seems to me that the more people you are talking to and including in your discussion, the more value there will be to your conclusions. I’ve got no problem at all with the idea that you talk to those sorts of families; it just depends on your feeling about your own remit. I think the families of the deceased are absolutely crucial, but I think you’re right that there are probably two or three subsets of other players in this whole debate that if you have time and opportunity you would want to include. But I think that unless you talk to the families of the deceased, it will always be seen as a very big hole in—

Q359 **Mr Francois:** I get that. I am just trying to get you to accept that these investigations have a major impact on the families of the veterans as well as—

Martyn Day: I do.

Mr Francois: You do accept that?

Martyn Day: I do.

Chair: Mark, can we move on?

Q360 **Mr Francois:** My last question is this. The Defence Secretary has a team within the Ministry of Defence that has been set up to examine these



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issues. What advice, if any, would you offer to that team?

Martyn Day: The main advice I would give is to stop the propaganda and get into the reality of what happened, because that will be the only way the Ministry of Defence can actually get to grips with what went wrong and what they can do about it in the future. The amount of propaganda that comes out of the MoD is massive, and that obscures so much in terms of the lessons that we can learn.

Q361 **Johnny Mercer:** Can you expand on that?

Martyn Day: Yes. The Ministry of Defence has a massive—it's bigger than my firm. It has 500 people who are involved in the media relations in terms of what happens with the MoD, and they are past masters at actually issuing propaganda in terms of the operations of what happened. I am clear that, rather than us being able to have a proper debate about the rights and wrongs of what has happened in Iraq, one is surrounded by so much murkiness that it is so hard to get at the actual truth, and the crucial point about that is that we need to learn lessons. Just as with the Mau Mau it took 50 years before we were able to actually properly understand what had happened to the Mau Mau all those years ago, so the same sort of nonsense is being propagated by the MoD, the Prime Minister and what-have-you in terms of what has actually happened; and it is important for us as a society to be able to learn from what actually did happen.

Q362 **Johnny Mercer:** Can you just give us an example of the nonsense that the Prime Minister and the MoD propagate about Iraq, just so that we are clear on what you are talking about?

Martyn Day: Yes. The Prime Minister—both Cameron and Theresa May—and Secretary of State Fallon have made a number of comments to say that they are suffused with nonsense claims. That was a point made by many, many people. As I have explained to you, that is not true. Apart from the ASI group, the claims that have been made have largely been held to be true, and the claims tied into what happened by bringing in the five techniques.

The Prime Minister should have stood up and said, "Look, we made a massive mistake bringing in the five techniques, which had been declared illegal back in the 1970s, because that was treating people in a humiliating way that our courts would never accept, as a result of which hundreds of Iraqis were treated terribly by us. We apologise for that and we are going to have to pay them compensation." If they had come to grips with that truth, it would have ensured that in the future we never go down that route again.

Q363 **Johnny Mercer:** I think we are finishing in a moment, but I just want to ask you this before you go. There are lots of people who will watch this who had great careers in the military, who had families and who have been found to have done nothing wrong, but have been pursued by you, Phil Shiner and others. Do you have anything at all to say to people like Brian Wood, who lost everything, over such things as Al-Sweady? Do you



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have anything at all to say to them in terms of an apology or any acknowledgment that you might have got it wrong?

Martyn Day: We have a rule of law in this country, which means that—

Johnny Mercer: I know what you're going to say, and you are very good at it. You have said it a number of times. Do you have anything particular to say to them?

Martyn Day: I was going to say it, but—

Q364 **Johnny Mercer:** Everyone knows we have a rule of law that we try to adhere to. I was a soldier. I totally accept that those who break the law should be prosecuted, and I would encourage you to do so, but this is not that. What you have produced is not that.

Martyn Day: But every prosecution does not lead to a conviction. Many prosecutions lead to people being found innocent—not guilty.

Q365 **Johnny Mercer:** So you wouldn't apologise to them, basically.

Martyn Day: I am not going to apologise for the rule of law, no.

Q366 **Mr Francois:** Lastly, do you ever intend to visit Iraq at any point?

Martyn Day: Maybe in the future.

Mr Francois: But you are not sure.

Martyn Day: Well, I can't say it is high on the list of places to go and visit at this stage, no, but it is certainly possible in the future, yes.

Q367 **Mr Francois:** But you have made 11 million quid out of a country that you have never been to and probably never will.

Martyn Day: I may well never will, yes.

Q368 **Chair:** I have one last thing to ask you, Martyn. You made this point that not every prosecution leads to a conviction. One of the problems with this whole area is that it is possible, through clever lawyers, to arrange for an awful lot of cases to be brought, even though only a small proportion of them may lead to a conviction. Do you not accept that part of the problem is the process, rather than the result, and the effect that that has on the people who are forced to go through the process and who lose everything, as has been said, career-wise and often in terms of mental health, before at the end of it all not being convicted? Do you not accept that it would be possible—that is what the concept of lawfare is about, and I am not talking about you or your firm—for clever lawyers with evil intent almost to paralyse the operations of the military by bringing cases, even though the likelihood of a conviction was small, knowing that the damage the process would do on the way to acquittal would be very significant?

Martyn Day: Just to be clear, are you talking about the civil claims that are brought for compensation, or are you talking about criminal prosecutions that are brought by the prosecutors?



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Q369 **Chair:** I am mainly talking about the latter, and I realise that that isn't your area, but you have stressed, and it has been noted by the Committee, that in your case you do not go after individuals; you go after the MoD. That is a problem for Government, but a bigger problem for society is the question of individual soldiers being pursued as a result of long-past events in a criminal court. Do you not agree that the legal framework opens up that possibility in a way that the law of armed conflict did not use to do?

Martyn Day: Murder is murder, and it has been the same over the decades, and the law surrounding when somebody has been charged—the line that you have to get over—hasn't changed. Whoever the prosecutor may be—it has been different people in different things—they have to be satisfied that there is a reasonably good chance of being able to get over that line and prove that somebody has committed murder or assault, or whatever it has been. I don't actually think that any of that has been changed by the Human Rights Act, the European convention or anything like that. It is still the same line that is drawn. So from that side of things, no, I don't think it is different.

Chair: All right. Finally, in your neck of the woods, as it were—the civil claims—what aspect of the law primarily has enabled you to bring so many cases in this country under our jurisdiction on behalf of foreign citizens who are based abroad in countries that, as you said, you have not always regarded as safe enough even to visit? Which part of the legal framework has enabled you to do that?

Mr Francois: No win, no fee.

Chair: No, it is not that.

Martyn Day: We were able to bring these cases successfully due to the decision of the Army to bring in the five techniques. That was the fundamental point. The five techniques breached a whole variety of legal standards, whether it was the Geneva convention, the Human Rights Act 1998 or the European convention on human rights—all were breached by bringing in the five techniques. As I said earlier, the technical issues around limitation meant that, in terms of the Human Rights Act 1998, it undoubtedly assisted us technically to bring the cases. However, the fundamental question of whether the British Army had breached its obligations and duties was tied to both the Geneva convention and the Human Rights Act 1998.

Q370 **Chair:** And you are adamant that these circumstances could not apply to the split-second decisions that are taken on the battlefield in a warzone?

Martyn Day: Absolutely not.

Chair: Let's finish on that point. Thank you for your evidence today.