

# EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS



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**Berlin, 29/06/2017**

**PUBLIC DOCUMENT**

**Re: Situation Iraq/United Kingdom**

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BERLIN-CHARLOTTENBURG  
VR 26608

—  
VORSTAND:  
DIETER HUMMEL  
LOTTE LEICHT  
TOBIAS SINGELNSTEIN

—  
GENERALSEKRETÄR:  
WOLFGANG KALECK

To the Office of the Prosecutor,

The European Center for Constitutional and Human Rights (ECCHR) has welcomed and is closely following the Office of the Prosecutor's preliminary examinations into the alleged responsibility of British officials for war crimes involving systemic detainee abuse in Iraq from 2003 to 2009, an examination opened following the communication filed by ECCHR and Public Interest Lawyers on 10 January 2014 (hereinafter referred to as "January 2014 communication").

In light of recent developments concerning litigation against the Ministry of Defence (MoD) and security services in the United Kingdom (UK), ECCHR is concerned by inaccurate and misleading assertions leveled by some high-level members of current and former British Governments implying that allegations of war crimes committed by British forces in Iraq are baseless. ECCHR sees these statements as a worrying attempt to undermine the legitimacy of any and all allegations of wrongdoing leveled against armed forces of the United Kingdom as part of a broader attempt by the Government to shield the armed forces

from legal scrutiny in cases of serious crimes and human rights abuses. With this short interim submission, ECCHR aims to correct these inaccuracies by briefly setting out some of the independent findings confirming beyond doubt that UK armed forces were involved in the abuse of detainees in Iraq and pointing to systemic failures in the military and the Ministry of Defence that led to such abuse. Whereas a larger number of official findings into abuse and patterns have already been included in the January 2014 communication, we highlight some new findings and developments since. In light of the existing evidence and the continued impunity in the United Kingdom particularly of those bearing the greatest responsibility for the war crimes committed, ECCHR reasserts the need for the Office of the Prosecutor to request the opening of a formal investigation in this matter to the Pre-Trial Chamber in order to be able to fully exercise investigatory powers under Article 54 of the Rome Statute.

## **I. Background: Attempts to discredit claims of war crimes in Iraq against the United Kingdom amid a political climate hostile to human rights litigation**

### *Efforts to mislabel allegations against UK forces as false and vexatious*

In early January 2016, then UK Prime Minister David Cameron publicly denounced what he described as an “industry trying to profit from spurious claims lodged against our brave servicemen and women who fought in Iraq”, announcing a plan to have the National Security Council “stamp out this industry” and protect troops “from being hounded by lawyers over claims that are totally without foundation.”<sup>1</sup> Some of the methods planned to achieve this aim included restricting legal aid to exclude claimants not resident in the United Kingdom,<sup>2</sup> urging the Solicitors Disciplinary Authority to open investigatory proceedings against the law firms involved in Iraq litigation,<sup>3</sup> and an attempt by the former Prime Minister to shut down the investigations being undertaken by the Iraq Historic Allegation Team (IHAT).<sup>4</sup>

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<sup>1</sup> Statement published on David Cameron’s official Facebook page on 22 January 2016, <https://www.facebook.com/DavidCameronOfficial/posts/1115509545140029>, and reported in various media outlets. See The Guardian, “UK government looks to stop 'spurious' legal claims against soldiers”, 22 January 2016, available at <https://www.theguardian.com/uk-news/2016/jan/22/uk-government-considers-plans-stop-claims-against-soldiers-iraq-war-allegations-abuse> and the Law Society Gazette, “Cameron vows to end ‘industry’ of claims against armed forces” 22 January 2016, available at <https://www.lawgazette.co.uk/law/cameron-vows-to-end-industry-of-claims-against-armed-forces/5053230.article>.

<sup>2</sup> The Guardian, “UK government looks to stop 'spurious' legal claims against soldiers”, 22 January 2016, available at <https://www.theguardian.com/uk-news/2016/jan/22/uk-government-considers-plans-stop-claims-against-soldiers-iraq-war-allegations-abuse>.

<sup>3</sup> Public Interest Lawyers: The Telegraph, “Al-Sweady file exposes the smearing of British soldiers”, 01 March 2015, available at <http://www.telegraph.co.uk/news/uknews/defence/11442574/Al-Sweady-file-exposes-the-smearing-of-British-soldiers.html>. Leigh Day: The Guardian, “Michael Fallon accused of influencing prosecution of law firm”, 10 February 2017, available at <https://www.theguardian.com/politics/2017/feb/10/michael-fallon-defence-secretary-accused-influencing-prosecution-leigh-day-law-firm-iraqi-torture-misconduct>

<sup>4</sup> The Guardian, “David Cameron wanted to ‘shut down’ Iraq historic allegations team”, 19 September 2016, available at <https://www.theguardian.com/uk-news/2016/sep/19/david-cameron-wanted-to-shut-down-iraq-historic-allegations-team>; The Daily Mail, “David Cameron 'wanted to shut down' the hated Iraq abuse inquiry into British troops but was BLOCKED by government lawyers”, 19 September 2016, available at <http://www.dailymail.co.uk/news/article-3795778/David-Cameron-overruled-wanted-end-Iraq-abuse-probes.html>.

Around the same time, the then Minister for Armed Forces Penny Mordaunt argued in Parliament that the “behaviour of parasitic law firms churning out spurious claims against our armed forces on an industrial scale is the enemy of justice and humanity [...]”.<sup>5</sup> After becoming Prime Minister in July 2016, Theresa May made statements on what she described as an “industry of vexatious allegations” against British troops in Iraq.<sup>6</sup> At the Conservative Party conference in October 2016, she spoke of her determination to “never again in any future conflict let those activist left wing human rights lawyers harangue and harass the bravest of the brave: the men and women of our armed forces”.<sup>7</sup> Similarly, Defence Secretary Michael Fallon argued that the “legal system has been abused to level false charges against our troops on an industrial scale”.<sup>8</sup>

### *Broader efforts to shield military from legal accountability for wrongdoing*

The above statements were accompanied by plans by the Prime Minister and the Defence Secretary to derogate from the European Convention on Human Rights in future conflicts. The Defence Secretary explained this would “help protect our troops from vexatious claims, ensuring they can confidently take difficult decisions of the battlefield”.<sup>9</sup> Plans for the United Kingdom to withdraw from the Convention entirely have also been proposed.<sup>10</sup> In its manifesto for the June 2017 elections, the Conservative Party pledged that the British armed forces will not be subject to the European Court of Human Rights, in a bid to protect “armed forces personnel from persistent legal claims.”<sup>11</sup>

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<sup>5</sup> Penny Mordaunt, The Minister for the Armed Forces, House of Commons Debate on IHAT , 27 January 2016, Volume 605, available at <https://hansard.digiminstre.com/Commons/2016-01-27/debates/1601275600001/IraqHistoricAllegationsTeam#contribution-16012756000034>.

<sup>6</sup> The Independent, “Theresa May will not allow an 'industry of vexatious allegations' against British troops over claims of abuse in Iraq”, 21 September 2016, available at <http://www.independent.co.uk/news/uk/politics/theresa-may-industry-of-vexatious-allegations-british-troops-claims-abuse-iraq-a7319851.html>; The Independent, “Theresa May, it's not patriotic to call claims against British soldiers 'vexatious' – it's patriotic to investigate them”, 22 September 2017, available at <http://www.independent.co.uk/voices/theresa-may-british-soldiers-iraq-vexatious-claims-industry-united-nations-cruelty-baha-mousa-a7321046.html>.

<sup>7</sup> The Independent, “Theresa May speech: Tory conference erupts in applause as PM attacks 'activist left wing human rights lawyers’”, 5 October 2016, available at <http://www.independent.co.uk/news/uk/politics/theresa-may-tory-conference-speech-applause-attacks-activist-left-wing-human-rights-lawyers-a7346216.html>; Open Democracy, A conspiracy cooked up by ‘activist left-wing human rights’ lawyers?, 14 November 2016, available at <https://www.opendemocracy.net/uk/shinealight/at-williams/conspiracy-cooked-up-by-activist-left-wing-human-rights-lawyers>.

<sup>8</sup> The Ministry of Defence, “Government to protect Armed Forces from persistent legal claims in future overseas operations”, 4 October 2016, available at <https://www.gov.uk/government/news/government-to-protect-armed-forces-from-persistent-legal-claims-in-future-overseas-operations>.

<sup>9</sup> *Ibid.* Also, Prime Minister May stated the move was necessary to ensure that those “who serve on the frontline will have our support when they come home”, see The Independent, 3 October 2016, <http://www.independent.co.uk/news/uk/politics/british-troops-shielded-legal-action-european-court-human-rights-iraq-afghanistan-a7343551.html>.

<sup>10</sup> BBC News, “Theresa May: UK should quit European Convention on Human Rights”, 25 April 2016, available at <http://www.bbc.com/news/uk-politics-eu-referendum-36128318>; The Independent, “Theresa May 'will campaign to leave the European Convention on Human Rights in 2020 election’”, 29 December 2016, available at <http://www.independent.co.uk/news/uk/politics/theresa-may-campaign-leave-european-convention-on-human-rights-2020-general-election-brexite-a7499951.html>.

<sup>11</sup> The Conservative and Unionist Party Manifesto 2017, p. 41, available at <https://www.conservatives.com/manifesto>.

## *The closure of Public Interest Lawyers*

Much of the above rhetoric was linked to the closure of the law firm Public Interest Lawyers and the disciplinary proceedings against its director Phil Shiner. Public Interest Lawyers closed in summer of 2016 when the Legal Aid Agency ended its contract with the firm, and in February 2017 Phil Shiner was struck off the register of solicitors for breaches of the professional rules and regulations applicable to British solicitors and their firms.<sup>12</sup> In an unprecedented development, those proceedings were undertaken at the explicit direction of the Defence Secretary and the Ministry of Defence in an effort to halt legal action against British forces.<sup>13</sup> The law firm's closure was expressly welcomed by the Prime Minister<sup>14</sup> and the Defence Secretary.<sup>15</sup> ECCHR notes that the Solicitors Disciplinary Tribunal made no findings on the substantive accuracy of any claims in relation to detainee abuse put forward by Public Interest Lawyers.

ECCHR is deeply concerned by the tenor of UK Government's rhetoric on human rights litigation and its attempts to use the closure of Public Interest Lawyers and the proceedings against Phil Shiner as a way of discrediting all claims of torture and abuse in Iraq, ending domestic investigations into torture, and shielding its military from scrutiny in future conflicts. The ECCHR, together with two other organizations, has presented information about the interference of the British Government with the work of lawyers involved in claims against the Ministry of Defence and security services in the United Kingdom in a letter to the United Nations Special Rapporteur on the independence of judges and lawyers to express its serious concerns. A copy of the letter was forwarded to the Office of the Prosecutor.

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<sup>12</sup> *Solicitors' Regulation Authority v. Philip J. Shiner*, Solicitors Disciplinary Tribunal, Case No.: 11510 / 2016, available at <http://www.solicitortribunal.org.uk/sites/default/files-sdt/11510.2016.Philip%20Joseph%20Shiner.pdf>.

<sup>13</sup> In an article in the Daily Mail, Defence Secretary Fallon states that he personally directed the investigations against Phil Shiner: "Last week the Solicitors Disciplinary Tribunal found that Phil Shiner should be struck off because of his reckless campaign of false and exaggerated allegations against our armed forces. That decision was made possible because two years ago I took the unprecedented step of directing officials to assemble and submit evidence of this dishonesty." *SIR MICHAEL FALLON: Members of our armed forces were victims of a charismatic conman who exploited vulnerabilities in the legal system*, Daily Mail, 10 February 2017, available at <http://www.dailymail.co.uk/news/article-4213576/Troops-victims-charismatic-conman.html#ixzz4awDFk6A5>. He also stated that "[i]t was the MoD that supplied the main evidence that got Phil Shiner struck off for making false allegations against our Armed Forces. Exposing his dishonesty means many more claims he made can now be thrown out and the beginning of the end for Ihat," Telegraph, "Iraq abuse inquiry to shut after MPs find it has 'directly harmed defence of our nation'", 10 February 2017, available at <http://www.telegraph.co.uk/news/2017/02/10/iraq-abuse-inquiry-has-directly-harmed-defence-nation-andmust/>. On the Ministry of Defence's key role in the "dismantling" of Public Interest Lawyers, see also "Who guards the guardians? MOD support for former and serving personnel", Sixth Report of Session 2016-17, published on 10 February 2017, paragraph 24, available at <https://www.publications.parliament.uk/pa/cm201617/cmselect/cmdfence/492/492.pdf>.

<sup>14</sup> See The Guardian, "Law firm at centre of Al-Sweady inquiry to close down, say reports", 15 August 2016, available at <https://www.theguardian.com/uk-news/2016/aug/15/public-interest-lawyers-iraq-war-al-sweady-theresa-may-uk-troops>. Excerpt: "The prime minister, Theresa May, was said to be "very much pleased" at the closure of the firm. "We made a manifesto commitment to addressing these types of spurious claims that companies like PIL are pursuing," a No 10 spokesman said. "The closure of PIL shows that we are making progress on that, tackling these types of firms head-on to make sure we get the right outcome for our armed forces who show such bravery in the most difficult of circumstances."

<sup>15</sup> *Ibid.* Excerpt: "The defence secretary, Michael Fallon, said: "This is the right outcome for our armed forces, who show bravery and dedication in difficult circumstances. For too long, we've seen our legal system abused to impugn them falsely. We are now seeing progress and we will be announcing further measures to stamp out this practice."

We intend to make further submissions to the Office of the Prosecutor on complementarity as we still find, like in the January 2014 communication (pp. 247 and 248), the United Kingdom not willing and able to carry out its own genuine investigations to determine responsibility for war crimes committed by British forces in Iraq. Not seeing any significant developments towards accountability since, a number of statements and activities by the highest representatives of the British Government are favoring impunity and thus supporting our 2014 conclusions.

## **II. Multiple sources confirming torture and ill-treatment by UK forces in Iraq**

In addition to information included and presented in the January 2014 communication, especially on the Baha Mousa Inquiry, video and photographic evidence, documentation disclosed by the British Government and on third party observers' reports (pp. 110-120), ECCHR lists new findings on torture and ill-treatment by British forces in Iraq and briefly repeats some of the findings of the Baha Mousa Inquiry. These findings confirm the allegations made in the January 2014 communication, including systemic failures.

Statements from the highest level of the British Government about claims that are “entirely without foundation”, “spurious” or “vexatious” ignore the fact that, as the Office of the Prosecutor will be aware, several courts and tribunals have already established that British forces committed torture and ill-treatment in Iraq and have indicated that this abuse was a systemic issue. The UK House of Commons Defence Committee itself acknowledged in a report from February 2017 that “it is not disputed that there were incidents of abuse of Iraqi prisoners by British armed services personnel” and that this was at least partly due to serious flaws in the training of soldiers, possibly leading to breaches of the Geneva Conventions.<sup>16</sup> The following paragraphs sketch out some of the relevant findings from other independent inquiries establishing that British forces engaged in ill-treatment and torture in Iraq and indicating a pattern of abuse caused by systemic failures.

### *a) Sample independent findings of ill-treatment and torture in Iraq*

#### Baha Mousa Inquiry

The Baha Mousa Inquiry was a public inquiry set up in the United Kingdom to investigate the circumstances surrounding the death of Iraqi citizen, Baha Mousa, in UK custody in Iraq in September 2003, and the treatment of eight men detained with him. Further analysis of this Inquiry's findings is set out on pages 20 to 32 and other parts of the section on the facts of the January 2014 communication.

In 2011 the Inquiry found that Baha Mousa died after being violently assaulted in UK detention having sustained 93 separate injuries.<sup>17</sup> Regarding the other men detained alongside

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<sup>16</sup> “Who guards the guardians? MOD support for former and serving personnel”, Sixth Report of Session 2016-17, published on 10 February 2017, paragraph 83. Available at <https://www.publications.parliament.uk/pa/cm201617/cmselect/cmdfence/1149/1149.pdf>.

<sup>17</sup> Report on the Baha Mousa Inquiry, Vol. I, para. 1.1., available at <https://www.gov.uk/government/publications/the-baha-mousa-public-inquiry-report> [hereinafter Baha Mousa Inquiry Report]

Baha Mousa, the tribunal confirmed that “most, if not all, of the Detainees were the victims of serious abuse and mistreatment by soldiers during their detention”.<sup>18</sup> The inquiry found that detainees were subjected multiple assaults,<sup>19</sup> including through a method known as the “choir” whereby they were kicked and punched in sequence to produce groans or other signs of distress.<sup>20</sup> They were also subjected to hooding<sup>21</sup>, stress positions<sup>22</sup>, sleep deprivation<sup>23</sup> and harsh noises<sup>24</sup> almost constantly during detention, for an “excessively long time”.<sup>25</sup> The Inquiry’s chairman described the events as “an appalling episode of serious, gratuitous violence on civilians”.<sup>26</sup>

### Al-Sweady Inquiry

The Al-Sweady Inquiry was set up to investigate allegations made against British soldiers of unlawful killing and ill-treatment of Iraqis by British soldiers at Camp Abu Naji and the Divisional Temporary Detention Facility at Shaibah Logistics Base between 14 May and 23 September 2004.<sup>27</sup> The Al-Sweady Inquiry has been addressed in the January 2014 communication on pages 228 and 229.

While the inquiry report, published in December 2014, rejected the claims of unlawful killing, it confirmed that “certain aspects of the way in which the nine Iraqi detainees, with whom this Inquiry is primarily concerned, were treated by the British military, during the time they were in British custody during 2004, amounted to actual or possible ill-treatment.”<sup>28</sup>

The report confirmed in particular the use of blindfolding<sup>29</sup>, sleep deprivation,<sup>30</sup> invasion of detainees’ personal space,<sup>31</sup> harshing techniques<sup>32</sup> including shouting, and the inadequate provision of food.<sup>33</sup> The Centre for Human Rights Law at the SOAS University of London points out that in one case addressed by the Al-Sweady inquiry, “repeated punches and kicks

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<sup>18</sup> Baha Mousa Inquiry Report, Vol. III, para. 40.

<sup>19</sup> Baha Mousa Inquiry Report, Statement by Chairman, 8 September 2011, p. 4. available at [http://webarchive.nationalarchives.gov.uk/20120215203912/http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/report/2011-09-08-chairmansstatement.pdf](http://webarchive.nationalarchives.gov.uk/20120215203912/http://www.bahamousainquiry.org/linkedfiles/baha_mousa/report/2011-09-08-chairmansstatement.pdf). Baha Mousa Inquiry Report, Vol. I, Table of findings about assaults, pp. 323-325; para 2.371.

<sup>20</sup> Baha Mousa Inquiry Report, Statement by Chairman, 8 September 2011, p. 4; Baha Mousa Inquiry Report, Vol. I, para 2. 153.

<sup>21</sup> Baha Mousa Inquiry Report, Vol. I, paras. 1.41, 2.343, 2.370, 2.1318. Vol. III, paras. 372, 414

<sup>22</sup> Baha Mousa Inquiry Report, Vol I., paras. 1.42., 2.239, 2.343, 2.370, 2.1316.

<sup>23</sup> Baha Mousa Inquiry Report, Vol. I, para 2.1314.

<sup>24</sup> Baha Mousa Inquiry Report, Vol. I, para. 2.1314.

<sup>25</sup> Baha Mousa Inquiry Report, Vol. I, 2.1322.

<sup>26</sup> Baha Mousa Inquiry Report, Statement by Chairman, 8 September 2011, p. 23.

<sup>27</sup> Al-Sweady inquiry report, Vol. I, paras. 1.1 - 1.9, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/388251/43358\\_02a\\_Part\\_1\\_C\\_hapter\\_01.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/388251/43358_02a_Part_1_C_hapter_01.pdf).

<sup>28</sup> Al-Sweady Inquiry Report, Vol.II, para.5.198.

<sup>29</sup> Al-Sweady Inquiry Report, Vol.II, paras. 3.766, 3.767.

<sup>30</sup> Al-Sweady Inquiry Report, Vol.II, paras. 3.736, 737.

<sup>31</sup> Al-Sweady Inquiry Report, Vol.II, para. 3.347.

<sup>32</sup> Al-Sweady Inquiry Report, Vol.II, para. 3.372.

<sup>33</sup> Al-Sweady Inquiry Report, Vol.II, para. 3.705.



to a detainee's head, shins and ribs are considered to be merely 'ill-treatment', and an incident that one military witness thought not worth reporting".<sup>34</sup>

### IHAT findings

The Iraq Historic Allegations Team was set up in 2010 to review and investigate allegations of abuse of Iraqi civilians by UK armed forces personnel in Iraq during the period of 2003 to July 2009. In the January 2014 communication, the mandate, structure and work of IHAT at the time is analyzed on pages 229 to 234 with conclusions in the part on complementarity following these pages. ECCHR is deeply concerned by IHAT's decision to discontinue their investigations in hundreds of cases for reasons that are less than transparent as well as by the fact that the Iraqi claimants are currently without legal representation in these proceedings, and again reserves the right to make a further submission to the Office of the Prosecutor on IHAT and the issue of complementarity more broadly.

Nonetheless, the information published to date by IHAT – whose investigations are based on evidence from a number of different sources – confirms that British troops engaged in the abuse and ill-treatment in Iraq during the relevant period. For example, IHAT examined video evidence emerged of one case of the brutal beating of an Iraqi civilian by several British servicemen.<sup>35</sup> IHAT also received information from a member of the Royal Military Police confirming that he had witnessed the hooding of detainees during his tour in Iraq.<sup>36</sup> IHAT received information from another, unspecified source, that a British soldier had been involved in the mock execution of an Iraqi.<sup>37</sup> It also uncovered an email concerning training by a Royal Air Force trainer in the use of hooding, blindfolding and the restraining of prisoners through the use of a collar and rope.<sup>38</sup>

Out of 3392 allegations of torture, ill-treatment in detention and unlawful killings received by IHAT, proceedings are still ongoing for approximately one-third of the allegations.<sup>39</sup> On 19 September 2016, the Deputy Head of IHAT decided to collectively discontinue investigations

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<sup>34</sup> Written evidence submitted to the Joint Committee on Human Rights inquiry on the Government's proposed derogation from the ECHR by Dr Lutz Oette and Elizabeth Stubbins Bates, Centre for Human Rights Law, SOAS, University of London (DRO0006), p. 3, available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/the-governments-proposed-derogation-from-the-echr/written/49415.pdf>.

<sup>35</sup> IHAT Case 97, IHAT Table of Work Completed [undated], downloaded 29 March 2017, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/604897/20170330\\_-\\_work\\_completed\\_table.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604897/20170330_-_work_completed_table.pdf).

<sup>36</sup> IHAT Case107, IHAT Table of Work Completed [undated], downloaded 29 March 2017, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/604897/20170330\\_-\\_work\\_completed\\_table.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604897/20170330_-_work_completed_table.pdf).

<sup>37</sup> IHAT Case 106, IHAT Table of Work Completed [undated], downloaded 29 March 2017, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/604897/20170330\\_-\\_work\\_completed\\_table.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604897/20170330_-_work_completed_table.pdf).

<sup>38</sup> IHAT Case 105, IHAT Table of Work Completed [undated], downloaded 29 March 2017, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/604897/20170330\\_-\\_work\\_completed\\_table.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604897/20170330_-_work_completed_table.pdf).

<sup>39</sup> 1,667 allegations were closed with minimal investigation and 696 cases closed or in the process of being closed - IHAT available at <https://www.gov.uk/government/groups/iraq-historic-allegations-team-ihat#allegations-under-investigation>

of 68 cases looking at allegations of ill-treatment on an ambiguous justification that “it was not proportionate to continue investigating” them.<sup>40</sup> Furthermore, on 24 October 2016, IHAT decided to collectively discontinue work on 489 “lower-level” allegations of ill-treatment,<sup>41</sup> without denouncing them or pursuing a further investigation to corroborate the existing evidence and following leads. The reasons for the decision to discontinue these cases have not been disclosed yet.

*b) Sample independent findings indicating a consistent pattern of and/or systemic issues*

What is also clear is that cases of abuse of detainees in Iraq were not isolated occurrences or excesses but instead fit a pattern of abuse pointing to systemic failures.<sup>42</sup> As already described and argued in the January 2014 communication, see e.g. the conclusions with regard to individual criminal responsibility on pages 199 to 201, systemic failures point to the responsibility of high-level officials of the British Government and the armed forces at the time. The following findings of independent bodies support these arguments.

Baha Mousa Inquiry

Regarding the confirmed use of the “five techniques” in the course of interrogations by the British military in Iraq, the Baha Mousa Inquiry Report found there was

*“[...] a systemic failure within the MoD that had, in practice, allowed knowledge of the 1972 Directive [which prohibited the usage of Five Techniques] and the Heath Statement to fade even amongst intelligence staff and, more surprisingly, had permitted knowledge of the current interrogation policy which only dated back to 1997 to have been almost completely lost. To this extent, in my opinion, the MoD did not have a grasp on, or adequate understanding of, its own interrogation policy.”<sup>43</sup> [...]*

*But the absence of a clear statement in the Directive that conditioning and the five techniques were prohibited in prisoner handling and tactical questioning operations may have contributed to the failure to prevent such conduct. Had there been such a clear statement disseminated to all units it may have prevented at least some of what happened in the TDF [Temporary Detention Facility].”<sup>44</sup>*

Al-Sweady Inquiry

On the mistreatment of detainees at the time of arrest and capture, the Al-Sweady Inquiry report found that certain “unacceptable practices”, including depriving detainees of sleep, had developed over time and that

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<sup>40</sup> IHAT Table of Work Completed [undated], downloaded 29 March 2017, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/604897/20170330\\_-\\_work\\_completed\\_table.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604897/20170330_-_work_completed_table.pdf).

<sup>41</sup> *Ibid.*

<sup>42</sup> See January 2014 Communication to the OTP by ECCHR and PIL, Part IV.

<sup>43</sup> Baha Mousa Inquiry Report, Vol. I, para 7.221.

<sup>44</sup> Baha Mousa Inquiry Report, Vol. I, Para 7.223



*“[t]he lack of guidance in some key areas also resulted in some significantly sub-standard treatment, in particular the failure to provide a meal at any stage and the practice of keeping the detainees blindfolded throughout the entire period of their detention at Camp Abu Naji. The latter unsatisfactory state of affairs was also compounded by the general perception that “the shock of capture” could be maintained by adopting such a practice.”<sup>45</sup>*

### House of Commons Defence Committee

In a February 2017 report – emerging from a sub-committee set up out of concern for the welfare of service personnel under investigation by IHAT – the House of Commons Defence Committee finds there was a “failing of the highest order” in the training provided to British soldiers which led to incidents of abuse of Iraqi prisoners.<sup>46</sup> The report details admissions from the Peter Ryan, Ministry of Defence - Director of Judicial Engagement, that “there were a number of serious defects and deficiencies in the way in which the Ministry of Defence prepared people for the Iraq campaign” and that “the MoD had ‘lost the fact’ that certain techniques had been banned and that it was lost somewhere ‘between 1970-something and 2003’”.<sup>47</sup>

### R (Ali Zaki Mousa & Ors.) v SSD (No. 2)<sup>48</sup>

On 25 May 2012, Iraqi victims who had been ill-treated by the UK armed forces in Iraq or were relatives of those killed by the forces, commenced a judicial review proceedings, challenging the independence of the reformed and reconstituted IHAT even after the removal of Royal Military Police (RMP) personnel.<sup>49</sup> The High Court while analyzing whether IHAT discharged UK’s investigative duty as envisaged in Article 2 of the European Convention of Human Rights (ECHR) found the following:

*“In this judicial review application, there are claims of nine deaths of Iraqis in custody, (other than Baha Mousa) in a period of 11 months starting in May 2003. On the basis of the evidence, it is suggested that there might have been systemic abuses and that such abuses may have been attributable to a lack of appropriate training.”<sup>50</sup>*

### Ministry of Defence Compensation Claims

A number of Iraqi victims have received compensation from the UK Ministry of Defence through its Common Law Claims and Policy Division for torture, abuse in detention or unlawful killings, as also mentioned in the January 2014 communication on pages 234 and 235. In response to a freedom of information request concerning payments made to civilians

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<sup>45</sup> Baha Mousa Inquiry Report, Vol. II, paras 3.862, 3.863, p.766.

<sup>46</sup> Who guards the guardians? MOD support for former and serving personnel”, Sixth Report of Session 2016-17, *supra* note 16.

<sup>47</sup> Baha Mousa Inquiry Report, paras. 84-85.

<sup>48</sup> [2013] EWHC 1412 (Admin) Case No: CO/5503/2012.

<sup>49</sup> See January 2014 Communication to the OTP by ECCHR and PIL, pp. 229-230.

<sup>50</sup> *R (Ali Zaki Mousa & Ors.) v SSD (No. 2)* [2013], para 176.

nationals as a result of the conflicts in Afghanistan and Iraq on 17 July 2015, the Ministry of Defence disclosed that the “claims from Iraq nationals number some 1,200 and of these, the number settled totals some 323 at a total value of £19.6 million.”<sup>51</sup> In its 2012-2013 Annual Claims Report, the Ministry of Defence declared that it was “dealing with 375 claims of abuse by Iraqi nationals arising from the years between 2003 and 2009. 204 further such claims have now been settled, at a total value of £10.575 million.”<sup>52</sup> There were 617 Iraq Private Law Public Liability Claims brought by Iraqi civilians to the Ministry of Defence in 2013-14,<sup>53</sup> 189 in 2014-15,<sup>54</sup> and 12 in 2015-16<sup>55</sup>. Prior to that, claims from Iraqi nationals were being dealt by the Public Liability Team which paid compensation of £5.4 million to victims of torture and abuse while in UK detention in 2008-09.<sup>56</sup> Notwithstanding that the compensation claims settlements do not serve as UK’s compliance with its obligation to conduct investigations and prosecute those who bear the greatest responsibility, the consistently sizable amount dispersed against the claims made by Iraqi nationals clearly indicates an underlying pattern of abuse and ill-treatment during the relevant period.

### c) Summary

The part above only includes some relevant excerpts in addition to the facts and arguments submitted by the January 2014 communication. ECCHR intends to make further submissions to the Office of the Prosecutor on complementarity at a later stage, including a legal analysis of the different UK entities engaged in the investigations of war crimes committed in Iraq.

As confirmed by the Office of the Prosecutor as early as 2006 in its letter to senders re Iraq, there was a reasonable basis to believe that crimes within the jurisdiction of the International Criminal Court had been committed, among them inhuman treatment (Article 8(2)(a)(ii) of the Rome Statute).<sup>57</sup> As already argued in the January 2014 communication, many more cases

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<sup>51</sup> Ministry of Defence, Letter Ref: FOI2014/0648. Available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/476727/20151109-FOI2015-06481-RESPONSE-O.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/476727/20151109-FOI2015-06481-RESPONSE-O.pdf).

<sup>52</sup> United Kingdom’s Ministry of Defence, Claims Annual Report, 2012/2013, p. 6. Available at <https://www.whatdotheyknow.com/request/183488/response/448458/attach/3/New%20Claims%20Annual%20Report%202012%202013.pdf>.

<sup>53</sup> MOD Compensation Claims Financial Year 2014/15. Available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/527777/MOD\\_compensation\\_claims-statistics-2014-15-26010606.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/527777/MOD_compensation_claims-statistics-2014-15-26010606.pdf).

<sup>54</sup> *Ibid*

<sup>55</sup> MOD Compensation Claims Financial Year 2015/16. Available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/558982/20160921-bulletin\\_FINAL\\_FOR\\_PUBLICATION\\_FY1516.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/558982/20160921-bulletin_FINAL_FOR_PUBLICATION_FY1516.pdf)

<sup>56</sup> United Kingdom’s Ministry of Defence, Claims Annual Report, 2008/2009, p. 7-8, available at [http://s3.amazonaws.com/zanran\\_storage/www.mod.uk/ContentPages/31361407.pdf](http://s3.amazonaws.com/zanran_storage/www.mod.uk/ContentPages/31361407.pdf).

<sup>57</sup> Office of the Prosecutor, Letter to Senders re Iraq (Feb. 2006), p. 8. See also Aoife Duffy, Searching for Accountability: British-Controlled Detention in Southeast Iraq, 2003-2008, *International Journal of Transitional Justice*, 2016, 10, 410-431, at 430-431. She argues that

“[w]hile one must treat detainee testimony presented to the ICC with caution, this can be counterbalanced by the way in which the general trends contained therein are consonant with testimonies provided by military witnesses to public inquiries and court martials, NGO reports and official documentation. Moreover, there is a historical precedent to this tendency to cover up detainee abuse. The situation in Iraq bears a striking similarity to the manner in which allegations of detainee mistreatment were handled in Northern Ireland, and, before that, in the British colonies. Memories of utter powerlessness in which detention-based violence occurred may resurface years after the abusive treatment, manifested by a recent claim stemming from mid-20th-century Kenyan detention camps, an incident litigated in the UK high courts from British Malaya, and


came to light afterwards which include torture and inhuman treatment. A number of them have since been confirmed by official bodies, as shown in the January 2014 communication and expanded on in the part above. Referring to pages 203 to 214 of the January 2014 communication, the cases are of sufficient gravity to proceed, in particular regarding the scale of the alleged crimes, its serious nature and its impact. The additional findings by official entities since 2014 support and strengthen the argumentation of sufficient gravity in the January 2014 communication.

### **III. Requests**

ECCHR notes that the Office of the Prosecutor as part of its factual and legal assessment of the relevant evidence has been able to undertake its own review of case files at Public Interest Lawyers' offices<sup>58</sup> as well as to meet with UK authorities<sup>59</sup> and to undertake an extensive assessment of third party information and independent reports. To assist with its assessments, ECCHR is planning to submit further information to the Office of the Prosecutor highlighting key cases of a number of victims of torture and inhuman treatment.

Under the Rome Statute, the standard of proof required for proceeding with an investigation is "a reasonable basis to believe a crime within the jurisdiction of the Court has been or is being committed."<sup>60</sup> In ECCHR's view, it is clear that this threshold has already been met with regard to UK war crimes and systematic detainee abuse in Iraq, given our January 2014 communication as well as the extensive third-party evidence of the abuse of Iraqis and the systemic failures that led to them. For the sake of the Iraqi victims, whose voices are rarely heard and who are living in a region in which international crimes continue to be committed with impunity, as well as in light of the continued failure of the United Kingdom to prosecute those bearing the greatest responsibility for the war crimes committed in Iraq, ECCHR requests from the Office of the Prosecutor to request the opening of an investigation to the Pre-Trial Chamber without undue delay in order to be able to fully exercise investigatory powers under Article 54 of the Rome Statute.

Sincerely Yours,



Wolfgang Kaleck  
General Secretary ECCHR

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the Irish government's 2014 application to Strasbourg seeking a reexamination of the European Court's 1978 judgment on the basis that it was incongruent with what the 'hooded men' actually experienced in Ballykelly. These historical claims exemplify a pressing need to set the record straight."

<sup>58</sup> Office of the Prosecutor, Report of Preliminary Examination Activities (2015), p. 10.

<sup>59</sup> *Ibid*, p. 9.

<sup>60</sup> The Rome Statute, Article 53(1)(a).