

# EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS



To:  
**Prosecutor Fatou Bensouda**

Cc:  
**Emeric Rogier, Head of Situation Analysis**  
and  
**Information and Evidence Unit, Office of the Prosecutor**

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**Berlin, 01/09/2017**  
**PUBLIC DOCUMENT**

**Re: Situation Iraq/United Kingdom - Status of preliminary examination**

Dear Prosecutor Bensouda,

On 10 January 2014 ECCHR, together with Public Interest Lawyers, submitted an Article 15 communication on the responsibility of UK officials for war crimes involving systematic detainee abuse in Iraq from 2003-2008 (hereinafter the 2014 Communication).<sup>1</sup> On 13 May 2014 your Office announced its decision to re-open the preliminary examination of the situation in Iraq. In the annual reports on preliminary examinations your Office reported on its activities undertaken and stated that it was “concluding its comprehensive factual and legal assessment of information available in order to establish whether there is a reasonable basis to believe that alleged crimes committed by United Kingdom nationals in the context of the

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<sup>1</sup> Communication to the Office of the Prosecutor of the International Criminal Court, The Responsibility of Officials of the United Kingdom for War Crimes Involving Systematic Detainee Abuse in Iraq from 2003-2008, submitted on 10 January 2014 by the European Center for Constitutional and Human Rights (ECCHR) and Public Interest Lawyers (PIL) [hereinafter ‘the 2014 Communication’], available at [https://www.ecchr.eu/en/our\\_work/international-crimes-and-accountability/united-kingdom.html?file=tl\\_files/Dokumente/Universelle%20Justiz/UKICC-Communication-2014-01-10\\_public.pdf](https://www.ecchr.eu/en/our_work/international-crimes-and-accountability/united-kingdom.html?file=tl_files/Dokumente/Universelle%20Justiz/UKICC-Communication-2014-01-10_public.pdf).

armed conflicts in Iraq in the period from March 2003 to July 2009 fall within the subject-matter jurisdiction of the Court”.<sup>2</sup>

In this submission, we comment on developments in the UK since our 2014 Communication, particularly efforts by the Ministry of Defence to shut down domestic investigations into claims against British forces in Iraq. We focus on the “reasonable basis to believe” standard and set out why – in the light of the information on a high number of Iraqi victims of abuse and extensive corroborative evidence of detainee abuse from independent sources – we believe that this threshold has been reached, and we examine related issues of gravity relevant at this stage of the assessment. In light of the failure by the UK to make any genuine attempts to investigate those bearing the greatest responsibility for war crimes in Iraq, and given that in our assessment the formal requirements for the opening of an investigation have been met, we urge your Office to move forward with the preliminary examination and ultimately to request a formal investigation.

## **I. Developments in the UK since 2014**

In our most recent letter to your Office of 29 June 2017 (see attached annex), we set out how the closure of Public Interest Lawyers (PIL), the disciplinary proceedings against Phil Shiner and the end of the Iraq Historic Allegation Team (IHAT) proceedings were sought by the UK Government as part of their attempt to mislabel all allegations against UK forces as false and vexatious and ultimately to shield its military from accountability for its crimes.<sup>3</sup> The UK Government, and in particular the Ministry of Defence (MOD), has interfered in an unprecedented manner with judicial proceedings in the UK to discredit and end the work of lawyers and law firms pursuing cases for their Iraqi clients. With the decision taken by the

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<sup>2</sup> Office of the Prosecutor, Report on Preliminary Examination Activities 2016, 14 November 2016, para. 107, available at [https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE\\_ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf).

<sup>3</sup> See ECCHR’s letter to the OTP dated 29 June 2017, attached. A further indicator of this approach has since emerged with news that the Ministry of Defence instructed Royal Military Police investigators to shut down investigations into allegations that British Special Forces killed unarmed civilians in what have been described as mass executions in Afghanistan, see: ‘Rogue SAS unit accused of executing civilians in Afghanistan: Claims of cover-up as Afghan investigation is wound down’, *The Times*, 2 July 2017, available at <https://www.thetimes.co.uk/article/rogue-sas-unit-accused-of-executing-civilians-in-afghanistan-f2bqlc897>; ‘SAS soldiers ‘suspected’ of executing unarmed Afghans and covering up potential war crimes: Special forces soldiers allegedly murdered civilians and planted guns on their bodies’, *The Independent*, 2 July 2017, available at <http://www.independent.co.uk/news/uk/home-news/sas-special-air-service-war-crimes-civilians-cover-up-ministry-of-defence-operation-northmoor-royal-a7819006.html>.

Defence Secretary to shut down IHAT by 30 June 2017, the UK cut its domestic investigation of cases of torture and ill-treatment down to a very limited number. Even more significant for your Office, at no point in time did the UK make any efforts to investigate and potentially prosecute higher-level officials. The Ministry of Defence has relied on the disciplinary proceedings against Phil Shiner to close investigations into allegations of abuse by IHAT.<sup>4</sup> Neither the MOD nor IHAT has articulated why the disciplinary proceedings against Phil Shiner should mean that the claims do not merit investigation. The Defence Secretary asserted that his Ministry was able to wind down IHAT because the claims originating from Phil Shiner now “fall away” after the MOD was “successful in exposing how false these allegations were”.<sup>5</sup> However, the disciplinary proceedings (themselves initiated by the MOD<sup>6</sup>) made no findings on the veracity of the claims brought forward and concerned only the cases

<sup>4</sup> “An MOD spokesperson said: The evidence we submitted on Phil Shiner’s abuse of our legal system saw him struck off and, with his conduct discredited, we announced the closure of IHAT,” *Ministry of Defence Media Blog*, 17 March 2017, available at <https://modmedia.blog.gov.uk/2017/03/17/defence-in-the-media-17-march-2017/>. See also ‘Iraq human rights lawyer Phil Shiner declared bankrupt’, *The Guardian*, 17 March 2017, available at <https://www.theguardian.com/law/2017/mar/17/iraq-war-crimes-lawyer-phil-shiner-declared-bankrupt> and ‘IHAT to close at the end of June’, *News Story UK Ministry of Defence*, 5 April 2017, available at <https://www.gov.uk/government/news/ihat-to-close-at-the-end-of-june>.

<sup>5</sup> ‘Defence Secretary announces IHAT will close this summer (video)’, *The Daily Mail*, undated, available at <http://www.dailymail.co.uk/video/news/video-1410347/Defence-Secretary-announces-IHAT-close-summer.html>; ‘Iraq abuse inquiry to shut after MPs find it has ‘directly harmed defence of our nation’, *The Telegraph*, 10 February 2017, available at <http://www.telegraph.co.uk/news/2017/02/10/iraq-abuse-inquiry-has-directly-harmed-defence-nation-andmust/>. “Tonight an MoD source told me they couldn’t have pulled the plug on IHAT before Phil Shiner’s allegations had been discredited or else the investigations would simply have transferred to the International Criminal Court (ICC),” ‘The real reason the MOD pulled the plug on Iraq War probe today’, *ITV News*, 10 February 2017, available at <http://www.itv.com/news/2017-02-10/the-real-reason-the-mod-shut-probe-into-iraq-war-troops/>. See also the statement from Ministry of Defence and The Rt Hon Sir Michael Fallon MP, Defence Secretary Sir Michael Fallon has confirmed the date that IHAT will close, 5 April 2017 available at <https://www.gov.uk/government/news/ihat-to-close-at-the-end-of-june>.

<sup>6</sup> On the role played by the MOD in the “dismantling” of Public Interest Lawyers, see also Defence Committee Report, ‘Who guards the guardians? MOD support for former and serving personnel’, Sixth Report of Session 2016-17, published on 10 February 2017, at 10: “The Secretary of State asserted that the firm would not have been “dismantled” in the way that it was without the intervention of the MoD”, available at <https://publications.parliament.uk/pa/cm201617/cmselect/cmdfence/1149/1149.pdf>. See also the Government’s response to this report, at 4-5, paras. 9-11, available at <https://publications.parliament.uk/pa/cm201617/cmselect/cmdfence/1149/1149.pdf>. See also ‘Defence Secretary announces IHAT will close this summer (video)’, *The Daily Mail*, *ibid*; In another 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’, *The 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,” ‘Iraq abuse inquiry to shut after MPs find it has ‘directly harmed defence of our nation’, *The Telegraph*, 10 February 2017, available at <http://www.telegraph.co.uk/news/2017/02/10/iraq-abuse-inquiry-has-directly-harmed-defence-nation-andmust/>.

related to the Al-Sweady inquiry. This inquiry rejected claims of unlawful killings at Camp Abu Naji on 14 and 15 May 2004 but confirmed that detainees were subjected to ill-treatment during overnight detention at the camp. Further, only around 65% of the thousands of allegations received by IHAT were submitted by PIL,<sup>7</sup> and yet the MOD moved to close the entire investigation, with just 20 cases reportedly remaining to be passed to the Service Police Legacy Investigations.<sup>8</sup> The fact that the UK Defence Secretary can decide to close IHAT's investigations into allegations of abuse committed by British soldiers wholly undermines the independence of such investigations and we intend to provide more information on issues of complementarity in a further, future submission, particularly with regard to the continuing unwillingness of the UK to investigate those most responsible for systematic ill-treatment of Iraqi detainees.

IHAT has also failed to provide any persuasive justification for its decision to discontinue investigations in hundreds of cases of ill-treatment. 68 allegations of ill-treatment were discontinued in September 2016 because it was "not proportionate to continue investigating".<sup>9</sup> Investigations into 489 allegations of ill-treatment were discontinued with no reason given to date in October 2016.<sup>10</sup> What happened to the remaining number of cases, given the last official numbers from IHAT of its January 2017 quarterly report amount to 1002,<sup>11</sup> is still unknown. When asked during a High Court review of IHAT proceedings why the evidence that came to light in Phil Shiner's proceedings would be a relevant consideration in the closing of ongoing investigations, the representative for the Secretary of State for Defence was unable to give a clear answer.<sup>12</sup> The earlier finding by the High Court that IHAT does not have to investigate those cases in which there is no signed witness statement but only a summary of the facts as reported by the victim, is based on concerns that IHAT was not

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<sup>7</sup> See Defence Committee Report, *ibid*, para. 18.

<sup>8</sup> 'IHAT to close at the end of June', *UK Ministry of Defence News Story*, 05 April 2017, available at <https://www.gov.uk/government/news/ihat-to-close-at-the-end-of-june>; 'Iraq War Claims unit to be shut down, says UK Defence Secretary', *The Guardian*, 10 February 2017, <https://www.theguardian.com/world/2017/feb/10/iraq-war-claims-unit-to-be-shut-down-says-uk-defence-secretary>.

<sup>9</sup> IHAT Table of Work Completed, updated March 2017, at 1, 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>10</sup> *Ibid*.

<sup>11</sup> IHAT Quarterly Update- October to December 2016, at 3, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/617305/20170116-Quarterly\\_Update\\_website\\_Dec16.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/617305/20170116-Quarterly_Update_website_Dec16.pdf)

<sup>12</sup> See representations of the government in *Al-Saadoon & Ors. v Secretary of State for Defence & Ors.*, transcript of hearing in the High Court of Justice, Queen's Bench Division, the Administrative Court, 8 June 2017, paras. 56 ff.

capable of dealing with the amount of allegations brought to its attention.<sup>13</sup> Ultimately, the High Court did not make an order on this point, anticipating that the claimants' representatives would want to make submissions on the matter,<sup>14</sup> e.g. to explain that witness statements would be preferential but the legal aid contract limited PIL to a total of only four hours of work per claimant, which was enough to prepare a claim summary on the basis of a questionnaire and a phone conference, but did not allow for the preparation of a full witness statement.<sup>15</sup>

In our view it would be wrong to reject such claims at a preliminary stage. The victims were not in a position to instruct and pay British lawyers to take full statements which they then sign, with the associated expenses for translations and logistics.<sup>16</sup> Therefore, case summaries given on telephone conferences to UK lawyers in some cases was the only possibility to bring forward the allegations, containing the most fundamental details as to the time and place of the mistreatment and the personal background of the claimants. Further, IHAT was focused on gathering evidence that could be used in criminal proceedings against the direct perpetrator – it did not look at evidence of systematic issues which could point to the responsibility of persons in senior positions.

Further, the UK Government's assertions that the proceedings against Phil Shiner render false all allegations concerning abuse in Iraq, must be rejected. Numerous sources such as video evidence, the public statements of former UK service personal, as well as ICRC reports and other independent reports exist to corroborate the allegations. The MOD's shutting down of IHAT for political reasons after instigating disciplinary proceedings against the lawyers presenting the cases shows the imminent need for a fully-fledged independent international investigation of the allegations. The ICC and your Office were set up precisely with a view to such situations, in which a state is not willing to investigate those most responsible for grave crimes and does everything to shield its high-level civilian and military officials from any form of criminal investigation.

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<sup>13</sup> *Al-Saadoon & Ors. v Secretary of State for Defence & Ors.*, [2016] EWHC 773 (Admin), para. 289.

<sup>14</sup> *Ibid.*, para. 293.

<sup>15</sup> *Ibid.*, para.287.

<sup>16</sup> *Ibid.*, para. 212 for the process adopted by PIL in taking instruction from its clients and preparing claim summaries.

## **II. Subject-matter jurisdiction: Grounds for a reasonable basis to believe that crimes within the jurisdiction of the Court have been committed in the Iraq situation**

### A. The reasonable basis to believe standard

We remain convinced that the information provided to your Office is sufficient to meet the ‘reasonable basis to believe standard’ under Article 15 (1-3) and Article 53(1)(a) of the Rome Statute. In its Policy Paper on Preliminary Examinations, your Office has explained that in accordance with the interpretation of the Chambers of the Court, this standard of proof requires “a sensible or reasonable justification” for a belief that a crime falling within the jurisdiction of the Court “has been or is being committed”.<sup>17</sup>

Below we briefly examine that standard, set out by the Pre-Trial Chamber in the situation of Kenya in 2010, as well as subsequent jurisprudence from the Chambers on the application of the standard in the situations of Comoros and Georgia.

In its decision on the authorization of an investigation into the situation in Kenya of 31 March 2010, the Pre-Trial Chamber II noted that the ‘reasonable basis to believe standard’ articulated in Article 53 (1)(a) is the lowest evidentiary standard provided for in the Rome Statute. The Chamber argued that it is logical for the ‘reasonable basis to believe’ test to represent a low threshold “given that the nature of this early stage of the proceedings is confined to a preliminary examination. Thus, the information available to the Prosecutor is neither expected to be ‘comprehensive’ nor ‘conclusive’, if compared to evidence gathered during the investigation. This conclusion also results from the fact that, at this early stage, the Prosecutor has limited powers, which cannot be compared to those provided in Article 54 of the Statute at the investigative stage.”<sup>18</sup> The Chamber found that there was no requirement

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<sup>17</sup> OTP, Policy Paper on Preliminary Examinations, ICC-OTP 2013, para. 34, with reference to Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010.

<sup>18</sup> Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19-Corr para 27.

that the available information point at this stage only to one conclusion.<sup>19</sup> These findings were affirmed by your Office in its request for authorization of an investigation on Georgia.<sup>20</sup>

The application of the standard set out in Article 53(1) was examined again in more detail in the Pre-Trial Chamber's decision on the request of the Comoros to review the Prosecutor's decision not to initiate an investigation after a state referral. The Chamber's position warrants citing at length:

The Prosecutor's assessment of the criteria listed in this provision does not necessitate any complex or detailed process of analysis. In the presence of several plausible explanations of the available information, the presumption of article 53(1) of the Statute, as reflected by the use of the word "shall" in the chapeau of that article, and of common sense, is that the Prosecutor investigates in order to be able to properly assess the relevant facts. Indeed, it is precisely the purpose of an investigation to provide clarity. Making the commencement of an investigation contingent on the information available at the pre-investigative stage being already clear, univocal or not contradictory creates a short circuit and deprives the exercise of any purpose. Facts which are difficult to establish, or which are unclear, or the existence of conflicting accounts, are not valid reasons not to start an investigation but rather call for the opening of such an investigation. If the information available to the Prosecutor at the pre-investigative stage allows for reasonable inferences that at least one crime within the jurisdiction of the Court has been committed and that the case would be admissible, the Prosecutor shall open an investigation, as only by investigating could doubts be overcome. This is further demonstrated by the fact that only during the investigation may the Prosecutor use her powers under article 54 of the Statute; conversely, her powers are more limited under article 53(1) of the Statute.<sup>21</sup>

The Chamber also held that "it is inconsistent with the wording of article 53(1) of the Statute and with the object and purpose of the Prosecutor's assessment under this provision for her to disregard available information other than when that information is manifestly false."<sup>22</sup>

The standard was addressed by the Pre-Trial Chamber again in the situation of Georgia, finding that if the accuracy of the information cannot be verified at the preliminary stage and conflicting accounts exist, such doubts call for an investigation rather than the opposite as it is only upon investigation that it may be determined how the events unfolded. In that situation the Pre-Trial Chamber disagreed with the assessment that contested material provided solely

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<sup>19</sup> *Ibid.*, para. 34.

<sup>20</sup> Request for authorization of an investigation pursuant to article 15, Situation in Georgia, ICC-01/15-4, 14 October 2015, para. 49.

<sup>21</sup> Pre-Trial Chamber I, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, Situation on the registered vessels of the Union of the Comoros, The Hellenic Republic and the Kingdom of Cambodia, ICC-01/13, 16 July 2015, para. 13.

<sup>22</sup> *Ibid.*, para. 35.

by the parties involved was not credible enough to be relied on and therefore the focus should be instead only on those allegations that were corroborated by third parties, finding that your Office had “acted too restrictively and ha[d] imposed requirements on the material that cannot reasonably be met in the absence of an investigation, the initiation of which is precisely the issue at stake.”<sup>23</sup>

## B. Cases submitted as part of the 2014 Communication

The Communication we submitted to your Office with PIL in January 2014 provided extensive information on and analysis of war crimes and systemic detainee abuse in Iraq between 2003 and 2008. It presented 85 representative cases of abuse by 109 victims, along with details of the dates of arrest, ill-treatment and release of the victims. These cases serve as a sample from hundreds of cases of ill-treatment and torture amounting to a number of different war crimes under the Rome Statute. The materials submitted included 39 extensive witness statements.

These were accompanied where available by extensive substantiating documentation such as detention records documentation confirming their internment by the British Forces Divisional Internment Review Committee,<sup>24</sup> as well as copies of passports, medical records and photographs of injuries sustained in detention.<sup>25</sup> A number of these statements also include correspondence concerning compensation claims brought by the victims to local UK Area Claims Offices.<sup>26</sup> Others are substantiated with certificates confirming detention by the delegates on their visits to these detention camps.<sup>27</sup> A number of statements are accompanied by prisoner of war identification cards issued by the ICRC Central Tracing Agency, detailing their detention.<sup>28</sup>

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<sup>23</sup> Pre-Trial Chamber I, Decision on the Prosecutor’s request for authorization of an investigation, Situation in Georgia, ICC-01/15, 27 January 2016, para. 35

<sup>24</sup> The 2014 Communication, *supra* note 1, Annexure B7, Exhibit AAZ4 et al.

<sup>25</sup> See generally the 2014 Communication, *supra* note 1, Testimonies 1 to 39, Annex B.

<sup>26</sup> *Ibid.*, Annexure B 13, Exhibit MHJAB 3, at 17; Annexure B16 Exhibit HAA2, at 14; Annexure B18, Exhibit QMK2, at 19.

<sup>27</sup> *Ibid.*, Annexure B6, Exhibit LBT3, at 20; Annexure B22, Exhibit HAH 1, at 10; Annexure B29, Exhibit HKH 2, at 16.

<sup>28</sup> *Ibid.*, Annexure B13, Exhibit MHJAB 2, at 16; Annexure B14, Exhibit SMIA 3, at 18; Annexure B24, Exhibit SNN4, at 21.



The 2014 Communication detailed how the use of the “five techniques” (hooding, stress positions, noise bombardment, sleep deprivation and deprivation of food and water) as well as other techniques including beatings, “harshing” and sexual and religious humiliation – in many cases with multiple techniques used simultaneously – amounted to war crimes under the Rome Statute.<sup>29</sup>

Where these occurred in the context of an international armed conflict, we argued in the 2014 Communication that they constituted the war crimes of willful killing (Article 8(2)(a)(i)), inhuman treatment (Article 8 (2)(a)(ii)), willfully causing great suffering (Article 8(2)(a)(iii)), and outrages upon personal dignity (Article 8(2)(b)(xxi)).<sup>30</sup> Where these techniques were used to punish, intimidate or coerce a detainee, this conduct also constituted torture (Article 8(2)(a)(ii)). Where such techniques were applied in the context of a non-international armed conflict, the Communication argued they constituted war crimes of murder (Article 8(2)(c)(i)), cruel treatment (Article 8(2)(c)(i)), and outrages upon personal dignity (Article 8(2)(c)(ii)), as well as torture (Article 8(2)(c)(i)) where these techniques were used to punish, intimidate or coerce a detainee.<sup>31</sup>

An extensive analysis showing that the abuses constitute crimes within the jurisdiction of the Court is set out in the 2014 Communication at pp. 123 to 155 and p. 202.

### C. Additional cases submitted by PIL (International) in the Second Communication to the OTP dated 15.06.2015

PIL (International) submitted a follow-up communication to your Office on 15 June 2015 (hereinafter the Second Communication) which not only supplemented further the issues highlighted in the 2014 Communication but also introduced new systemic issues. Since the 2014 Communication, PIL had been continually submitting to your Office the claims received from Iraqi victims alleging breaches of Article 2, 3, and 5 of ECHR. In addition to being lodged on the Claims Register set up by the High Court of Justice for England and Wales these claims were sent to various representatives of the UK, namely, the Secretary of State for

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<sup>29</sup> *Ibid.*, at 123 - 155.

<sup>30</sup> *Ibid.*, at 155.

<sup>31</sup> *Ibid.*

Defence, the IHAT, and the Director of Service Prosecutions (DSP) at the Service Prosecution Authority (SPA).

The Second Communication from PIL stated that the total number of cases in the two submissions is 1268<sup>32</sup> and that out of these 1268 cases,<sup>33</sup> 1009 cases are for allegations of torture, cruel, degrading or ill-treatment in detention.<sup>34</sup> These two communications discussed 109 exemplary cases in detail, presented as illustrative of all the cases in their respective categories.

In light of the details disclosed from these subsequent claims, the Second Communication introduced additional war crimes arising from detainee abuse, including, in the context of international conflict war crimes, rape (Article 8(2)(b)(xxii)), and sexual violence (Article 8(2)(b)(xii)), and in the case of non-international armed conflict, war crimes of rape (Article (2)(e)(xi)) and sexual violence (Article 8(2)(e)(xi)).<sup>35</sup> That communication also makes legal submissions on systematic abuse concerning the aforementioned additional war crimes under the Statute and further addressed the complementarity and gravity analysis on the situation.<sup>36</sup>

Due to the large number of victims and limited resources at its disposal, PIL could not hold face to face interviews for all these claims and therefore, relies on case summaries instead.<sup>37</sup> However, these summaries prepared for the purposes of Claims Register are sufficient to estimate the kind, nature, time, and location of the crimes committed. Further details can be definitively established at the investigation stage.

#### D. Other sources of information

In our 2014 Communication and letter of 29 June 2017, we highlighted extensive material from independent sources confirming torture and ill-treatment by UK forces in Iraq, some of

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<sup>32</sup> Second Communication to the Office of the Prosecutor of the International Criminal Court, The Responsibility of Officials of the United Kingdom for War Crimes Involving Systematic Detainee Abuse in Iraq from 2003-2008, submitted on 15 June 2015 by Public Interest Lawyers (International) (PIL INT), [hereinafter referred as 'Second Communication'] at 22.

<sup>33</sup> The term 'case' as referred herein includes either issued claims (or pre-action protocol letters) or entries in the Claims Register and may represent single multiple victims, see the second communication, *ibid.*, at 21.

<sup>34</sup> *Ibid.*, at 23, para. 2.4.

<sup>35</sup> For more details, *ibid.*, at 105 – 119.

<sup>36</sup> *Ibid.*, at 120-197.

<sup>37</sup> *Ibid.*, at 53.

which included indications of a widespread pattern of abuse. This included information from the Baha Mousa inquiry, the Al-Sweady inquiry, findings of the House of Commons Defence Committee and findings by the Iraq Historic Allegations Team,<sup>38</sup> as well as video evidence of the use of abusive interrogation techniques,<sup>39</sup> a report by Amnesty International<sup>40</sup> and an ICRC report made to the UK Government.<sup>41</sup> It also included documents such as interrogation logs, medical records and internal memos disclosed by the UK Government as part of the Baha Mousa inquiry judicial review proceedings.<sup>42</sup> These materials will be familiar to your Office as part of its independent assessment of the information available.<sup>43</sup> ECCHR also notes that the representatives from your Office have travelled to PIL’s offices to screen the evidence relating to the claims.<sup>44</sup>

As submitted in the 2014 Communication and follow-up letter of 29 June 2017,<sup>45</sup> the Ministry of Defence has settled over 300 civil claims taken by Iraqis. While the details of these settlements are subject to confidentiality agreements, it is known that some of the settled claims concerned ill-treatment as well as unlawful detention,<sup>46</sup> and we understand your Office has received further information on these procedures. On the significance of these settlements for the credibility of claims of detainee abuse, Lieutenant-Colonel Nicholas Mercer, the British Army’s chief legal adviser in Iraq in 2003, has stated: “Anyone who has fought the MoD knows they don’t pay out for nothing. So there are 326 substantiated claims at a cost of £20m, and almost no criminal proceedings to accompany it. You have to ask why.”<sup>47</sup>

<sup>38</sup> See overview in ECCHR’s letter to the OTP dated 29 June 2017, attached as Annex A.

<sup>39</sup> 2014 Communication, *supra* note 1, at 110.

<sup>40</sup> *Ibid.*, at 119, referencing Amnesty International, One Year on the Human Rights Situation Remains Dire, March 2004, at 3, available at <https://www.amnesty.org/en/documents/MDE14/006/2004/en/>.

<sup>41</sup> *Ibid.*, at 120, referencing International Committee of the Red Cross, Report on the Treatment by the Coalition Forces of Prisoners of War and other Protected Persons by the Geneva Conventions in Iraq during Arrest, Internment and Interrogation, February 2004, available at <http://www.derechos.org/nizkor/us/doc/icrc-prisoner-report-feb-2004.pdf>

<sup>42</sup> *Ibid.*, at 113 -115.

<sup>43</sup> OTP, Report on Preliminary Examination Activities 2016, *supra* note 2, at 100 – 102.

<sup>44</sup> OTP, Report on Preliminary Examination Activities 2015, at 42, available at <https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf>.

<sup>45</sup> The 2014 communication, *supra* note 1, at 234-235; also ECCHR’s letter to the OTP dated 29 June 2017 at 9.

<sup>46</sup> See further supplementary written evidence submitted by the Ministry of Defence to the Defence Subcommittee’s inquiry into MoD support for former and serving personnel subject to judicial processes inquiry, at question 18, available at <http://www.parliament.uk/business/committees/committees-a-z/commons-select/defence-committee/defencesubcommittee/inquiries/parliament-2015/mod-support-former-and-serving-personnel/publications/>.

<sup>47</sup> ‘David Cameron ‘wrong to crack down on legal claims against Iraq veterans’, *The Guardian*, 22 January 2016, available at <https://www.theguardian.com/uk-news/2016/jan/22/david-cameron-wrong-to-deter-legal-claims-against-iraq-veterans>.

E. Further corroborating evidence which could be reviewed by the OTP

Various sources indicate that there is extensive video footage of detainee interrogations by UK forces in Iraq.<sup>48</sup> These videos could be fundamental in corroborating accounts by victims. We would consider any decision questioning the credibility of accounts by victims submitted to your Office without having considered the video evidence to be unacceptable. As we are not in the possession of the videos nor do we have the right to obtain them, we urge your Office to formally request the videos from the UK Government either now as part of the preliminary examination or during subsequent investigations.

ECCHR and PIL's 2014 Communication highlighted as corroborative evidence the 2004 report submitted by the ICRC to the UK on the abuse and in some cases torture of Iraqi detainees during interrogations as well as the systemic use of hooding.<sup>49</sup> It appears that the International Committee of the Red Cross made a further complaint to the UK about the mistreatment of detainees;<sup>50</sup> again if your Office has yet to review this complaint we urge it to seek a copy from the Ministry Of Defence.

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<sup>48</sup> In the Ali Zaki Mousa domestic proceedings, Geoff White, the former head of IHAT, stated that there are currently available over 3,500 such recordings. See also written evidence submitted by Reverend Nicholas Justin Mercer to the Defence Sub-Committee's inquiry into MoD support for former and serving personnel subject to judicial processes inquiry, para. 30, "I understand that the vast majority of interrogations in Iraq were recorded on video. The MOD, in all probability, knows the true position with regard to the legal advice given and the conduct during interrogation. It could be established relatively quickly whether allegations of physical and sexual intimidation and possible religious abuse were in fact genuine complaints. If such claims are with merit and the MOD is aware that they are genuine claims, then it would raise very serious questions about their conduct in the judicial proceedings which are currently in progress. They would know that a sizeable number of the allegations are true but be deliberately trying to discredit those who had the professional obligation (and courage) to bring them to court," available at <https://www.parliament.uk/business/committees/committees-a-z/commons-select/defence-committee/defencesubcommittee/inquiries/parliament-2015/mod-support-former-and-serving-personnel/publications/>. See also Carla Ferstman, 'Why the ICC examination into torture and other abuses by UK soldiers in Iraq must continue', Open Democracy, 16 July 2017, "The MOD has confirmed to REDRESS that 752 of the IHAT cases concern interrogation and that the videos of some of the interrogations are held in the archives of Defence Intelligence and with IHAT," available at <https://www.opendemocracy.net/uk/carla-ferstman/why-icc-examination-into-torture-and-other-abuses-by-uk-soldiers-in-iraq-must-cont>.

<sup>49</sup> International Committee of the Red Cross (ICRC), Report on the treatment by the Coalition Forces of prisoners of war and other protected persons by the Geneva Conventions in Iraq during arrest, internment and interrogation, February 2004, available at <http://www.antiwar.com/rep/red-cross-report.pdf>.

<sup>50</sup> See written evidence submitted by Reverend Nicholas Justin Mercer to the Defence Sub-Committee's inquiry into MoD support for former and serving personnel subject to judicial processes inquiry, available at <https://www.parliament.uk/business/committees/committees-a-z/commons-select/defence-committee/defencesubcommittee/inquiries/parliament-2015/mod-support-former-and-serving-personnel/publications/>.

Further corroborating evidence, if needed, can also be gathered through consultation with experts on missions to the UK or by invitation to the seat of the Court. We suggest consulting with Reverend Nicholas Mercer, the British army's chief legal adviser in Iraq in 2003,<sup>51</sup> journalist (The Guardian) and author Ian Cobain, editor and journalist (The Guardian) Richard Norton-Taylor, and Professor Andrew T. Williams of the University of Warwick. Your Office has indicated in its annual reports on preliminary examinations that it is consulting local and international NGOs and examining reports by NGOs such as REDRESS, Amnesty International and Human Rights Watch;<sup>52</sup> we encourage your Office to meet with representatives from these organizations, including their researchers, if further information is required.

#### F. Impact of the disciplinary proceedings against Phil Shiner on credibility of information

The outcome of the disciplinary proceedings against Phil Shiner in February 2017 does not alter the assessment that the threshold of a reasonable basis to believe has been reached in this situation. The Solicitors Disciplinary Tribunal's findings on Phil Shiner were limited to the handling of claims examined in the Al-Sweady Inquiry, which concerned the Battle of Danny Boy on 14 May 2004 near Majar al-Kabir in Southern Iraq.<sup>53</sup> Further, the Tribunal's findings say nothing about the substantive accuracy of the evidence provided in this or other cases. It is worth noting that while that Al-Sweady Inquiry ultimately rejected the claims of unlawful killing in that case, it confirmed that the detainees were subjected to the use of blindfolding<sup>54</sup>, sleep deprivation,<sup>55</sup> invasion of detainees' personal space,<sup>56</sup> harshing techniques<sup>57</sup> including shouting, and the inadequate provision of food.<sup>58</sup> Thus even these cases could in no way be characterized as frivolous. What seems to be forgotten in the discourse around these developments is that in several other cases, courts and inquiries have confirmed British ill-

<sup>51</sup> See *ibid.*, his written evidence to the Defence Sub-Committee's inquiry into MoD support for former and serving personnel subject to judicial processes inquiry.

<sup>52</sup> Office of the Prosecutor, Report of Preliminary Examination Activities 2016, at paras. 98, 102.

<sup>53</sup> *Solicitors' Regulation Authority v. Philip J. Shiner*, Solicitors Disciplinary Tribunal, Case No.: 11510 / 2016, paras. 45 – 61, available at <http://www.solicitorstribunal.org.uk/sites/default/files-sdt/11510.2016.Philip%20Joseph%20Shiner.pdf>.

<sup>54</sup> Report of the public inquiry into allegations of unlawful killing and ill treatment of Iraqi nationals by British troops in Iraq in 2004, Report of the Al-Sweady Inquiry, 17 December 2014, [hereinafter referred as Al-Sweady Inquiry Report], Vol.II, paras. 3.766, 3.767.

<sup>55</sup> *Ibid.*, paras. 3.736, 737.

<sup>56</sup> *Ibid.*, para. 3.347.

<sup>57</sup> *Ibid.*, para. 3.372.

<sup>58</sup> *Ibid.*, para. 3.705.

treatment of detainees in Iraq in cases brought forward domestically by PIL.<sup>59</sup>

The law firm Leigh Day, which worked with PIL to bring cases in the UK on behalf of Iraqi clients, and which was also brought before the Solicitors Disciplinary Tribunal on charges related to this litigation, and which unlike Phil Shiner had legal representation to fight the allegations against it, was acquitted on all charges in June 2017.<sup>60</sup> British MP and former Chair of the Joint Committee on Human Rights Harriot Harman has recently highlighted the pressure exerted by the MOD on the Solicitors Regulation Authority (SRA) to take action against Leigh Day and has called for the release of relevant correspondence between the MOD and the SRA.<sup>61</sup> The proceedings against both Phil Shiner and Leigh Day were part of the MOD's efforts to avoid accountability for human rights abuses in Iraq.

As set out in our letter from 29 June 2017, we urge your Office to reject efforts by the MOD to use the proceedings against Phil Shiner as a means to characterize all claims relating to detainee abuse in Iraq as “spurious” or “vexatious”.<sup>62</sup>

#### G. Implications for future cases if a stricter standard were to be applied

If your Office were to hold that the information put forward to date was not sufficient to meet the threshold of the reasonable basis to believe, for example that concise, unsigned witness statements from victims were insufficient, such a finding would have serious implications for future cases as it would risk shifting the burden of carrying out comprehensive investigations from the Office of the Prosecutor to NGOs and other organizations on the ground. The dangers of this are indicated for example by Human Rights Watch, which advises that NGOs seeking to work with the ICC not to take full witness statements and instead provide only a summary of information from victims and witnesses. This is to avoid a situation in which

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<sup>59</sup> See *e.g.* those set out in ECCHR's letter to the OTP dated 29 June 2017, Annex A, at Section II.

<sup>60</sup> Press Summary, Case No. 11502 / 2016 - *SRA v Day, Malik, Crowther and Leigh Day (A Firm)*, published 9 June 2017, available at [http://www.solicitortribunal.org.uk/sites/default/files-sdt/SDT%20Press%20Release%20-%209%20June%202017\\_0.pdf](http://www.solicitortribunal.org.uk/sites/default/files-sdt/SDT%20Press%20Release%20-%209%20June%202017_0.pdf). The final written judgment is due to be published in late September 2017, see Case Update of August 2017, available at <http://www.solicitortribunal.org.uk/news/update-case-no-11502-2016-sra-v-day-malik-crowther-and-leigh-day-firm>.

<sup>61</sup> Ministers ‘undermined law’ over Iraq war crimes allegations, *The Guardian*, 22 July 2017, available at <https://www.theguardian.com/law/2017/jul/22/iraq-war-crimes-ministry-of-defence>; letter accessible here: <http://www.harrietharman.org/ministers-must-not-attack-independent-legal-professionals-the-times>.

<sup>62</sup> ECCHR's letter to the OTP dated 29 June 2017, Annex A, at 2.

NGOs act as “mini-prosecutors” and end up complicating the work of the Prosecutor at the investigation stage.<sup>63</sup>

#### H. Conclusion on the reasonable basis to believe

To recap, the information submitted as part of the 2014 Communication includes detailed witness statements along with official documentation of the victims’ detention and in some case medical and photographic evidence of injuries suffered. The information submitted with the Second Communication contains witness information that is more concise, but still provides the necessary basic information for further scrutiny at the investigation stage. ECCHR notes also that your Office as part of its assessment of the evidence has been able to undertake its own review of case files at PIL’s offices<sup>64</sup> and speak to some of the people involved in gathering the witness accounts as well as to third parties. The information provided, combined with the extensive corroborating material from independent and indeed UK Government sources on the widespread ill-treatment and torture of detainees in Iraq, provides a compelling indication that a large number of crimes within the Court’s jurisdiction have been committed.

It is submitted that this information and material more than fulfill the standard applied by your Office and the Pre-Trial Chamber of a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court has been committed.

In our view, this assessment is – contrary to the MOD’s claims – unaltered by recent developments in the UK. Should there be points in need of clarification, we recall in particular the Chamber’s findings on Comoros, that “[f]acts which are difficult to establish, or which are unclear, or the existence of conflicting accounts, are not valid reasons not to start an investigation but rather call for the opening of such an investigation.”

### **III. Gravity**

The 2014 Communication made submissions addressing the factors relevant for determining gravity under Article 17(1)(d) of the Statute, including on the scale, nature, manner of

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<sup>63</sup> Human Rights Watch, Background Briefing, How National Nongovernmental Organizations Can Work with the Court, available at <https://www.hrw.org/legacy/backgrounder/africa/icc0904/3.htm>.

<sup>64</sup> Office of the Prosecutor, Report of Preliminary Examination Activities (2015), at 10.

commission and impact of the alleged crimes.<sup>65</sup> Specific submissions were also made concerning the group of persons who are likely to be the object of an investigation and that they bear the greatest responsibility for the alleged crimes, including individuals at the highest levels of the UK Army, former Secretaries of State for Defence, and former Ministers for the Service Personnel.<sup>66</sup> Taking into account the information available at this stage, we believe that the gravity threshold required to initiate an investigation in the situation on Iraq is fulfilled in terms of both the quantitative and qualitative factors.

In the 2006 decision not to investigate the situation in Iraq the gravity assessment of the situation set forth by your Office was two-fold. One, the situation on Iraq did not appear to satisfy the specific gravity threshold envisaged in Article 8(1) of the Statute<sup>67</sup>; and two, that the general gravity requirement under Article 53(1)(b) was not met based on a relative quantitative gravity assessment across multiple situations before the ICC.<sup>68</sup>

With respect to the specific gravity threshold under Article 8(1), the 2014 Communication<sup>69</sup> addressed the issue to emphasize that ‘large scale commission of crime’ is not a strict or determinative requirement under Article 8.<sup>70</sup> The legislative history of the provision also corroborates the conclusion that crimes to be committed ‘as part of a plan or policy or as part of a large-scale commission’ are not absolute pre-requisites for war crimes under the Rome

<sup>65</sup> The 2014 communication, *supra* note 1, at 203 – 214.

<sup>66</sup> *Ibid.*, at 209.

<sup>67</sup> OTP Letter to Senders re Iraq of 09 February 2006, at 8

*“For war crimes, a specific gravity threshold is set down in Article 8(1)...provide[s] Statute guidance that the Court is intended to focus on situations meeting these requirements. According to the available information, it did not appear that any of the criteria of Article 8(1) were satisfied.”*

<sup>68</sup> *Ibid.*, with respect to general gravity requirement under Article 53(1)(b), the letter stated:

*“The number of potential victims of crimes within the jurisdiction of the Court in this situation – 4 to 12 victims of wilful killing and a limited number of victims of inhuman treatment – was of a different order than the number of victims found in other situations under investigation or analysis by the Office.”*

<sup>69</sup> The 2014 communication, *supra* note 1, at 126.

<sup>70</sup> Appeals Chamber, Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled —Decision on the Prosecutor’s Application for Warrants of Arrest, article 58, Situation in the Democratic Republic of the Congo, ICC-01/04, 13 July 2006, para. 70. Pre Trial Chamber II, Decision pursuant to article 61 (7)(a) and (b) , Bemba, ICC-01/05-01/08, 15 June 2009, para. 211. The Pre-Trial Chamber stated that this is “not a prerequisite for the Court to exercise jurisdiction over war crimes ...it rather serves as a practical guideline for the Court”. We also note the view that Article 8(1) ICC Statute can be described as “an expedient to be invoked opportunistically rather than a meaningful legal norm.” William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010), at 202. Also that “the OTP went too far when it affirmed that in war crimes ‘a specific gravity threshold’ exists. This statement, if isolated from the rest of the OTP’s reasoning, is simply incorrect. The words ‘in particular’ in Article 8(1) ICC Statute were adopted in order to offer guidance to the OTP regarding the situations and cases it had to prioritize, and not to create an additional threshold” Marco Longobardo, ‘Factors relevant for the assessment of sufficient gravity in the ICC proceedings and the elements of international crimes’, Nov 30, 2016, available at [http://www.qil-qdi.org/wp-content/uploads/2016/11/03\\_ICC-Gravity-Test-\\_LONGOBARDO\\_FIN-2.pdf](http://www.qil-qdi.org/wp-content/uploads/2016/11/03_ICC-Gravity-Test-_LONGOBARDO_FIN-2.pdf), at 34.



Statute.<sup>71</sup> However, even if one were to consider these factors as determining criteria, the 2014 Communication substantively argues that these allegations of war crimes were not just a few isolated incidents in the situation, but rather were committed in a systematic pattern, thereby fulfilling the element of being ‘a part of a plan or policy’.

More importantly, developments after 2014 warrant additional submissions concerning the general gravity requirement under Article 53(1)(b). It has been established that the gravity assessment at this stage requires: (i) an assessment of both quantitative and qualitative factors such as nature, scale and manner of commission of the alleged crimes, as well as their impact on victims; and (ii) an assessment of whether the groups of persons that are likely to form the object of the investigation include those who may bear the greatest responsibility for the alleged crimes committed.<sup>72</sup>

We maintain that the over one thousand victim statements presented to your Office suffice to show that in terms of the quantitative factor the situation meets the sufficient gravity threshold required at this stage. However, even if your Office decides to discount the validity of some of the statements or claims made by Iraqi nationals – which in our view would be erroneous – we submit that having a smaller number of cases would not necessarily impact the assessment of gravity under Article 53(1)(b). The latest developments in the practice of the Court and your Office clearly indicate that the quantitative element of gravity assessment, though important, cannot be the sole criterion in determining the standard of gravity to proceed for an investigation under Article 53(1).

The Pre-Trial Chamber in the Situation of Registered Vessels of Comoros Greece and Cambodia rejected the approach on the quantitative gravity analysis of a situation (as the one

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<sup>71</sup> The US, during the negotiations of the Statute proposed to limit the ICC jurisdiction on war crimes by adding the word “only” for cases of a clear, plan, policy or large scale commission, however, the proposal was rejected to instead have these as a qualifying criteria and not a determinative one. See M. Cottier, ‘Article 8 – War Crimes’, in K. Ambos, O. Triffterer (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2016), 295 at 322.

<sup>72</sup> Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19-Corr paras 60-62; Pre-Trial Chamber III, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire, 15 November 2011, ICC-02/11-14-Corr, paras. 203-205.

Also, Regulation 29(2), Regulations of the Office of the Prosecutor, ICC-BD/05-01-09; OTP, Policy Paper on Preliminary Examinations, ICC-OTP 2013, paras. 9 and 71; Office of the Prosecutor, Policy Paper on Case Selection and Prioritisation, ICC-OTP 2007, paras. 37- 41 (emphasis supplied).

taken in the situation of Iraq) in deciding not to initiate an investigation.<sup>73</sup> The Chamber challenged the conclusion reached by the OTP as follows:

In the view of the Chamber, ten killings, 50-55 injuries, and possibly hundreds of instances of outrages upon personal dignity, or torture or inhuman treatment, which would be the scale of the crimes prosecuted in the potential case(s) arising from the referred situation, in addition to exceeding the number of casualties in actual cases that were previously not only investigated but even prosecuted by the Prosecutor (e.g. the cases against Bahar Idriss Abu Garda and Abdallah Banda), are a compelling indicator of sufficient, and not of insufficient gravity. The factor of scale should have been taken into account by the Prosecutor as militating in favour of sufficient gravity, rather than the opposite, and in failing to reach this conclusion, the Prosecutor committed a material error.<sup>74</sup>

Thus in considering the factor of scale in the gravity threshold assessment at the stage of preliminary examination it is also necessary to take into consideration the potential number of cases arising from the situation after the opening of an investigation.

Furthermore, a mere quantitative assessment of the gravity analysis has also been widely critiqued by academic commentators.<sup>75</sup> One scholar aptly highlights that the attempt to reduce gravity to a quantitative concept – the ‘body count’ approach – “will only convince certain Western audiences horrified by the number of casualties in peripheral African armed conflicts. Worse, it risks being part of a very concrete politics that minimizes the collateral casualties of more sophisticated warfare.”<sup>76</sup>

Moreover, the situation does not need to satisfy a comparative analysis with other situations before the ICC but should only meet the threshold of ‘sufficient gravity’ to justify further action by the Court.<sup>77</sup> Specifically discussing the problems posed by comparative gravity

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<sup>73</sup> OTP Article 53(1) Report, Situation on Registered Vessels of Comoros, Greece and Cambodia, & November 2014, para. 138. “Overall, while the Office regrets and deplores the loss of life and injury, it has to be acknowledged that the total number of victims of the flotilla incident reached relatively limited proportions as compared, generally, to other cases investigated by the Office.”

<sup>74</sup> *Ibid*, para. 26.

<sup>75</sup> William A. Schabas, ‘Prosecutorial Discretion v. Judicial Activism at the International Criminal Court’, (2008) 6 *Journal of international criminal justice* 4, 731-761; Frédéric Mégret, ‘Beyond Gravity: For a Politics of International Criminal Prosecutions’, (2013) *ASIL Annual Meeting Proceedings*, 107. American Society for International Law, p. 430; Ignaz Stegmiller, ‘The Gravity Threshold under the ICC Statute: Gravity Back and Forth in Lubanga and Ntaganda’ (2009) 9 *International Criminal Law Review* 3, 547-565; Susana SáCouto and Cleary Katherine, ‘The gravity threshold of the International Criminal Court’ (2007) *Am. U. Int’l L. Rev.* 23, at 838-839.

<sup>76</sup> Frédéric Mégret, ‘Beyond “Gravity”’: For a Politics of International Criminal Prosecutions’, *supra* note 73, at 430.

<sup>77</sup> Article 17(1)(d) of the Rome Statute; M. deGuzman, ‘Gravity and the Legitimacy of the International Criminal Court’, (2009) 32 *Fordham International law Journal* 1400.

analysis across situations, another scholar has concluded that “the ICC is better off with a case-by-case assessment of the gravity of individual situations, rather than comparative gravity.”<sup>78</sup>

Your Office has also noted that in certain circumstances, a single event of sufficient gravity could warrant investigation by the Office.<sup>79</sup> In the decision not to open investigations in the Situation of Registered Vessels of Comoros Greece and Cambodia, a clarification was added for the action in the situation of Abu Garda stating that “very small - scale episodes might cross the gravity threshold as long as the crimes allegedly committed are ‘violent crimes of exceptionally serious gravity which have serious consequences not only for the victims, but also for the international community.’”<sup>80</sup>

This situation entails not only the severe physical and psychological impact on the victims of detainee abuse, but also the serious implications for the international community flowing from the context in which the abuse occurred – the invasion and subsequent occupation of Iraq in actions ostensibly undertaken to ensure respect for the fundamental rights of the Iraqi people – and the risk, given the UK’s standing in the international community, that its actions could undermine well established international standards including the prohibition against torture.

Taking into account the scale and serious nature of the alleged crimes and the brutal, cruel and degrading manner in which they were committed, the impact of the alleged crimes on the local and international community, along with the fact that the persons who are most likely to be the object of an investigation are those who bear the greatest responsibility for the alleged crimes, we restate our submission that the standard of sufficient gravity has been met.

#### IV. CONCLUSION

Given the extensive information and corroborative evidence available to your Office, we submit that the threshold of a reasonable basis to believe under the Rome Statute has been met as regards crimes committed by UK nationals in the context of the armed conflict in Iraq in the period from March 2003 to July 2009. We agree with the analysis of the Pre-Trial

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<sup>78</sup> Carsten Stahn, ‘Damned If You Do, Damned If You Don’t: Challenges and Critiques of ICC Preliminary Examinations’ (April 3, 2017).

<sup>79</sup> Situation on Registered Vessels of Comoros, Greece, and Cambodia, Article 53(1) Report, para. 144.

<sup>80</sup> *Ibid.*, para. 145.

Chamber that given the nature of a preliminary examination a low threshold must be applied at this stage. To apply a stricter standard would risk denying Iraqi victims of any prospect of a genuine investigation into their mistreatment, and would also create an obstacle to justice in future cases and situations of international crimes.

Recent developments in the UK such as the shutting of IHAT and the broader efforts to avoid any legal scrutiny of crimes committed by UK forces in Iraq make it clear that the UK is unwilling to carry out genuine investigations in this matter, particularly as it relates to the responsibility of senior military and political figures.

In light of this, we reiterate the need for your Office to proceed in the preliminary examination and ultimately request the opening of a formal investigation in this matter.

Sincerely yours,

A handwritten signature in black ink, appearing to read "W. Kaleck".

Wolfgang Kaleck  
ECCHR General Secretary

Annex: Letter from ECCHR to OTP of 29 June 2017