# Never Two Without Three: On the – To Be Reopened – ICC Preliminary Examination in Iraq

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On 1 July 2021 an important request  was submitted to the Office of the Prosecutor of the ICC by the European Center for Constitutional and Human Rights (ECCHR), to seek a review of the Prosecutor's decision, which closed the preliminary examination inthe Situation in Iraq/UK without pursuing an investigation (the Request is accessible here, and its Executive Summary here). The Request was supported by UpRights and filed also in the name of an Iraqi survivor.

The OTP's Final Report on the Situation of 9 December 2020 was already the object of intense debate and critical comments, which will not be specifically addressed in this post. The "bones" of the criticisms were that the decision: (i) contained contradictory findings *vis-à-vis* the final conclusion; (ii) adopted incorrect legal standards in evaluating the admissibility/complementarity threshold under the Statute; (iii) failed to consider the overall political context in the UK; and (iv), was an example of double standards in international justice. See, among others, the critical comments by Kevin Jon Heller, here and here, by Clive Baldwin here, and by Andreas Schüller here. The new Request tries to put flesh on the bones, by articulating in great detail, throughout 82 pages, a number of legal and factual errors that affected the outcome of the OTP's Final Report and by setting out new facts and evidence that warrant the reopening of the preliminary examination.

Procedurally speaking, the submission is unprecedented and is worth of note already for being the first time that victims and civil society organisations representing victims' interests request the Prosecutor to reconsider a decision not to open a *proprio motu* investigation. Indeed, different than situations triggered by a State or UN Security Council Referral, under Articles 13 (a)-(b) and 14 of the Statute, the Rome Statute does not provide victims' representatives and information providers (such as ECCHR, whose Article 15 communication in 2014 had prompted the reopening of the examination) with a direct remedy against the Prosecutor's decision not to pursue a *proprio motu* investigation. Thus, mindful of an apparent gap in the Rome Statute, the Request aims at triggering a *proprio motu* review by the Prosecutor, under Article 15(3) or (6) of the Statute, or a ruling from the Pre-Trial Chamber pursuant to Article 19(3) of the Statute, also requiring a reaction by the Prosecutor.

On the one hand, the Request notes that precluding any remedy to victims and stakeholders that have been in close exchange with the Court over the years of examination would defeat the OTP's commendable public engagement on the Situation. On the other hand, content wise, what justifies the challenge is the importance of the legal issue at stake, namely the interpretation of crucial elements of the complementarity principle, the pillar around which the entire ICC system is designed. As acknowledged by the OTP in the Report, the challenges entailed in the concrete application of Article 17(2) of the Statute and the gaps of the ICC practice in relation to the complementarity assessment are evident. Therefore, judicial review is required in view of the dramatic impact of the adopted complementarity assessment, on the present situation and beyond it, as the overly restrictive approach adopted by the Prosecutor in this situation may have grave consequences for other preliminary examinations and investigations. In light of the above, a new determination on the issue will only reinforce the Court and enhance confidence in the ICC Prosecutor's independence, as the request notes referring also to the strong open letter addressed to the new Prosecutor, Karim Khan, by Amnesty International's Director Agnès Callamard.

With regard to the content of the Request, this is structured around eight legal and factual errors and presentation of new facts and evidence. In particular, it submits that the Prosecutor erred in the interpretation of the admissibility assessment – specifically of the complementarity elements – at the stage of the preliminary examination. Had the correct standard been applied to the complementarity assessment, the Prosecutor would have concluded that the UK authorities were unwilling, under Article 17 of the Statute, to conduct investigations and prosecutions *vis-à-vis* the alleged crimes. Instead of the "reasonable basis to believe" standard, which shall be applied under Article 53(1) of the Statute to each limb of the admissibility assessment, the Request highlights that the Prosecutor adopted a much higher threshold for the complementarity assessment, in particular to determine the UK "unwillingness" "genuinely to prosecute" under Article 17 of the Statute. The adoption of an incorrect and higher standard was the result of the anticipation by the Prosecutor of future, hypothetical proceedings that might have been pursued by the UK authorities, including the concern that UK authorities would seek a deferral of the OTP investigation under Article 18(2) of the Statute. The Prosecutor based the analysis on the assumption that Article 17(2)(a) requires evidence of the "intent to shield" by the domestic authorities, an element that the Office was allegedly not able to substantiate with strong-enough evidence. As a consequence, the Prosecutor concluded that the UK proceedings were not undertaken "for the purpose of shielding the person concerned from criminal responsibility" within the meaning of Article 17(2)(a) of the Statute, failing to give proper weight to crucial elements, such as the filtering criteria set out by the UK High Court, the impact of the Solicitors Disciplinary Tribunal's findings, the proportionality criteria adopted by the Iraq Historical Allegations Team (IHAT) and the Service Police Legacy Investigations (SPLI) as a basis for closing cases of alleged war crimes, as well as allegations of cover-up as reported by the BBC and the Sunday Times.

Another underlying error which is highlighted throughout the Request concerns the downgrading by the Prosecutor of the principles of due process with regard to the interpretation of Article 17(2)(a)-(c) of the Statute (see paras 52-66 of the Request). Pursuant to the chapeau of Article 17(2), due process principles should be regarded as a set of determinative factors when interpreting the "unwillingness" of the State to genuinely conduct proceedings. Contrary to the Prosecutor's contention, a careful reading of the *Al-Senussi* Judgement confirms that violations of due process principles must be used as *objective parameters* to assess and determine a State's "unwillingness", namely whether the proceedings were undertaken for the purpose of shielding, there was an unjustified delay, and/or the proceedings were not conducted independently or impartially. This is further supported by a number of sources, including OTP's policy papers, also quoted in the Request.

The Prosecutor, however, only gave due process principles a mere assisting function in interpreting the elements of Article 17(2)(a)-(c) of the Statute. In this respect the Prosecutor failed to take into proper account the role played by the structural delays in the initial

investigations by the British Royal Military Police, and consequently, failed to conclude the fact that those initial delays irremediably affected all subsequent proceedings conducted by IHAT and SPLI – and is to be attributed precisely to a general "unwillingness" of the UK authorities. The Prosecutor also failed to effectively question the independence and impartiality of domestic proceedings undertaken by the various UK "investigative" bodies, thereby failing to conclude that the proceedings were not conducted independently or impartially within the meaning of Article 17(2)(c) of the Statute. In sum, the Prosecutor failed to consider holistically the totality of conducts at various levels of the UK authorities, thereby failing to assess a larger pattern of shielding which would have led to the conclusion that the State was "unwilling" to carry out genuine proceedings.

The Request further argues that the complementarity assessment, at this early stage of the proceedings, was necessarily flawed because it can only be conducted in the abstract, rather than on the basis of concrete cases. Contrary to the Prosecutor's stated intention, such an abstract analysis ended up being a sort of general review of the domestic mechanisms established by the UK to deal with thousands of allegations of crimes by their troops in Iraq. The problem is that a completely ineffective system of domestic mechanisms aimed at examining thousands of allegations of abuse committed by UK soldiers in Iraq, and which has resulted in in not even a single prosecution in the UK (as remarked by the OTP), now has the ICC's stamp of approval.

Back in 2014, I reflected here on the fact that the ICC Prosecutor would have encountered a possible obstacle in the complementarity principle that could become a ground not to open an uncomfortable investigation. At the same time, however, it was already clear then that, given the systematic character of the abuse, justice required addressing the responsibility of the highest levels, and in particular the command and superior responsibility of British officials for their failure to prevent and punish the commission of torture and other crimes by their soldiers against Iraqi detainees, which had been denied by the British authorities. In fact, through its Article 15 Communication filed in 2014, ECCHR was already asking the Prosecutor to reserve special attention to potential cases of superior/command responsibility, including the cases of Baha Mousa, and of other grave crimes committed at Camp Breadbasket and Camp Stephen, which had been blocked at the domestic level. The Prosecutor however failed to give proper weight to the testimonies from former IHAT investigators that alleged that cases involving superior responsibility were prematurely terminated. The Request now emphasizes the failure to effectively investigate or prosecute cases regarding superior/command responsibility and is providing new facts and evidence concerning the command responsibility of a commanding officer of Black Watch, implicated in a case of grave torture, which is brough to the attention of the Prosecutor for the first time.

As the OTP's Final Report acknowledges, the many Iraqi victims have been deprived of justice in the UK. To avoid that the denial of justice is reinforced and perpetuated by the ICC itself, with very problematic repercussion also on other situations, it is urgent that the new

Prosecutor reconsiders the decision at stake and reopens the preliminary examination for the third time after its premature closing in 2006 and the more recent closing in 2020.