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Policy Choices, Dilemmas and Risks in the ICC's Iraq-UK Preliminary Examination

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1. The Iraq-UK preliminary examination

In May 2014, the Chief Prosecutor of the International Criminal Court ('ICC'), Fatou Bensouda, announced that she had decided to reopen a preliminary examination into war crimes allegedly committed by British soldiers during the Iraq war and occupation.[1] Bensouda's decision was made specifically with reference to evidence being provided to her Office by Public Interest Lawyers ('PIL') – a relatively small law firm based in Birmingham, then led by Phil Shiner – together with the Berlin-based European Center for Constitutional and Human Rights ('ECCHR'), headed by Wolfgang Kaleck.[2]

Bensouda's decision put the United Kingdom ('UK') – an ICC member-state and long-standing supporter of the Court – under scrutiny for a second time. A previous examination into the same situation had been terminated by former Chief Prosecutor Luis Moreno-Ocampo in 2006 on the grounds that the allegations of war crimes by British soldiers in Iraq were not numerous enough to be admissible under the gravity requirement in the ICC Statute.[3] However, that examination was based on much more limited evidence compared to what PIL and the ECCHR have now made available to Bensouda.

The Iraq-UK preliminary examination is of interest for several reasons. For one, this is the first time that the ICC is scrutinizing a major power that is also a State Party. Further, the alleged crimes involve war crimes such as unlawful killings and torture of detainees committed in a major international armed conflict, as opposed to the type of civil war and/or election violence situations which have been the focus of most ICC activity to date. What is more, the existence of judicial processes in the UK addressing the Iraqi claims brings into question how the Office of the Prosecutor ('OTP') approaches the ICC's complementarity regime at this stage.

This brief comments on the dilemmas and risks associated with the policy choices made by the OTP in the Iraq-UK preliminary examination with respect to three key issues. First, this relates to the type of crimes and actors put under scrutiny. Second, this concerns the OTP's approach to key legal standards relevant to a preliminary examination, specifically the "reasonable basis to believe" standard for proceeding with an investigation. Lastly, this concerns ICC prosecutors' approach to the legal processes in the UK which address crimes in Iraq. In so doing, this brief also comments on some of the broader challenges associated with pursuing accountability for crimes committed by major powers.

2. Policy Choices in Preliminary Examinations

The Iraq-UK preliminary examination raises novel questions relating to ICC-State relations, including the options available to – and challenges facing – ICC prosecutors at the preliminary examination stage in situations involving scrutiny of major powers. Whereas ICC prosecutors say they apply the same standards to this preliminary examination as they apply to others, the political implications of examining war crimes allegedly committed by the armed forces of a permanent member of the UN Security Council during a war that has come to be seen as highly controversial quite obviously means that different dynamics are in play in this preliminary examination.

To understand these dynamics, one must appreciate the institutional interests of the Court, and the OTP in particular. Besides promoting accountability for serious crimes under international law, it is also in the OTP's interest to maintain a functional relationship with powerful States, especially those that are generally supportive of the Court. At the same time, having an ongoing examination into the Iraq-UK situation may be seen as useful for countering the narrative that the Court is predisposed to targeting less resourceful countries in the global south, especially in Africa. What is more, to the extent the preliminary examination has a positive impact on the conduct of legal proceedings in the UK relating to the Iraq allegations, this could be portrayed as an example of positive

1 Office of the ICC Prosecutor, "Statement by the ICC Prosecutor: Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq", 13 May 2014 (hereinafter '*13 May 2014 Statement by the ICC Prosecutor*').

2 ECCHR and PIL, "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", 10 January 2014 (hereinafter '*ECCHR and PIL January 2014 communication*').

3 Office of the ICC Prosecutor, "OTP response to communications received concerning Iraq", 9 February 2006.

complementarity 'working', something that has come to be seen as a key policy objective of preliminary examinations.[4] So far, observers have paid only limited attention to understanding how ICC prosecutors may be attempting to balance the various institutional interests of the OTP at the preliminary examination stage, including in situations involving major powers.[5]

At the same time, it is important to keep in mind that the OTP has broad discretion at this stage. Several key issues are not – or only vaguely – regulated in the Statute. Consequently, this is not simply a question of law and statutory interpretation. Beyond that, prosecutors face a series of important policy choices, the outcome of which will have significant ramifications for how the Iraq-UK preliminary examination is conducted, how it proceeds and, importantly, what outcome it will ultimately create, which will be seen by many as suggestive of the future direction and reach of international justice.

Speaking about the OTP's policy *choices* in preliminary examinations, we should recognize that the action and behaviour of other actors – including but not limited to States – may drastically limit the options available to ICC prosecutors. Indeed, the Iraq-UK preliminary examination suggests that prosecutors may frequently find themselves *responding* to developments largely driven by other actors. Such limitations on the OTP's ability to take charge of affairs are clearly more manifest in preliminary examinations involving resourceful States, not only because they can afford to add pressure on the Court but also because they are better equipped to devise other strategies to effectively counter accountability processes, including framing forceful narratives.

3. Actors and Crimes Being Examined

The Iraq-UK preliminary examination relates to war crimes allegedly committed by British soldiers during the Iraq war and subsequent occupation in the period 2003–2008. Unlike most other preliminary examinations, the focus of this examination is limited to crimes allegedly committed by one actor only, namely British service personnel.

The Iraq-UK preliminary examination involves inquiry into two main forms of war crimes, namely detainee abuse (including torture and other forms of ill-treatment, rape and other forms of sexual violence) and unlawful killings.[6] Although the OTP's reports on preliminary examinations address both types of crimes, prosecutors appear to be mainly focusing on the first type of allegations. This may in part be because under international humanitarian law "not every instance of killing necessarily amounts to a crime under the Statute".[7] Further, torture and other forms of ill-treatment of detainees – for which there is in contrast an absolute prohibition – is more likely to be the result of a 'system failure', or even a deliberate policy of the military and/or the political leadership at the time, as alleged by the ECCHR and PIL.[8] Focusing on ill-treatment of detainees will also be more in alignment with perceptions in the public, which now generally condemns abuse of detainees – persons captured, no longer posing an immediate threat and subject to the full control of the detaining authority. In contrast, there will be much less sympathy – at least in Britain – for prosecuting 18-year-old boys for 'pulling the trigger too fast' in the intense pressure and chaos of combat situations. From these perspectives, the decision of the OTP to focus mainly on allegations relating to detainee abuse appears to advance the Court's broader mission.

Yet, decisions concerning what type of actors and crimes to scrutinize in preliminary examinations are not made by the OTP in a vacuum. Rather, such decisions are profoundly influenced by the choices and strategies of other actors. In the Iraq-UK preliminary examination, prosecutors appear to have so far largely limited their analysis of the crime basis to the specific allegations brought by the ECCHR and PIL. This highlights the quite significant role human rights lawyers and NGOs may have, not only in bringing about the opening of a preliminary examination, but also in influencing its directions.

4. The "Reasonable Basis to Believe" Standard

Three years after it was opened, the Iraq-UK preliminary examination remains in 'phase two', meaning that prosecutors are still deciding whether crimes within the Court's jurisdiction were likely committed. This may seem surprising because the evidence submitted to the OTP is quite substantial, involving allegations – and in some cases detailed supporting documentation – relating to torture and other forms of ill-treatment of a total of 1,071 Iraqi detainees and 319 cases of unlawful killings.[9] Several other sources similarly suggest there is a reasonable basis to believe that crimes within the Court's jurisdiction were committed in Iraq.[10] This brings into question whether the ICC prosecutors may be applying too high a threshold for making this determination and hence for proceeding to the next phase of the preliminary examination.

On 1 September 2017, the ECCHR filed an additional submission to the OTP addressing exactly this question. The organization notes that it is "convinced" that the information already provided to the OTP by itself and PIL is sufficient to meet the reasonable basis to believe standard under the Statute.[11] Among other factors, the ECCHR notes that the January 2014 submission provided the OTP with a substantive number of witness statements, further supplemented by a

4 See Office of the ICC Prosecutor, "Policy Paper on Preliminary Examinations", November 2013 (http://www.legal-tools.org/doc/acb906/).

5 See, however, Mark Kersten, "Casting a Larger Shadow: Pre-Meditated Madness, the International Criminal Court, and Preliminary Examinations", draft paper on file with author.

6 Office of the ICC Prosecutor, "2016 Report on Preliminary Examination Activities", 14 November 2016 (hereinafter '*2016 Report on Preliminary Examination Activities*'), paras. 87-97.

7 *Ibid.*, para. 96.

8 See *ECCHR and PIL January 2014 communication.*

9 *2016 Report on Preliminary Examination Activities*, paras. 89, 95.

10 For an overview of these sources, see ECCHR, Letter to Prosecutor Fatou Bensouda (re: Situation Iraq/United Kingdom - Status of preliminary examination), 1 September 2017 (hereinafter '*ECCHR September 2017 submission*'), pp. 10-13.

11 *Ibid.*, p. 6.

subsequent submission by PIL in June 2015 which provided the OTP with information making it possible to "estimate the kind, nature, time, and location of the crimes committed".[12]

As the ECCHR has pointed out, the policy paper of the OTP on preliminary examinations suggests that the standard of "reasonable basis to believe" must be understood to require a relatively low threshold, namely that there is "a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court 'has been or is being committed'.[13] As the ECCHR also mentions, ICC judges have held that "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".[14] Accordingly, the requirements to the crime evidence are low at the preliminary examination stage.

One decision of a Pre-Trial Chamber even went so far as to suggest that if the information available to the OTP at the preliminary examination 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".[15] Whereas it will be difficult – if not outright impossible – to give effect to the latter decision already due to the limited resources of the OTP, that decision raises important questions concerning the scope of the Office's discretion at the preliminary examination stage. To advance the legitimacy of the Court, it is important that this discretion does not appear to be exercised arbitrarily – or even worse, so as to privilege powerful States.

As noted above, in the Iraq-UK preliminary examination, the OTP appears to have largely limited its analysis of crimes in Iraq to the specific allegations and evidence submitted by the ECCHR and PIL. Importantly, ICC prosecutors do not appear to believe they have the powers at this stage to *request* access to certain forms of material, such as video recordings of interrogation sessions, in the possession of British authorities which could provide a clear indication of whether the allegations are credible.[16] This points to a profound circularity in preliminary examinations: whereas a thorough assessment of the allegations cannot easily be made at this stage due to prosecutors' limited investigative powers, prosecutors may at the same time feel restricted to take an examination forward – especially in situations involving powerful States generally supportive of the Court – in the absence of a 'smoking gun'.

To add to these challenges for taking the Iraq-UK preliminary examination forward, ICC prosecutors appear to have been put somewhat 'on the defensive' following the recent closure of PIL and lead lawyer Phil Shiner's admission to counts of misconduct relating to paying Iraqi middlemen to locate clients and subsequent disbarment. While no excuses should be made for Shiner's misconduct, it is important to note that his disbarment followed in the wake of what appears as a deliberate campaign of the British government to discredit lawyers involved in bringing the Iraq allegations and use this as a pretext to challenge relevant accountability processes. With reference to PIL's closure and Shiner's disbarment, the government closed a domestic investigative body (IHAT) in June this year which had been tasked with examining the allegations of crimes in Iraq, and further argues that the ICC's examination should be terminated for the same (and other) reasons.[17] ICC prosecutors have for some time said that they are examining the credibility of the ECCHR and PIL and are expected to comment further on the topic in the soon to be released 2017 report on preliminary examinations.[18] Even assuming that the OTP will differentiate between Shiner's wrongdoing and the credibility of the allegations he and other lawyers have brought, there is a clear risk that the campaign of the British government will negatively impact prosecutors' ability to decide whether there is a basis to take the preliminary examination forward, for example, due to difficulty in liaising with the involved lawyers.

5. The Complementarity Assessment

Another key issue in the Iraq-UK preliminary examination relates to how ICC prosecutors approach the legal processes in the UK that address crimes in Iraq, and hence the utilization of the ICC's complementarity regime at the preliminary examination stage. The understanding of 'best case scenario' within the OTP is likely that the Iraq-UK preliminary examination can be terminated with reference to the existence of a genuine domestic accountability process in the UK. If so, this could bolster the Office's policies on preliminary examinations and positive complementarity, and would at the same time avoid a direct confrontation with a major power and key supporter of the Court.

However, it is also clear that the OTP has certain expectations on domestic accountability processes which may make it difficult to terminate the preliminary examination with reference to the complementarity regime as the situation currently stands. Even if the UK is widely seen as a sophisticated country with a system in place to address war crimes, ICC prosecutors must be aware that there are significant obstacles in the country to prosecuting members of the armed forces for war crimes, especially to the extent this involves senior commanders or civil servants. To conclude the preliminary examination on grounds of complementarity, ICC prosecutors would likely want to see that domestic accountability processes adequately address systemic issues, but we cannot reasonably claim that this has so far been the case. In short, the main challenge for making positive complementarity

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12 *Ibid.*, pp. 8-10.

13 *Ibid.*, p. 6 (citing para. 34 of the policy paper, which in turn cites to the standards set by Pre-Trial Chamber II in its authorisation of an investigation into the Kenyan situation (http://www.legal-tools.org/doc/f0caaf/)).

14 *Ibid.*, p. 7 (citing the standards set by Pre-Trial Chamber I in its decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation (http://www.legal-tools.org/doc/2f876c/)).

15 *Ibid.* (emphasis added).

16 On the nature and scope of such video recordings, see further *ECCHR and PIL January 2014 communication*, pp. 110-112.

17 See further Thomas Obel Hansen, 'In Pursuit of Accountability for War Crimes in Iraq', *Global Politics*, 14 September 2017.

18 See *2016 Report on Preliminary Examination Activities*, para. 105.

work in this situation is not 'ability' but 'willingness'.

At the same time, ICC prosecutors must be aware that moving ahead with requesting the opening of an investigation with reference to 'unwillingness' (or 'inactivity') would be extremely sensitive, especially if this determination is made on the basis that existing domestic proceedings fail to pursue sufficiently senior people. Proceeding with an investigation on the basis of unwillingness where some form of domestic accountability process is in place would be a delicate matter in *any* situation. However, the OTP is likely to be particularly careful judging the quality of judicial processes in the UK due to a general understanding that the country's legal system is robust. ICC prosecutors are probably also aware that British authorities have significantly more resources at their disposal – both financial and personnel – compared to what the OTP has allocated to this preliminary examination and what it would be able to apply to an investigation, should one be opened. This suggests that preliminary examinations are likely to proceed quite differently in situations involving States with significant resources and strong legal systems.

One key question in this regard is whether ICC prosecutors will look at the government's recent decision to close IHAT and replace it with a much more limited investigation by the service police as indicating unwillingness, as the ECCHR suggests it should in its September 2017 submission.[19] Even if questions relating to admissibility are formally examined only in the so-called phase three of a preliminary examination, the OTP has stated that it had received and was considering information on relevant national proceedings conducted by the UK authorities, emphasizing that it was "in particular mindful that domestic proceedings involving a judicial review of [IHAT] activities are taking place in the UK".[20]

The OTP has not made any public statement on the decision of the British government to close IHAT, but it is expected to comment on the matter in the forthcoming report on preliminary examinations. In so doing, prosecutors would benefit from referring to the decision-making process in the UK surrounding IHAT's closure. Whereas Britain's attorney general argued that closing IHAT was not "a risk worth taking" in light of the ICC's intervention, the Commons Defence Sub-Committee had a different view and recommended that IHAT be closed, in part because it was unconvinced that the ICC would "commit to investigate such a large case load which is based, to a great extent on discredited evidence".[21]

[19] *ECCHR September 2017 submission*, pp. 3-4.

[20] *2016 Report on Preliminary Examination Activities*, para. 106.

[21] Commons defence sub-committee, "Who guards the guardians? MoD support for former and serving personnel", 9 February 2017.

6. Options for Promoting Accountability in the Face of Major Power Resistance?

Arguably, the closure of IHAT demonstrates a broader resistance among key players in the UK to any legal process that puts members of the country's armed forces under scrutiny. As Prime Minister Theresa May recently noted: "We will 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".[22] It seems that British authorities have come to perceive the political costs associated with keeping alive domestic legal processes relating to the Iraq claims as outweighing the risk that an ICC investigation will be opened.

What options do ICC prosecutors have to convince them otherwise? While investigating war crimes allegedly committed by the armed forces of a major power will inevitably meet significant challenges, the OTP will benefit from showing its commitment to doing what the British authorities seem to have failed to do themselves. It is only by presenting a credible threat to investigate alleged systemic crimes that the outcome of British authorities' cost-benefit analysis could change. For this to happen, ICC prosecutors need to carefully consider what should be understood by a "reasonable basis" to believe that crimes were committed, and whether statements by British officials may be taken to suggest 'unwillingness'. The fact that the OTP now seeks to move to investigation in the Afghanistan situation, should not be a factor in these considerations.

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[22] As quoted in Andrew Williams, "A conspiracy cooked up by 'activist left-wing human rights' lawyers?", *OpenDemocracy*, 14 November 2016.

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