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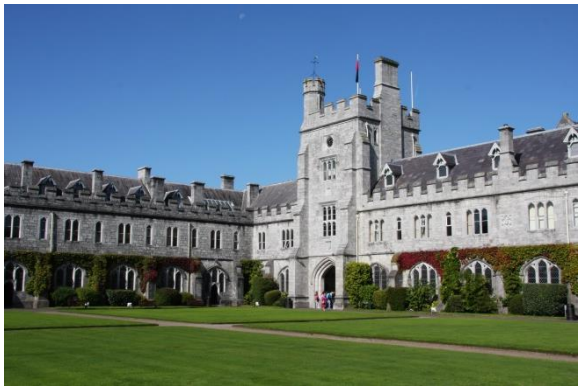

Legal Research Series

Working Paper No. 14

Human Rights vs Complementarity: the Iraq war, the UK, & the International Criminal Court

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August 2021

CCJHR

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HUMAN RIGHTS vs COMPLEMENTARITY: THE IRAQ WAR, THE UK, AND THE INTERNATIONAL CRIMINAL COURT

Giovanni Chiarini*

Abstract:

On 20th March 2003 a US-led coalition, which included the UK, invaded Iraq initiating an international armed conflict. By 7th April 2003, UK forces had occupied the city of Basra and surrounding areas. Nearly two decades later the role of the UK armed forces in Iraq is still under the scrutiny of the International Criminal Court. Incidents arising out of the UK occupation of southern Iraq were submitted to the Office of the Prosecutor (OTP or Office) by those who believed members of the UK forces committed war crimes within the Court's jurisdiction. On 9th December 2020, the ICC Prosecutor published the Final Report on the "Situation in Iraq/UK", concerning crimes potentially committed by the UK armed forces, classified as war crimes within the jurisdiction of the Court. Due to the principle of complementarity, the OTP closed the preliminary examination without seeking authorisation to initiate an investigation. This case could be considered as a milestone in the evolution of the concept of complementarity in international criminal law. The deep analysis of the national proceedings, in terms of the willingness of the competent UK authorities to carry out the relevant investigations or prosecutions under article 17(2), is a trailblazer of the so-called complementarity assessment. The principles, as well as the methodology adopted in the Iraq/UK Final Report, represents a fundamental step forward, that will influence the ICC Prosecutor on future cases involving questions of pre-existing national legal proceedings and the whole process of complementarity evaluations.

Key words: complementarity, Iraq war, admissibility, jurisdiction, International Criminal Court

A. INTRODUCTION

On 20th March 2003 a US-led coalition, which included the UK, invaded Iraqi initiating an international armed conflict. By 7th April 2003, UK forces had occupied the city of Basra and surrounding areas. Nearly two decades later the role of UK armed forces in Iraq is still under the scrutiny of the International Criminal Court (ICC). Incidents arising out of the UK occupation of southern Iraq were submitted to the Office of the Prosecutor (OTP or Office) by those who believed members of the UK forces had committed war crimes within the Court's jurisdiction. This 'situation' has long been under the scrutiny of the ICC. As early as 2004 the Office of the Prosecutor received communications from individuals and NGO's, as Amnesty International and Human Rights Watch, regarding the launching of military operations and the resulting human loss in Iraq, and therefore a preliminary examination into Iraq/UK situation was opened. On 9th February 2006, the former

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ICC Prosecutor Luis Moreno-Ocampo, after having analysed over 240 communications, information and divergent sources documentation, in accordance with the *proprio motu* powers under Article 15 of the ICC Rome Statute, announced the closure of the preliminary examination into the Iraq/UK situation. As Moreno-Ocampo explained in his letter to these groups,[2] the reasoning for the closure was that the required "gravity" threshold of Article 17 of the Rome Statute was not met, since isolated war crimes with a small-scale number of victims are not sufficiently grave to be admissible under the ICC statutory law.[3]

Nonetheless, on 10th January 2014, the OTP received a new communication from the European Centre for Constitutional and Human Rights together with the NGO Public Interest Lawyers, entitled "Responsibility of Officials of the United Kingdom for War Crimes Involving Systematic Detainee Abuse in Iraq from 2003-2008."[4] In response, on 13th May 2014, Moreno-Ocampo's successor, Fatou Bensouda, re-opened the preliminary examination.[5] Since then, as highlighted in the Final Report (hereinafter, also 'report'),[6] the OTP has received a total of 236 communications or additional submissions pursuant to Article 15 of the Rome Statute. The hopes of the advocacy groups that this would lead to a different outcome did not, however, materialise. On 9th December 2020, Bensouda decided to close the preliminary examination for the second time, the reasons for which are comprehensively explained in her report.[7]

This paper will consider four procedural aspects of ICC practice highlighted by the Iraq/UK inquiry and how this inquiry highlights the critical importance of the principle of complementarity. Specifically, it will include: 1) a brief account on the preliminary examination phase; 2) the alleged war crimes and the issues of jurisdiction; 3) issues of admissibility; and 4) the question of complementarity in the light of UK's military and national investigations.

[2] ICC Office of The Prosecutor, *Letter to Senders of Luis Moreno-Ocampo* (The Hague, 9 February 2006). Available at: www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf (last accessed: 3 August 2021).

[3] Ibid, para. 8: "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. It is worth bearing in mind that the OTP is currently investigating three situations involving long-running conflicts in Northern Uganda, the Democratic Republic of Congo and Darfur. Each of the three situations under investigation involves thousands of wilful killings as well as intentional and large-scale sexual violence and abductions. Collectively, they have resulted in the displacement of more than 5 million people."

[4] ECCHR & 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). Available at: www.ecchr.eu/fileadmin/Juristische_Dokumente/January_2014_Communication_by_ECCHR_and_PIL_to_ICC_OTP_re_Iraq_UK__public_version_.pdf (last accessed: 3 August 2021).

[5] ICC Office of The Prosecutor, *Statement* (13 May 2014). Available at: www.icc-cpi.int/Pages/item.aspx?name=otp-statement-iraq-13-05-2014 (last accessed: 3 August 2021).

[6] ICC Office of The Prosecutor, *Situation in Iraq/UK*, *Final Report* (09 December 2020), para.14. Available at: www.icc-cpi.int/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf (last accessed: 3 August 2021).

[7] ICC Office of The Prosecutor, *Statement* (9 December 2020). Available at: www.icc-cpi.int/Pages/item.aspx?name=201209-otp-statement-iraq-uk (last accessed: 3 August 2021).

B. A BRIEF ACCOUNT OF THE FOUR-PHASE PRELIMINARY EXAMINATION

It is important to note from the outset that a preliminary examination is not an investigation,[8] although both phases could be considered as "inherently connected."[9] A preliminary examination is a legalistic process,[10] that "serves as a bridge between the documentation of human rights violations and criminal investigation,"[11] but which is also wrapped by "magic, mystery and mayhem."[12] It has been defined as an "amorphous status,"[13] a kind of "pre-investigative process,"[14] or – as stated by the OTP itself – a "pre-investigative phase,"[15] and a "core activity"[16] of the Office of the Prosecutor.

At the preliminary examination stage,[17] as highlighted in the OTP's Policy Paper on Preliminary Examination,[18] (hereinafter 'Policy Paper' or 'Paper'), the OTP "does not enjoy investigative powers, other than for the purpose of receiving testimony at the seat of the Court and cannot invoke the forms of cooperation specified in Part 9 of the Statute from States." Hence, a preliminary examination is essentially a phase of evaluation of the information available in order to understand if there is a "reasonable basis"[19] to proceed with an investigation. Although the Prosecutor has a formal "legal duty"[20] to proceed, in the essence their role is based on discretion as well as political considerations.[21]

A preliminary examination may be initiated by the OTP taking into account any information on crimes within the jurisdiction of the Court. Only crimes enumerated within these broad categories may be considered,

[8] See Morten Bergsmo, Jelene Pejic & Dan Zhu, 'Article 15', in Kai Ambos & Otto Triffterer (eds), *The Rome Statute of the International Criminal Court. A Commentary* (C. H. Beck-Hart-Nomos, 2015) 730.

[9] Carsten Stahn, 'From Preliminary Examination to Investigation: Rethinking the Connection', in Xabier Agirre, Morten Bergsmo, Simon De Smet & Carsten Stahn (eds), *Quality Control in Criminal Investigation* (TOAEP 2020), 38.

[10] Matilde E. Gawronski, 'The Legalistic Function of Preliminary Examinations: Quality Control as a Two-Way Street', in Morten Bergsmo & Carsten Stahn (eds), *Quality Control in Preliminary Examination*, vol 1 (TOAEP 2018), 179, 222.

[11] Carsten Stahn, 'Damned If You Do, Damned If You Don't. Challenges and Critiques of Preliminary Examinations at the ICC' (2017) 15 *Journal of International Criminal Justice* 416.

[12] Carsten Stahn, Morten Bergsmo & Chan Icarus, 'On the Magic, Mystery and Mayhem of Preliminary Examinations', in Bergsmo & Stahn (n.10) 1, 32.

[13] Gregory S. Gordon, 'Reconceptualizing the Birth of the International Criminal Case: Creating an Office of the Examining Magistrate', in Morten Bergsmo & Carsten Stahn (eds), *Quality Control in Preliminary Examination*, vol 2 (TOAEP 2018), 255.

[14] Sara Wharton & Rosemary Grey, 'The Full Picture: Preliminary Examinations at the International Criminal Court' (2018) 56 *Canadian Yearbook of International Law* 3.

[15] ICC Office of the Prosecutor, *Annex to the 'Paper on Some Policy Issues before the Office of the Prosecutor: Referrals and Communications* (2003*)* 4.

[16] ICC Office of the Prosecutor, *OTP Strategic Plan 2016-2018* (2018), para.55.

[17] See, also, Asaf Lubin, 'Politics, Power Dynamics, and the Limits of Existing Self-Regulation and Oversight in ICC Preliminary Examinations', in Bergsmo & Stahn (n.13) 85.

[18] ICC Office of the Prosecutor, *Policy Paper on Preliminary Examination* (2013), para.85. Available at: www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf (last accessed: 3 August 2021).

[19] David Bosco, 'Symposium On The Rome Statute At Twenty. Putting The Prosecutor On A Clock? Responding To Variance In The Length Of Preliminary Examinations' (2018) 112 *American Journal of International Law* 158, observed: "One of the unique challenges that the International Criminal Court's (ICC's) Office of the Prosecutor (OTP) faces is deciding when and where to launch investigations." On the standard of proof, see Matthew E. Cross, 'The Standard of Proof in Preliminary Examinations', in Bergsmo & Stahn (n.13) 213, 253.

[20] Policy Paper, para.2: "If the Office is satisfied that all the criteria established by the Statute for this purpose are fulfilled, it has a legal duty to open an investigation into the situation." Moreover, see *Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation (ICC-01/13), Pre-Trial Chamber I* (16 July 2015), para.13. Available at: www.icc-cpi.int/CourtRecords/CR2015_13139.PDF (last accessed: 3 August 2021).

[21] On this point, Alexander Heinze & Shannon Fyfe, 'Prosecutorial Ethics and Preliminary Examinations at the ICC', in Bergsmo & Stahn (n.13) 1: "We argue that the influence of political considerations is most apparent in prosecutorial discretion exercised during the preliminary examination phase."

thereby limiting the jurisdiction of the Court to only the most serious crimes of concern to the international community as a whole. These crimes are summarised in Article 5 of the Rome Statute, and further enumerated in the Statute and the Elements of Crimes, and include: genocide (Art. 6); crimes against humanity (Art. 7); war crimes (Art. 8); and the crime of aggression (art. 8 bis). As indicated in an OTP Policy Paper (an essential document reflecting an internal policy of the OTP), the Office of the Prosecutor may receive information on crimes from multiple sources: "a) information sent by individuals or groups, States, intergovernmental or non-governmental organisations; (b) a referral from a State Party or the Security Council; or (c) a declaration accepting the exercise of jurisdiction by the Court pursuant to article 12(3) lodged by a State which is not a Party to the Statute."[22] But such communications do not automatically lead to the start of an investigation.[23]

To initiate an investigation, the Prosecutor needs to submit to the Pre-Trial Chamber a request for authorisation together with any supporting material collected.[24] Pursuant to articles 15(3) and 53(1), the standard proof for requesting this authorisation is a "reasonable basis." Any such request by the OTP should be inspired – at least in theory – by the principles of independence, impartiality and objectivity. First, according to article 42(1), the OTP "act[s] independently as a separate organ of the Court," and pursuant to Regulation 13 of the Regulations of the OTP, "the Prosecutor shall ensure that the Office and its members maintain their full independence and do not seek or act on instructions from any external source." Second, impartiality is implicitly reflected in article 21(3), which states that the application and interpretation of law must be "without any adverse distinction founded on grounds such as gender [...], age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status." Third, in accordance with article 54(1), the OTP has a duty to objectively assess both inculpatory *and* exculpatory information equally with a singular focus of seeking the truth related to any incident implicated by a communication. Moreover, as noted in the Policy Paper, the OTP should "ensure that, in the interests of fairness, objectivity and thoroughness, all relevant parties are given the opportunity to provide information to the Office."[25] There is no temporal limit for the preliminary examination, and the Prosecutor must continue the examination "until the information provides clarity on whether or not a reasonable basis for an investigation exists."[26]

If, and only if, the OTP assesses a situation as necessitating the more formal preliminary examination, the OTP follows a so-called "statutory-based approach."[27] This requires the OTP to ascertain and affirm the following fundamental requirements for triggering the examination: jurisdiction (*ratione materiae, ratione temporis, ratione personae; ratione loci*); admissibility (comports with "complementarity" and "gravity"); and

[22] OTP, *Policy Paper* (n.18) para.4.

[23] For a comparison on the investigation stage, see Hanna Kuczyńska, *The Accusation Model Before the International Criminal Court. Study of Convergence of Criminal Justice Systems* (Springer 2015), 61, 122. For a comparison between the U.S. system, see Franklin D. Rosenblatt, 'Preliminary Examination in the United States Military: Quality Control and Reform', in Bergsmo & Stahn (n.10) 75, 99. For an historical view, G. Turone, 'Powers and Duties of the Prosecutor', in Antonio Cassese, Paola Gaeta & J.R.W.D. Jones, *The Rome Statute of the International Criminal Court: A Commentary,* vol 2 (OUP 2002) 1143, 1155.

[24] On the Pre-Trial Chamber power's, see *Decision on the 'Request for review of the Prosecutor's decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar's Decision of 25 April 2014'*, paras.7-8. Available at: www.icc-cpi.int/CourtRecords/CR2014_07766.PDF (last accessed: 3 August 2021). Furthermore, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya* (31 March 2010), para.21. Available at: www.icc-cpi.int/pages/record.aspx?uri=1051647 (last accessed: 3 August 2021).

[25] OTP, *Policy Paper* (n.18) para.33.

[26] Ibid, para.90. For a critical approach, see Anni Pues, 'Towards the "Golden Hour"? A Critical Exploration of the Length of Preliminary Examinations' (2017) 15 *Journal of International Criminal Justice* 436: "The only visible element is the huge disparity in the length of preliminary examinations."

[27] OTP, *Policy Paper* (n.18) para.77.

the "interests of justice." In practice this means that the path from initial communication to preliminary examination to formal investigation is divided into four phases:[28]

- **Phase 1:** the initial assessment of all information related to potential crimes within the Court's jurisdiction implicated by any communication is submitted pursuant to article 15 in order to analyse and verify the gravity of the alleged crime and filter out information on crimes that are outside the jurisdiction of the Court or a *ne bis in idem.*[29]
- **Phase 2:** the formal commencement of a preliminary examination. This focuses on the "preconditions to the exercise of jurisdiction" contained in article 12. It is an assessment of the crimes allegedly committed, with a view to identifying potential cases falling within the jurisdiction of the ICC.
- **Phase 3:** Assessing the admissibility of potential cases in terms of "complementarity" and "gravity" pursuant to article 17.
- **Phase 4:** Consideration of whether the "interests of justice" – a quasi-juridical and malleable concept contained in article 53(1)(c) – necessitate the request to initiate a formal investigation.[30]

Phase 3 was by any account the most important step in the case of the Iraq/UK communications, not only because it is the step where the effort to subject UK personnel to international criminal jurisdiction fell short, but also because of the different justifications invoked by two different ICC Prosecutors to decline to initiate such proceedings. While in 2004 the former Prosecutor Luis Moreno-Ocampo closed the preliminary examination due to the lack of "gravity," his successor Fatou Bensouda took the same action in 2020 due to considerations of "complementarity." This highlights an emerging reality of the path from communication to ICC investigation: phase 3 of the process will often be the proverbial "procedural key" to assessing when a communication evolves into an ICC prosecution.

C. THE ALLEGED WAR CRIOMES AND THE ISSUES OF JURISDICTION

The detailed history of the Iraq/UK situation before the ICC is comprehensively documented in the Final Report published by the OTP on 9th December 2020. Based on that Report, the following issues of jurisdiction, *ratione materiae*; *ratione temporis*; *ratione personae*; and *ratione loci*, are important to summarise.

- Jurisdiction *ratione materiae:* the Prosecutor indicated that jurisdiction *ratione materiae* imposed no impediment to seeking an investigation.[31] Specifically, she concluded that:

[28] Ibid, para.78-92.

[29] See Amy Khojasteh, 'The Pre-Preliminary Examination Stage: Theory and Practice of the OTP's Phase 1 Activities', in Bergsmo & Stahn (n.10) 223-256.

[30] On the interests of justice, see Maria Varaki, 'Revisiting the "Interests of Justice" Policy Paper' (2017) 15 *Journal of International Criminal Justice* 455, 470; Bartłomiej Krzan, 'International Criminal Court Facing the Peace vs. Justice Dilemma' (2016) 2 *International Comparative Jurisprudence* 81, 88; T. De Souza Dias, '"Interests of Justice": Defining the scope of Prosecutorial discretion in Article 53(1)(c) and (2)(c) of the Rome Statute of the International Criminal Court' (2017) 30 *Leiden Journal of International Law* 731, 751. For the jurisprudence, see Appeals Chamber, *"Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan"* (5 March 2021) paras.35-42. Available at: www.legal-tools.org/doc/x7kl12/pdf (last accessed: 3 August 2021). See also, *Corrigendum to "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), paras.207-212. Availale at: www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/11-14-Corr (last accessed: 3 August 2021)

[31] OTP, *Final Report* (n.6) paras.2, 14-21, 46-53, 75-114.

> "[…] there is a reasonable basis to believe that from April 2003 through September 2003 members of UK armed forces in Iraq committed the war crime of willful killing/murder pursuant to article 8(2)(a)(i) or article 8(2)(c)(i), at a minimum, against seven persons in their custody. The information available provides a reasonable basis to believe that from 20 March 2003 through 28 July 2009 members of UK armed forces committed the war crime of torture and inhuman/cruel treatment (article 8(2)(a)(ii) or article 8(2)(c)(i)); and the war crime of outrages upon personal dignity (article 8(2)(b)(xxi) or article 8(2)(c)(ii)) against at least 54 persons in their custody. The information available further provides a reasonable basis to believe that members of UK armed forces committed the war crime of rape and/or other forms of sexual violence article 8(2)(b)(xxii) or article 8(2)(e)(vi), at a minimum, against the seven victims, while they were detained at Camp Breadbasket in May 2003."

The Prosecutor reached a similar conclusion in respect to jurisdiction *ratione temporis*. The UK had deposited its instrument of ratification to the Rome Statute on 4th October 2001, therefore the ICC may exercise its jurisdiction from 1st July 2002 onwards.[32] Nor did jurisdiction *ratione personae* present any impediment to jurisdiction. Members of UK armed forces are citizens of UK.

With respect to jurisdiction *ratione loci*, it is important to highlight that since Iraq is not a State Party to the Rome Statute – and furthermore, Iraq has not lodged a declaration under article 12(3) accepting the exercise of jurisdiction – not all the alleged crimes occurring on the territory of Iraq could properly be examined. Instead, only those involving UK members fell within the proper scope of the OTPs assessment.[33] In other words, because the ICC does not have territorial jurisdiction in Iraq on the basis of article 12(2)(a), the preliminary examination had to be "necessarily limited" to the conduct of nationals of States Parties in Iraq, which is in this case was the UK, with respect to article 12(2)(b).

Based on these considerations, there were no jurisdictional impediments to requesting an investigation into the Iraq/UK situation, except the limitation due to the lack of membership of Iraq to the Rome Statute. The 'key' to understanding the decision of both Prosecutors is therefore not an abstract understanding of the Court's jurisdiction, but the equally important consideration of admissibility.

D. ISSUES OF ADMISSIBILITY

As indicated in article 53(1)(b) of the Statute (applied via rule 48 of the Rules of Procedure and Evidence ("Rules")), in determining whether there is a "reasonable basis to proceed" to an investigation the Prosecutor shall consider whether "the case is or would be admissible under article 17." The admissibility considerations set out in article 17 of the Rome Statute are: "gravity" pursuant to article 17(1)(d), and "complementarity" pursuant to article 17(1)(a)-(c).

[32] Ibid, paras.69-74.
[33] Ibid, paras.35-68.

Gravity. The "gravity" assessment[34] was made by an evaluation of the following criteria, all of which satisfied the Prosecutor that further action was justified:[35]

A. *Scale of the crimes:* the Iraqi detainees concerned were subjected to "forms of abuse with varying levels of severity,"[36] therefore the "scale of crimes" was demonstrated.
B. *Nature of the crimes:* crimes that were serious "by their very nature" were allegedly committed against persons under custody.[37] The Prosecutor recalled the Torture Convention[38] and the principles contained in the ICTY Appeals Chamber judgment (*Prosecutor v. Prlić et al, IT-04-74-A, 29 November 2017*),[39] which characterised internment of civilians as one of the "most severe measures that may be inflicted on protected persons" under Geneva Convention IV,[40] "subject to strict rules."[41]
C. *Manner of commission*: The Prosecutor noted that the manner in which these crimes are alleged to have been committed "appears to have been particularly cruel, prolonged and severe" and constituted "serious and gratuitous violence."[42]
D. *Impact*: The Prosecutor concluded that the alleged crimes appeared to have had "severe short-term and long-term impact on the physical and mental health of detainees, including permanent physical injuries, such as bodily scars from cuttings and beatings, fractured bones and teeth, chronic bodily pain, and the inability to engage in sexual activity and/or have children."[43]

Having considered the scale, nature, manner of commission, and impact, the Prosecutor concluded that the crimes set out in the report were sufficiently grave to justify further action by the OTP. Thus, the outcome of the OTP's second assessment highlights the importance of the second stage of the admissibility procedures, and one which State Parties to the Rome Statute expected would be a critical check on the exercise of ICC jurisdiction, complementarity.

Complementarity. The limiting principle of complementarity is contained in paragraph 10 of the Rome Statute Preamble, as well as in articles 1 and 17(1)(a)-(c). This principle is a cornerstone in the Rome Statute,[44] and seems to permeate its entire structure of the ICC and is central to the intended role of the Court.[45]

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[34] On the gravity, see Susana SaCouto & Katherine Cleary, 'The Gravity Threshold of the International Criminal Court' (2007) 3(5) *American University International Law Review* 807, 854; Margaret M. deGuzman, 'How Serious are International Crimes? The Gravity Problem in International Criminal Law' (2012) 51(18) *Columbia Journal of Transnational Law* 17, 68; Margaret M. deGuzman, 'Gravity and the Legitimacy of the International Criminal Court' (2008) 32(5) *Fordham International Law Journal* 1400, 1465; Ghazia Popalzai & Hiba Thobani, 'The Complexities of the Gravity Threshold in the International Criminal Court: A Practical Necessity or an Insidious Pitfall?' (2017) 20(1) *Max Planck Yearbook of United Nations Law Online* 150, 169.

[35] OTP, *Final Report* (n.6) paras.119-127.

[36] Ibid, paras.128-133.

[37] Ibid, paras.134-139.

[38] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (24 January 2008). On the crime of torture, see William A. Schabas, 'The Crime of Torture and the International Criminal Tribunals' (2006) 37(2) *Case Western Reserve Journal of International Law* 349, 364.

[39] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Prlić et al, IT-04-74-A* (29 November 2017). Available at: www.legal-tools.org/doc/941285/pdf (last accessed: 3 August 2021).

[40] Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (12 August 1949).

[41] OTP, *Final Report* (n.6) para.514.

[42] Ibid, paras.140-144.

[43] Ibid, paras.145-148.

[44] Jann K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions,* (OUP 2008) 3. See also, Carsten Stahn, 'Complementarity: a Tale of Two Notions' (2007) 19 *Criminal Law Forum* 89.

[45] See Fausto Pocar & Magali Maystre, 'The Principle of Complementarity: A Means Towards a More Pragmatic Enforcement of the Goal Pursued by Universal Jurisdiction?' in Morten Bergsmo (ed) *Complementarity and the Exercise*

Pursuant to the Rome Statute, ICC jurisdiction is never primary, but always only complementary to national criminal jurisdiction.[46] Consequently, pursuant to article 17, a case before the ICC is inadmissible whenever: (a) the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; or (c) the person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20(3). This latter is essentially the *ne bis in idem* provision of the Rome Statute.

Following the ICC case-law, in considering whether a case is inadmissible under article 17(1)(a) and (b) of the Statute, the initial questions to ask are: (1) whether there are ongoing investigations or prosecutions; or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second half of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. For the ICC, "to do otherwise would be to put the cart before the horse."[47] It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so)[48] renders a case admissible before the Court, subject to article 17(1)(d) of the Statute.

E. WHY THE IRAQ/UK CASE IS A STEP AHEAD OF THE COMPLEMENTARITY ASSESSMENT

It is noteworthy that in the assessment of initial communications related to allegation of crimes that certainly fell within the jurisdiction of the ICC, the Prosecutor gave ample attention to the important limiting consideration of complementarity.[49] Even more noteworthy is the fact that this Iraq/UK assessment was the first time in the OTP's history that a State's potential unwillingness to pursue national criminal prosecution was the primary focus of the Office's complementarity assessment. The Prosecutor engaged in a comparative

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of Universal Jurisdiction for Core International Crimes (TOAEP 2010) 247, 301; Gregory S. Gordon, 'Complementarity and Alternative Justice' (2009) 88 *Oregon Law Review* 101, 182; Linda E. Carter, 'The Principle of Complementarity and the International Criminal Court: The Role of *Ne Bis in Idem*' (2010) 8(1) *Santa Clara Journal of International Law* 165, 198; Carsten Stahn, *Taking Complementarity Seriously*, in Carsten Stahn & Mohamed M. El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (CUP 2011) 233, 282; Kevin Jon Heller, 'A Sentence-Based Theory of Complementarity' (2012) 53(1) *Harvard International Law Journal* 86, 132.

[46] Antonio Cassese in 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) *European Journal of International Law* 158 stated: "To have provided for this sort of complementarity is in many respects a positive step. […] First of all, those national institutions are in the best position to do justice, for they normally constitute the forum conveniens, where both the evidence and the alleged culprit are to be found. Secondly, under international law, national or territorial states have the right to prosecute and try international crimes, and often even a duty to do so. Thirdly, national jurisdiction over those crimes is normally very broad, and embraces even lesser international crimes, such as sporadic and isolated crimes, which do not make up, nor are part of, a pattern of criminal behaviour."

[47] *Situation in The Democratic Republic of the Congo, The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case*, ICC Appeals Chamber (25 September 2009) para.78. Available at: www.legal-tools.org/doc/ba82b5/pdf/ (last accessed: 3 August 2021).

[48] As the former ICC Prosecutor Luis Moreno-Ocampo observed, in *Ceremony for the Solemn Undertaking of the Chief Prosecutor* (16 June 2003), 3*:* "As a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success." Available at: www.icc-cpi.int/nr/rdonlyres/d7572226-264a-4b6b-85e3-2673648b4896/143585/030616_moreno_ocampo_english.pdf (last accessed: 3 August 2021).

[49] OTP, *Final Report* (n.6) paras.149-491.

analysis in order to implement the mandate of article 17, essentially dividing the analysis into two parts following the so-called "complementarity test" inherited from a blend of the jurisprudence of the ICC derived from the cases of Libya,[50] Afghanistan,[51] and the Democratic Republic of Congo.[52] These two steps are:

1. Verification of whether national authorities are active or inactive in relation to the same case.
2. If they are not active, assessment of whether this inactivity is the result of unwillingness or inability of the authorities to pursue a credible investigation and prosecution of the offences.

In her 'first step' assessment, the Prosecutor analysed the state of UK enquiries,[53] investigations and prosecutions of the alleged crimes. Her report on this step is divided into many parts addressing, *inter alia*:

- *Institutional Mechanism:* a study of the military-institutional framework of the UK, passing through the Royal Military Police ('RMP'), the Special Investigations Branch ('SIB') and the independent Service Prosecuting Authority ('SPA').[54]
- *Iraq Historic Allegations Team*: a study of the so-called IHAT, an institution created with the mandate to investigate cases of alleged crimes in Iraq committed by UK armed forces. The creation of IHAT was necessary to discharge the implicit duty to investigate set out in sections 116 and 113 of the Armed Forces Act 2006,[55] as well as the procedural duty under articles 2 and 3 of the European Convention of Human Rights. IHAT was divided into various investigative pods, overseen by a Senior Investigating Officer, and supported by specialised teams such as the 'Intelligence Cell' and the 'Major Incident Room.' IHAT received more than 3,600 allegations, of which 2,367 were ultimately closed. Of those 2,367 closed allegations, 1,667 were dismissed at the initial assessment stage, 661 were dismissed following pre-investigation case assessment, and 39 were discontinued at the investigation stage.[56]
- *Service Policy Legacy Investigations (SPLI):* This institution replaced the IHAT in 2017. The SPLI is composed of service (army, naval and air force) police personnel and headed by a senior Royal Navy Police Officer. As of its last quarterly update of 1st July 2020, SPLI reported that it had received 1287 allegations: 1260 inherited from IHAT and an additional 27 allegations.[57]
- *Service Prosecuting Authority (SPA)*: The SPA is headed by the Director of Service Prosecutions, currently employs both military and civilian staff, is independent of the military chain of command and is not answerable to the Secretary of State for Defence with regard to prosecutorial decisions. IHAT made four referrals to the SPA: one for homicide, one for manslaughter, and two for ill-

[50] *Situation in Libya in The Case Of The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Decision on the admissibility of the case against Saif Al-Islam Gaddafi*, ICC Pre-Trial Chamber I (31 May 2013) para.122: "The Chamber is not called to determine whether such evidence is strong enough to establish the criminal responsibility of Mr Gaddafi but, instead, whether Libya is taking steps to investigate Mr Gaddafi's responsibility in relation to the same case. The Chamber's finding as to the latter would not be negated by the fact that, upon scrutiny, the evidence may be insufficient to support a conviction by the domestic authorities". Available at: www.legal-tools.org/doc/339ee2/pdf (last accessed: 3 August 2021).

[51] *Situation in the Islamic Republic of Afghanistan, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan*, ICC Appeals Chamber (5 March 2020) paras.35-42. Available at: www.legal-tools.org/doc/x7kl12/pdf (last accessed: 3 August 2021).

[52] See ICC. Katanga & Chui (n.47).

[53] See also, Carla Ferstman, Thomas Obel Hansen & Dr Noora Arajärvi, *The UK Military In Iraq: Efforts And Prospect For Accountability For International Crimes Allegations? A Discussion Paper*, University of Essex Human Rights Centre (2018); Thomas Obel Hansen, 'Accountability for British War Crimes in Iraq? Examining the Nexus Between International and National Justice Responses', in Bergsmo & Stahn (n.10), 399.

[54] OTP, *Final Report* (n.6) paras.159-162.

[55] UK, Armed Forces Act 2006. Available at: www.legislation.gov.uk/ukpga/2006/52/contents (last accessed: 3 August 2021).

[56] OTP, *Final Report* (n.6) paras.163-181.

[57] Ibid, paras.182-191.

treatment during interrogation. All four cases resulted in the decision by the SPA not to proceed with prosecution.[58]

Moreover, the OTP analysed some of individual cases[59] and the non-criminal mechanism,[60] as the 'Iraq Fatality Investigations' (IFI), the 'Systemic Issues Working Group' ('SIWG') and, in general, public inquiries and civil proceedings. After having assessed the totality of this information the Prosecutor quite logically concluded that UK authorities had not been inactive.[61]

In the second step of her complementarity assessment, the Prosecutor evaluated the UK investigation and prosecutorial efforts and decisions in terms of "genuineness."[62] These criteria are to be found in article 17(2) of the Rome Statute, namely:

- In accordance with article 17(2)(a), the determination of unwillingness requires, "having regard to the principles of due process recognised by international law", that "[t]he proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court" ("intent to shield").[63]
- In respect to article 17(2)(b), if there was an "unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice" ("unjustified delay").[64]
- Lastly, pursuant to Article 17(2)(c), if "[t]he proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice" ("lack of independence or impartiality").[65]

The Prosecutor concluded that the information assessed did not justify a finding of "shielding." Nonetheless, her Report also indicated that she found "deficiencies of the domestic processes that, while falling short of the threshold of establishing shielding, nonetheless give rise to the concerns in this report."[66] Ultimately, however, this was insufficient to reach the threshold required for admissibility in view of complementarity.

The OTP's second assessment was certainly a 'win' for the complementarity principle. With all the other proverbial doors to the exercise of ICC jurisdiction opened, it was this last door that could not be unlocked. This is a positive outcome. Complementarity should be an important consideration of jurisdictional constraint at the earliest state of ICC inquiry in order to forego the cost and anxiety inflicted by more formal investigations that ultimately lead to the same outcome. But it also seems clear that complementarity will continue to be a complex and loosely defined principle of jurisdictional constraint. As observed by the OTP, the Iraq/UK situation gave rise to complex factual and legal assessments on complementarity.[67] For the Prosecutor, "the preliminary examination has shown that there is a reasonable basis to believe that various

[58] Ibid, paras.192-204.
[59] Ibid, paras.205-229.
[60] Ibid, paras.248-274.
[61] Ibid, paras.275-279.
[62] Ibid, paras.280-491.
[63] Ibid, paras.294-412.
[64] Ibid, paras.413-433.
[65] Ibid, paras.434-480.
[66] Ibid, para.490.
[67] Ibid, paras.492-505.

forms of abuse were committed by members of British forces against Iraqi civilians in detention,"[68] but in term of complementarity the "test" was not successfully passed.

In her one-page statement of 9th December 2020, the Prosecutor further found that "several levels of institutional civilian supervisory and military command failures contributed to the commission of crimes against detainees by UK soldiers in Iraq," and the "initial response of the British army in theatre at the time of the alleged offences was inadequate and vitiated by a lack of a genuine effort to carry out relevant investigations independently or impartially".[69] But "the ICC, however, is not a human rights body called upon to decide whether in domestic proceedings, the requirements of human rights law or domestic law have been violated. Instead, it is tasked with determining whether it should exercise its own competence in a criminal case, in place of a State." This was an important interpretation of the limits of the Court's competence and reaffirmed the foundational jurisprudence of the Court in 2014: the ICC "was not designed to make principles of human rights per se determinative of admissibility."[70] Rather, its function is to exercise its own jurisdiction only when States renounce or fail to their primary-imperative duty to investigate and prosecute these crimes.[71]

Some may consider the finding of *prima facie* information to support allegations of serious crimes committed by UK personnel inconsistent with the Prosecutor's statement and ultimate decision to forego any further investigation. Such a conclusion is invalid.[72] To the contrary, this outcome was the result of a rigorous interpretation of the statutory law and of the principle of complementarity, in strict conformity with her mandate. Respect for the process established by the Rome Statute is as central to the legitimacy of the Court as is the imposition of accountability for violations of its enumerated crimes. Indeed, there are rarely more troubling indications of the illegitimacy of a criminal tribunal than the tribunal's failure to respect the procedures established by its foundational charter. Complementarity may be a difficult limitation to assess and apply, but States will be wary of any ICC decisions that fail to accord this principle the type of critical role it played in this situation.

[68] Ibid, para.493.
[69] OTP, *Statement* (n.7). See also, OTP, *Final Report* (n.6) para.9.
[70] *Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi"* (24 July 2014) para.190: "the Appeals Chamber recalls that, in the context of admissibility proceedings, the Court is not primarily called upon to decide whether in domestic proceedings certain requirements of human rights law or domestic law are being violated. Rather, what is at issue is whether the State is willing genuinely to investigate or prosecute." Available at: www.legal-tools.org/doc/ef20c7/ (last accessed: 3 August 2021).
[71] For a comparison between ICC and ECHR, Nicolas A. J. Croquet, 'The International Criminal Court and the Treatment of Defence Rights: A Mirror of the European Court of Human Rights' Jurisprudence?' (2011) *Human Rights Law Review* 92; Martin Scheinin (ed), *Human Rights Norm in 'Other' International Courts* (CUP 2019) 461.
[72] OTP, *Statement* (n.7): "As a prosecuting office, our aim is to bring a measure of justice to the victims of atrocity crimes in strict conformity with our mandate, without fear or favour. That commitment and duty are always subject to the possibilities and limits set by the Court's founding treaty, the Rome Statute, and a rigorous objective assessment of the applicable legal criteria." See also, OTP, *Final Report* (n.6) para.504: "While this decision might be met with dismay by some stakeholders, while viewed as an endorsement of the UK's approach by others, the reasons set out in this report should temper both extremes."