

EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS



Berlin, 1 July 2021

Office of the Prosecutor
International Criminal Court
The Hague, the Netherlands

RE: Situation in Iraq/UK - Request for Review of the Prosecutor's Decision Not to Open an Investigation

Executive Summary

1. The European Center for Constitutional and Human Rights (“ECCHR”) submits a request to the Office of the Prosecutor (“OTP”) of the International Criminal Court (“ICC”) to seek a review of the Prosecutor’s decision not to pursue an investigation with respect to the Situation in Iraq/UK (“Request”).¹ The Request is also filed on behalf of Mr. Sabah Al-Sadoon, an Iraqi national who was captured and tortured by UK soldiers in Basra. UpRights provided support to ECCHR in the drafting of this Request.²
2. After first being closed in 2006, the preliminary examination of the Situation in Iraq/UK was reopened on 13 May 2014 in light of new information received by the Court. In particular, as acknowledged by the OTP, it was the communication under Article 15 of the Rome Statute (“Statute”) submitted by ECCHR together with Public Interest Lawyers (“PIL”)³ alleging the responsibility of UK officials for war crimes involving systematic detainee abuse in Iraq from 2003 until 2008 that prompted the reopening.

¹ Situation in Iraq/UK, Final Report, 9 December 2020 (“Final Report”), available at: <https://www.icc-cpi.int/Pages/item.aspx?name=201209-otp-final-report-iraq-uk>.

² UpRights is a non-profit initiative assisting civil society organizations in investigations and legal proceedings concerning human rights violations and international crimes.

³ 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, at:

3. The OTP's Final Report on the Situation in Iraq/UK was published December 2020. It found that there was a reasonable basis to believe that members of the UK armed forces committed war crimes in Iraq. However, the Prosecutor concluded that the UK was not unwilling to genuinely conduct investigations and prosecutions *vis-à-vis* the alleged crimes, pursuant to Article 17 of the Statute. Therefore, the Prosecutor closed the preliminary examination without seeking authorization to pursue an investigation into the alleged crimes, arguing that the potential cases would be inadmissible under the Statute.
4. It is ECCHR's submission that the Prosecutor's complementarity analysis, as contained in the Final Report, reflects serious legal and factual errors that affected the OTP's final decision not to seek the authorization to pursue an investigation. The Statute, however, does not provide victims and civil society organizations with a remedy to directly challenge the Prosecutor's decision not to open a *proprio motu* investigation, as Article 53(3)(a) of the Statute only gives referring States or the Security Council the power to request the Pre-Trial Chamber to review a decision of the Prosecutor not to proceed with an investigation. The lack of statutory remedies for victims and civil society organizations who are essential information-providers for the Court and in close exchange with the OTP during the years-long preliminary examination process represents a problematic lack of balance and a gap in the Rome Statute. This is particularly true in situations such as the one at stake, where, as acknowledged, the preliminary examination was reopened following the Article 15 communication submitted by ECCHR and PIL in 2014.
5. ECCHR notes with appreciation that the OTP, in releasing its 184-page Final Report, has demonstrated serious commitment to greater transparency about its management of preliminary examinations and readiness to engage in public scrutiny of crucial decisions, such as the opening of an investigation. Therefore, ECCHR requests the new Prosecutor, Mr. Karim Khan, to undertake a *proprio motu* reconsideration of the decision to close the preliminary examination, or to seek a review by the Pre-Trial Chamber under Article 19(3) of the Statute, in particular with regard to the admissibility of the potential cases resulting from the Situation. New facts and evidence also support the Request.

6. ECCHR’s Request articulates eight legal and factual errors that affected the outcome of the OTP’s Final Report. In addition, it sets out new facts and evidence that warrant the reopening of the preliminary examination.

Legal and factual errors

7. First, the Prosecutor erred in law by adopting a standard of proof that is too high and incorrect with regard to the requirements for the opening of an investigation. The correct standard of proof is the “reasonable basis to believe” standard under Article 53(1) of the Statute. This is the lowest evidentiary threshold provided by the Statute. Under this standard, the Prosecutor shall request the Pre-Trial Chamber authorization to initiate an investigation when there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed and that the case would be admissible under Article 17 of the Statute.
8. Notwithstanding the clear finding on the “reasonable basis to believe” that grave crimes within the jurisdiction of the Court have been committed by UK armed forces in Iraq, the Prosecutor applied a much higher threshold to assess the “unwillingness” of the UK authorities. The Request respectfully submits that it was inappropriate for the Prosecutor to take into consideration future, hypothetical proceedings that might have been pursued by the UK authorities, including the concern that a deferral of the ICC investigation might have been requested under Article 18(2) of the Statute. In fact, the OTP’s statement that, *inter alia*, the allegations of cover up could not be substantiated “with evidence that it could rely upon in court”⁴ clearly shows that the Prosecutor adopted a higher standard of proof than what required at the preliminary examination stage, by inappropriately anticipating speculations related to hypothetical proceedings under Articles 18 and 19 of the Statute that should not form part of the assessment at this early stage of the proceedings.
9. Had the Prosecutor correctly applied the “reasonable basis to believe” standard to the complementarity assessment, the OTP would have concluded that the UK authorities were indeed “unwilling”, under Article 17 of the Statute, to conduct investigations and prosecutions *vis-à-vis* the alleged crimes.

⁴ OTP, Final Report, para. 409.

10. Second, the Prosecutor erred in concluding that principles of due process have a mere interpretative function with respect to the elements contained in Article 17(2)(a)-(c) of the Statute. On the contrary, due process principles should have been regarded as a set of determinative factors when interpreting “unwillingness” of the State to genuinely conduct proceedings under Article 17(2) of the Statute. The chapeau of Article 17 states that “the Court shall consider, *having regard to the principles of due process* recognized by international law” 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. Due process principles, thus, should have guided the Prosecutor’s determination of the State’s unwillingness. The OTP, however, significantly downplayed the authoritative role of due process principles when interpreting the wording of this provision.
11. Third, the Prosecutor erred in concluding that 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. The Prosecutor mistakenly adopted the view that Article 17(2)(a) requires evidence of the “intent to shield” with regard to the specific agents involved in the domestic proceedings. Moreover, the Prosecutor’s analysis failed to consider the list of indicators for “intent to shield” set forth in the OTP’s own Policy Paper on Preliminary Examinations. . This led to a failure to give proper weight to crucial factual 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 substantiated by a report by the BBC and the Sunday Times.
12. Fourth, the Prosecutor erred in concluding that the delays in the initial investigations which consequently affected the IHAT and SPLI proceedings were not unjustified within the meaning of Article 17(2)(b) of the Statute. In addition, the Prosecutor did not take into proper account the role played by the structural delays in the initial investigations by the British Royal Military Police (RMP), 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 overarching “unwillingness” of the UK authorities.

13. Fifth, the Prosecutor failed to question the independence and impartiality of domestic proceedings undertaken by the RMP, the IHAT/SPLI and the Service Prosecuting Authority (“SPA”), and thereby failed to conclude that the proceedings were not being conducted independently or impartially within the meaning of Article 17(2)(c) of the Statute. The Prosecutor failed to recognize how the lack of independence and impartiality of the RMP affected IHAT/SPLI proceedings and ultimately led to the closure of investigations concerning war crimes allegedly committed by UK troops in Iraq. In addition, the Prosecutor failed to recognize the UK Government’s past and present role in influencing the conduct of independent and impartial proceedings, as reflected by the initiation of the disciplinary proceedings against PIL and Leigh Day. Another example of the continuous efforts of the British Ministry of Defense (“MoD”) to avoid investigations into crimes by their soldiers is the debate around the Overseas Operations Bill (now Act) that proposed to introduce illegitimate obstacles for investigations of torture and war crimes allegations, such as a fast track for dismissal of such cases. These facts clearly evince the “unwillingness” of the UK Government to carry out independent and impartial proceedings.
14. Sixth, the Prosecutor failed to consider the totality of factors stemming from the actions of various UK authorities in determining the UK’s overall “unwillingness” to carry out genuine proceedings. The OTP conducted a fragmented analysis of factors – such as the filtering criteria, Solicitors Disciplinary Tribunal proceedings, proportionality criteria – without taking a holistic approach, and thus failed to assess a larger pattern of shielding. By limiting the analysis of the State’s “unwillingness” to the conduct of UK investigative and judicial authorities without properly giving weight to the obstructions and failures of the executive and legislative branches of the UK Government, the OTP committed a serious error that compromised the outcome of the analysis.
15. Seventh, the Prosecutor’s complementarity assessment was flawed due to the failure to identify potential cases arising from the preliminary examination, as required by Article 53(1)(b) of the Statute. According to the case law of the Court, the Prosecutor shall conduct the complementarity assessment in relation to *specific potential* cases; therefore, the Prosecutor shall undertake a specific analysis of the concrete investigative steps taken in relation to identified potential cases. In contrast, the OTP conducted the complementarity assessment mostly in the abstract, which resulted in a broad, general review of the domestic mechanisms established to contend with thousands of allegations of crimes by UK troops in Iraq.

16. It is a fact that the long and apparently complex system of domestic mechanisms aimed at examining thousands of allegations of abuse committed by UK soldiers in Iraq has resulted in not one single case of prosecution in the UK, as acknowledged by the Final Report. It is striking that the Prosecutor's analysis simply describes domestic historical mechanisms to deal with such allegations and narrates the proceedings undertaken without taking into proper consideration whether *effective* investigative steps were undertaken. The OTP's Final Report contains a quantitative description of the caseload and record of such domestic mechanisms without engaging in an assessment of their quality *vis-à-vis* the potential cases identified.
17. The failure to conduct the complementarity assessment in relation to specific potential cases affected the Prosecutor's assessment of all three limbs of the UK authorities' "unwillingness" under Article 17(2)(a)-(c) of the Statute, namely: whether the proceedings were undertaken for the purpose of shielding; whether there was an unjustified delay; and whether the proceedings were conducted independently or impartially. As such, the Prosecutor's analysis of whether the UK was "unwilling" to genuinely investigate and prosecute the potential cases was empty and inadequate.
18. Eighth, the Prosecutor failed to give proper consideration to the lack of steps in UK investigations regarding superior/command responsibility. Even though the OTP found evidence that "several levels of institutional civilian supervisory and military command failures contributed to the commission of crimes against detainees by UK soldiers in Iraq", the OTP did not find fault with the approach taken by IHAT/SPLI, which focused on the role of physical perpetrators. It also did not take into account testimonies from former IHAT investigators that alleged that cases involving superior responsibility were prematurely terminated.
19. ECCHR has set out potential cases of superior/command responsibility among the Incidents identified in the OTP's Final Report that should have been properly analyzed by the Prosecutor. This includes the cases of Baha Mousa, and of the crimes committed at Camp Breadbasket and Camp Stephen.

New facts and evidence

20. In addition to the above-mentioned legal and factual errors, the Request also introduces the case of Mr. Sabah Al-Sadoon as new evidence that needs to be considered by the Prosecutor. Mr. Al-Sadoon was arrested and subject to torture by Black Watch soldiers

in Basra on 22 June 2003. Mr. Al-Sadoon's new evidence reinforces the allegations concerning the command responsibility of the commanding officer of Black Watch, who should have been aware of the nature and extent of crimes that soldiers under his command were committing, resulting in the deaths of at least two other Iraqi detainees. Mr. Al-Sadoon was informed on 3 September 2020 that SPLI was closing his case on the basis that "there is no realistic prospect of any criminal charges being brought against any member of the UK Armed Forces and that it would not be proportionate to conduct further enquiries".

21. The case of Mr. Al-Sadoon was not part of the submission by ECCHR and PIL in 2014. Neither was his case among the "sample pool of incidents" identified by the Prosecutor in the subject-matter assessment in the context of this Situation. Therefore, the facts of Mr. Al-Sadoon's case should be considered as new facts and evidence for the purposes of the assessment under Article 15(6) of the Statute.

The Request

22. In light of the grave factual and legal errors in the Final Report, as well as the new facts surfaced in this submission, ECCHR respectfully requests the Prosecutor to proceed with a *proprio motu* reconsideration of the decision to close the preliminary examination in the Situation in Iraq/UK. In the alternative, the Prosecutor shall seek a ruling from the Pre-Trial Chamber under Article 19(3) of the Statute to review the decision to close the preliminary examination.
23. Reconsideration of the decision or seeking a ruling from the Pre-Trial Chamber are the only equitable next steps when "the outcome of the more than ten year long domestic examination of thousands of allegations, has resulted in not one single case of prosecution" – an outcome that, as the OTP's Final Report acknowledges, "has deprived the victims of justice".⁵

⁵ OTP, Final Report, para. 6.