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Front cover: *Pasquale Trento, with other masons, mounting a sculpture in Florence. Masons have a proud tradition of self-regulation and quality control in Florence. The guild of master stonemasons and wood-carvers* – Arte dei Maestri di Pietra e Legname – *was already listed in 1236 as one of the Intermediate Guilds. Ensuring rigorous quality control through strict supervision of the workshops, the guild not only existed for more than 500 years (until 1770, when several of its functions were assigned to the Florentine chamber of commerce), but it has contributed to the outstanding quality of contemporary masonry in Florence. Photograph: © CILRAP 2017.*

Back cover: *Section of the original lower-floor of the Basilica of Saints Cosmas and Damian in Rome which honours the memory of two brothers and physicians for the poor in Roman Syria. Its mosaics and other stonework influenced the Florentine guild of masons referred to in the frontpage caption, as its craftsmen and sponsors created a culture of excellence through competition and exacting quality control. Photograph: © CILRAP 2018.*

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Accountability for British War Crimes in Iraq? Examining the Nexus Between International and National Justice Responses

Thomas Obel Hansen*

13.1. Introduction

In May 2014, Chief Prosecutor of the International Criminal Court ('ICC') Fatou Bensouda announced that her Office had decided to re-open a preliminary examination into alleged war crimes committed by British soldiers in Iraq in the period 2003-08. Bensouda's decision followed in the wake of a "devastating dossier" of evidence being provided to her Office by public international law and human rights groups.[1] The Office of the Prosecutor's ('OTP' or 'Office') decision put the United Kingdom ('UK') – an ICC State Party and long-standing supporter of the Court – under scrutiny for the second time. A previous examination had been terminated by former Chief Prosecutor Luis Moreno-Ocampo on the grounds that the allegations of UK abuses in Iraq were not sufficiently grave.[2]

The Iraq/UK preliminary examination is of interest for several reasons. First, it presents the first time that a major power and State Party has been put under ICC scrutiny, raising novel questions concerning ICC-

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1 The term used in *The Independent*: Jonathan Owen, "Exclusive: Devastating dossier on 'abuse' by UK forces in Iraq goes to International Criminal Court", in *The Independent*, 12 January 2014.

2 See OTP, "OTP response to communications received concerning Iraq", 9 February 2006 (http://www.legal-tools.org/doc/5b8996/).

State relations. Second, the alleged crimes involve war crimes, such as abuse 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. Third, the existence of a variety of judicial processes in the UK which address crimes allegedly committed in Iraq raises important questions relating to the ICC's existing complementarity regime.

Based on interviews with British authorities, ICC officials, the lawyers who made submissions to the ICC (the Article 15 communication providers), and other human rights lawyers and academics,[3] this chapter examines the dynamics, consequences and impact of the Iraq/UK preliminary examination. Overall, the chapter aims to clarify how this preliminary examination has been approached and whether it has impacted justice processes in the domestic sphere – and the rule of law more broadly – and if so, how and why. In this way, the chapter provides a critical empirical examination of the assumptions made in the scholarship and by ICC prosecutors about 'positive complementarity' as well as an early case study of how a great power responds to and interacts with the Court when subject to a preliminary examination.

In particular, the chapter offers a detailed analysis of the interactions between the ICC's preliminary examination into alleged UK abuses in Iraq and the response by the British government, including judicial measures put in place domestically to address the alleged crimes and broader policy responses. The chapter further identifies and elaborates the strategies adopted by the OTP, British authorities and other relevant stakeholders such as the civil society groups and lawyers submitting material to the OTP. In this way, the chapter contributes to our understanding of how the ICC approaches preliminary examinations in 'hard cases' involving major powers (in this case involving a permanent member of the UN Security Council), and how such powers respond and engages the Court when put under scrutiny. Notwithstanding some debate among academics concerning the Iraq/UK preliminary examination,[4] this chapter –

[3] Whereas some interviewees agree to be cited by name, several of the interviews are confidential and can therefore not be cited to by name in this chapter. All interviews and consultations were carried out in 2016–17 at various locations, including The Hague, London, Belfast and elsewhere.

[4] Davis Bosco, for example, observes that the "UK is taking ICC scrutiny quite seriously", and speculate that the ICC Prosecutor's decision may reflect "increased institutional confi-

together with Rachel Kerr's contribution to this volume – present the first detailed academic analyses of how the Iraq/UK preliminary examination has unfolded to date, the responses to it by British authorities and its broader ramifications.[5]

While focusing on the interaction between the ICC's preliminary examination and domestic accountability efforts, the chapter demonstrates how the examination is just one part of a number of critical developments that have engendered an interest in investigating alleged crimes perpetrated by UK forces in Iraq. The chapter sheds light on a complex network of factors that have driven British authorities to investigate these crimes, including the creation of the Iraq Historic Allegations Team ('IHAT'), a unit established to examine the veracity of the alleged crimes with an eye on criminal prosecutions. In so doing, the chapter illustrates complex interactions between the UK and the ICC concerning how the preliminary examination should proceed with a shared object in mind: avoiding a direct confrontation between the Court and the UK. At the same time, there are conflicting interests and understandings concerning what the accountability processes for alleged crimes in Iraq should look like and how they should proceed. This raises profound questions relating to quality control in preliminary examinations, including whether avoiding a confrontation may come at the price of not opening a formal investigation due to long-lasting but not necessarily effective investigate steps domestically.

The chapter proceeds as follows: First, it outlines the assumptions made about the connections between preliminary examinations and positive complementarity, including relevant OTP standards and policy objectives (Section 13.2.). Next, it provides an overview of the Iraq/UK preliminary examination as well as the crimes under examination (Section 13.3.). It then proceeds to an analysis of the OTP's strategies, expectations to domestic proceedings and the Office's engagement with other stakehold-

dence and a new willingness to discomfit – if not yet formally investigate – major powers". See, for example, David Bosco, "British War Crimes Investigations and the ICC's Shadow", *Lawfare*, 11 January 2016.

5 The two chapters supplement each other in that Rachel Kerr's contribution takes the starting point in analysing the legal processes in the UK and the political debate about accountability in the country, whereas the present chapter takes the starting point in the ICC's preliminary examination and expectations to positive complementarity, and on that basis elaborates the connections to domestic responses and judicial processes. Accordingly, Kerr's chapter provides for a more detailed account of the various judicial processes in the UK addressing war crimes in Iraq.

ers in this accountability process (Section 13.4.). Following that analysis, the chapter examines how UK authorities have responded to the preliminary examination, including an analysis of how the ICC's preliminary examination and the dynamics surrounding it have impacted legal processes in the UK (Section 13.5.). The chapter concludes by discussing the broader ramifications of the Iraq/UK preliminary examination.

13.2. Preliminary Examinations and Positive Complementarity

13.2.1. Assumptions about the Connection between Preliminary Examinations and Positive Complementarity

Existing scholarship tends to assume that preliminary examinations hold considerable potential for galvanizing accountability processes at the national level.[6] The expectation in much of what has been said about positive complementarity is that once the OTP opens a preliminary examination, the threat that the Office will proceed to a full investigation will add sufficient pressure on the State for it to commence its own proceedings, even if there may be important contradicting interests, in this way rendering further steps by the ICC unnecessary – and in legal terms, inadmissible under the complementarity regime. This prevailing view is well summarized by Christine Bjork and Juanita Goebertus, who note that the anticipated reaction from a State under preliminary examination is that it will "aggressively and fairly pursue domestic prosecutions of international crimes so as not to trigger the jurisdiction of the ICC over the case and invite the glare of the eyes of the international community upon it".[7]

ICC prosecutors have similarly made far-reaching claims concerning the importance of positive complementarity, sometimes implying that

[6] For examples of such expectations to positive complementarity, see William Burke-White, "Implementing a Policy of Positive Complementarity in the Rome System of Justice", in *Criminal Law Forum*, 2008, vol. 19, no. 1, pp 59–85 (noting at p. 62 that "the overall goal of the Rome Statute—ending impunity—may be best achieved through […] encouragement of national prosecutions"); David Bosco, "The International Criminal Court and Crime Prevention: Byproduct or Conscious", in *Michigan State Journal of International Law,* 2011, vol. 19, no. 2, pp. 163–200 (noting at p. 181 that preliminary examinations can serve as an effective means of catalyzing political will toward prosecution in situations under analysis as they create pressure for national judicial proceedings and the possible incarceration of those responsible for crimes).

[7] Christine Björk and Juanita Goebertus, "Complementarity in Action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya", in *Yale Human Rights and Development Law Journal*, 2011, vol. 14, no. 1, pp. 205–30, at p. 208.

the ultimate goal of advancing accountability for international crimes is best achieved by encouraging national authorities to prosecute these in their own jurisdictions at the expense of ICC prosecutions. Even in 2003 – shortly after the Court became operational –former Chief Prosecutor Moreno-Ocampo infamously stated that 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".[8] ICC prosecutors are in particular emphasizing the capacity of preliminary examinations to contribute to positive complementarity. For example, Bensouda argues that the preliminary examination phase "is one of the most remarkable efficiency tools we have at our disposal as it encourages national prosecutions and prevents or puts an end to abuses", allowing the Court "to avoid opening investigations and prosecutions when national mechanisms are functioning in accordance with our founding Statute".[9]

The Policy Paper on Preliminary Examinations ('PE Policy Paper') published by the OTP in 2013 further clarifies the Office's expectations of how preliminary examinations will impact domestic proceedings. Importantly, one of the overall goals of preliminary examinations set out by the PE Policy Paper involves the "ending of impunity, by encouraging genuine national proceedings"[10] – a goal sometimes referred to in the Paper as "ending impunity through positive complementarity".[11] The Paper emphasizes that "a significant part of the Office's efforts at the preliminary examination stage is directed towards encouraging States to carry out their primary responsibility to investigate and prosecute international

8 Moreno-Ocampo as cited in ICC, *Informal Expert Paper: The Principle of Complementarity in Practice*, 2003, p. 3 (http://www.legal-tools.org/doc/90915d/).

9 Fatou Bensouda, "Reflections from the International Criminal Court Prosecutor", in *Case Western Reserve Journal of International Law*, 2012, vol. 45, no. 1, pp. 505–11, at 508–09. The 2016 Report on Preliminary Examination Activities similarly suggests that preliminary examination activities "constitute one of the most cost-effective ways for the Office to fulfil the Court's mission". See OTP, *Report on Preliminary Examination Activities 2016*, 14 November 2016, at para. 16 (http://www.legal-tools.org/doc/f30a53/) (hereinafter '*2016 Report on Preliminary Examination Activities*').

10 OTP, *Policy Paper on Preliminary Examinations*, 1 November 2013, at para. 93 (http://www.legal-tools.org/doc/acb906/) (hereinafter '*PE Policy Paper*').

11 *Ibid*., para. 100.

crimes".[12] The PE Policy Paper further explains that the "complementary nature of the Court requires national judicial authorities and the ICC to function together"; that "proceedings before the ICC should remain an exception to the norm"; and that a "Court based on the principle of complementarity ensures the international rule of law by creating an interdependent, mutually reinforcing international system of justice".[13]

13.2.2. Lack of Empirical Support and Conceptual Clarity concerning Positive Complementarity

Despite ICC prosecutors' optimism concerning the capacity of preliminary examinations to galvanize domestic accountability proceedings, there is little empirical evidence this actually occurs.[14] The limited empirical research that does exist often challenges – and sometimes even contradicts – the assumption made by prosecutors that preliminary examinations, through positive complementarity, present the most significant tool for advancing accountability. Based on research involving a number of African countries, Dancy and Montal, for example, observe that although ICC involvement in countries "significantly increases domestic human rights prosecutions in the intermediate term", this impact of the ICC is triggered only at the investigation stage, not the preliminary examination stage because it does not "carry high costs for states since the Court is not empowered to do much more than to collect information".[15] Similarly, examining whether the ICC's preliminary examination in Kenya contributed to accountability at the domestic level in that country, Bjork and Goebertus conclude that the examination "did not appear to encourage Kenyan authorities to take action".[16]

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12 *Ibid*.

13 *Ibid*.

14 As noted by Dancy and Montal, "little systematic empirical research has been carried out on the relationship between ICC investigations and domestic human rights prosecutions". See Geoff Dancy and Florencia Montal, "Unintended Positive Complementarity: Why International Criminal Court Investigations Increase Domestic Human Rights Prosecutions", in *American Journal of International Law*, 2017, vol. 111, no. 3, pp. 689–723.

15 See *ibid*., p. 13. As discussed below in this Article, the limited powers of the OTP at the preliminary examination stage may in some ways make it difficult to decide whether there is a reasonable basis to proceed in the Iraq/UK examination.

16 Björk and Goebertus further argue that the ICC's intervention may more broadly have had a negative impact on the rule of law in the country, in particular because NGOs viewed participation in criminal justice system reform as posing a threat to the ICC's involvement due to the government's ability to cite such reforms in a potential admissibility challenge.

Moreover, despite the broad claims made about the value of 'positive complementarity', it is not necessarily clear what precisely is understood by that notion and how it departs from the assumedly broader term of 'complementarity'.

The PE Policy Paper observes that 'complementarity' forms part of the admissibility assessment under Article 17 of the Statute whereby "an examination of the existence of relevant national proceedings in relation to the potential cases being considered for investigation by the Office" is required.[17] In contrast, the Paper uses the term 'positive complementarity' to refer to a situation where national judicial authorities and the ICC "function together" to create an "interdependent, mutually reinforcing international system of justice".[18] Elsewhere, Bensouda has explained that positive complementarity implies "a proactive policy of cooperation and consultation, aimed at promoting national proceedings and at positioning itself as a sword of Damocles, ready to intervene in the event of unwillingness or inability by national authorities".[19] However, prosecutors' understandings of positive complementarity have varied over time. Moreno-Ocampo implied a less collaborative conception, stating that it "is not about training judges, [us] passing information, [us] building capacity. No, complementarity is what the others are doing".[20]

The lack of conceptual clarity became increasingly clear around 2010. That year, the Assembly of States Parties Bureau published a report which defined positive complementarity in very broad terms as "all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute, without involving the Court in capacity building, financial support and technical assistance, but instead leaving these actions and

See Björk and Goebertus, 2011, pp. 205–30, see *supra* note 7. Research by this author similarly suggests that even if the 'uncertainty' brought about by the preliminary examination may have helped to sustain a national debate about accountability, it did not 'trigger' any credible accountability process in Kenya. See Thomas Hansen, "Complementarity in Kenya? An Analysis of the Domestic Framework for International Crimes Prosecution", in Ron Slye (ed.), *The Nuremberg Principles in Non-western Societies: A Reflection on their Universality, Legitimacy and Application*, The International Nuremberg Principles Academy, 2016, pp. 143–65.

17 *PE Policy Paper*, para. 8, see *supra* note 10.

18 *Ibid*., para. 100.

19 Bensouda, 2012, p. 507, see *supra* note 9.

20 As cited in Björk and Goebertus, 2011, p. 213, see *supra* note 7.

activities for States, to assist each other on a voluntary basis".[21] However, as Morten Bergsmo *et al.* note, this broad understanding was criticized by some during the plenary at the 2010 Review Conference in Kampala.[22]

The 2009-12 Prosecutorial Strategy settled on the following definition: "The positive approach to complementarity means that the Office will encourage genuine national proceedings where possible, including in situation countries, relying on its various networks of cooperation, but without involving the Office directly in capacity building or financial or technical assistance".[23] The Strategy clarifies that the Office's approach to positive complementarity includes measures such as:

- the provision of information "collected by the Office to national judiciaries upon their request pursuant Article 93(10)", though subject to certain caveats;
- "calling upon officials, experts and lawyers from situation countries to participate in OTP investigative and prosecutorial activities";
- "acting as a catalyst with development organizations and donors' conferences to promote support for relevant accountability efforts"; and
- other activities.[24]

Whereas these types of activities *may* be valuable from the perspective of positive complementarity in situations where there is political will in the relevant State to advance accountability for the crimes under scruti-

[21] ICC ASP, Resolution ICC-ASP/8/Res.9, 25 March 2010, Appendix, para. 16 (http://www.legal-tools.org/doc/6077ca/).

[22] Bergsmo *et al*. note: "Whilst repeated reference was made to the term [that is, 'positive complementarity'], some States questioned its use, preferring the term 'technical assistance'. It was highlighted that the term had no basis in the Rome Statute and served to confuse judicial capacity building with the principle of complementarity as laid down in Article 17 of the Rome Statute. Despite some hesitation of the use of the term 'positive complementarity', there was general agreement during all meetings that the active involvement of States and civil society in building national capacity is desirable. Furthermore, doubts as to the use of the term 'positive complementarity' may have been outweighed by the frequency with which the term was used". See Morten Bergsmo *et al*., "Complementarity After Kampala: Capacity Building and the ICC's Legal Tools", in *Goettingen Journal of International Law*, 2010, vol. 2, no. 2, pp. 791–811, at pp. 797–802.

[23] OTP, "Prosecutorial Strategy 2009-2012", 1 February 2010, para. 17 (hereinafter '*2009-2012 Prosecutorial Strategy*') (http://www.legal-tools.org/doc/6ed914/).

[24] *Ibid*., para. 17.

ny, one might question if they will have any significant impact when such political will is essentially absent.

Accordingly, the term 'complementarity' is usually seen to refer to the legal regime relating to the admissibility test set out in Article 17 of the Statute whereby the ICC can only exercise jurisdiction insofar as national authorities are unable or unwilling to pursue the persons and crimes subject to ICC investigation. 'Positive complementarity', in turn, is used to refer to a policy objective to promote accountability at the domestic level for Rome Statute crimes on the basis of active steps taken by the Court, especially the OTP, and preliminary examinations are often seen to provide a particularly useful tool in that regard.[25]

Yet, positive complementarity may include two rather distinct approaches, the ramifications of which have not been sufficiently elaborated in OTP standards or in the scholarship, namely: (1) efforts by the Court, especially the OTP, to ensure that crimes subject to ICC scrutiny are investigated and prosecuted domestically at the *expense* of ICC prosecutions (referred to in this chapter as the 'hand-over version of complementarity'); and (2) efforts by the Court, especially the OTP, to facilitate some form of *burden-sharing* whereby the ICC typically proceeds with prosecuting those most responsible for the crimes committed whereas national authorities target other, typically lower level, perpetrators (referred to in this chapter as the 'burden-sharing version of complementarity'). It is usually the hand-over version of complementarity that is emphasized by

[25] Accordingly, whereas the exact meaning of the term 'positive complementarity' is contested, it does remain clear, as Burke-White points out, that there is a significant difference between the notion of complementarity in the Rome Statute's admissibility regime and the principle of 'positive complementarity', as expressed by the OTP and scholars alike, as the latter suggests that the Rome Statute "does far more than merely define the limits of the Court's power". See Burke-White, 2008, p. 60, see *supra* note 6. Rod Rastan similarly notes that complementarity contains two conceptual approaches, namely 1) the admissibility principle that deals with competing jurisdictions, and 2) a principle of "burden sharing for the consensual distribution of caseloads". See Rod Rastan, "Complementarity: Contest or collaboration?", in Morten Bergsmo (ed.) *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes*, Torkel Opsahl Academic EPublisher, Oslo, pp. 83–132, at p. 83 (http://www.toaep.org/ps-pdf/7-bergsmo). On the notion of positive complementarity, see further Carsten Stahn, "Complementarity: A Tale of Two Notions", in *Criminal Law Forum*, 2008, vol. 19, no. 1, pp. 87–113; and more generally the essays in Carsten Stahn and M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, Cambridge University Press, 2011.

ICC prosecutors and scholars in the context of preliminary examinations, especially in more recent accounts.[26]

13.2.3. OTP Standards Relating to Positive Complementarity at the Preliminary Examination Phase

The PE Policy Paper commits the Office to take active steps to encourage domestic proceedings, noting that where potential cases falling within the jurisdiction of the Court have been identified, the Office "will seek to encourage, where feasible, genuine national investigations and prosecutions by the States concerned in relation to these crimes".[27] The commitment to advance domestic proceedings at the expense of escalating the ICC's intervention is, however, not absolute. According to the Paper, the "nature of the Office's efforts towards encouraging genuine national proceedings will be dependent on the prevailing circumstances", in this regard emphasizing that the Office will only engage with national authorities to the extent that it does not "risk tainting any possible future admissibility proceedings".[28]

The PE Policy Paper takes note that the standard of proof for proceeding with an investigation into a situation under the Statute is "reasonable basis", and notes that Article 53(1)(a)-(c) of the Statute provides that the OTP shall consider the following factors during a preliminary examination: (a) jurisdiction (including temporal, material, and either territorial or personal jurisdiction); (b) admissibility (including complementarity and gravity); and (c) the interests of justice.[29] Among them, the complementarity assessment takes place in the so-called Phase 3 of preliminary examinations.[30] As there is not yet a "case" – that is, "an identified set of incidents, suspects and conduct" – the Office's consideration will be based on

[26] As Dancy and Montal note, a significant development took place around 2010, in that the role of OTP was seen to morph from "encouraging referrals to avoiding full investigations" and positive complementarity turned increasingly from "an instrument to strengthen the Court into a tool to strengthen domestic jurisdiction". See similarly Dancy and Montal, 2017, see *supra* note 14.

[27] *PE Policy Paper*, para. 101, see *supra* note 10.

[28] *Ibid*., para. 102.

[29] The Paper takes note that the requisite standard of proof of 'reasonable basis' has been interpreted by the Chambers of the Court to require "a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court has been or is being committed". *Ibid*., paras. 5, 34.

[30] *Ibid*., paras. 15, 82.

"potential cases" identifiable from the available information that would likely arise from an investigation into the situation.[31] As discussed in further detail below, there may be significant challenges determining what makes up 'potential cases' at the preliminary examination stage.

In particular, what type of perpetrators must be targeted to satisfy the Office's expectations of domestic proceedings? In this regard, the PE Policy Paper states that its policy of investigating and prosecuting those "most responsible for the most serious crimes" means that the Office's efforts towards encouraging genuine national proceedings at the preliminary examination stage will "centre on potential cases that fall within the ambit of this policy, without being limited to those cases".[32] Although the Paper does not clarify whether the Office operates with specific guidelines concerning the seniority of persons it would require to be prosecuted domestically, it does emphasize that a determination of "inactivity" may follow from the "deliberate focus of proceedings on low-level or marginal perpetrators despite evidence on those more responsible".[33] The Office's annual reports on preliminary examination activities offer some additional clues concerning prosecutors' expectations to the nature and scope of domestic accountability processes. For example, with respect to national proceedings against members of the Afghan authorities, the 2016 report implies that in light of the allegations of widespread ill-treatment of detainees, the Office may not view it as sufficient that authorities have prosecuted only two security officials.[34]

The annual reports on preliminary examination activities further suggest that a variety of developments not strictly related to domestic accountability processes, such as cabinet appointments, may be perceived as relevant by the Office in conducting the complementarity assessment.[35] The annual reports also clarify how the Office approaches the *timing* of domestic proceedings. In one preliminary examination, the Office emphasized that whereas the fight against impunity "appear[s] to remain a priority" of the authorities, the Office will only accept an (unspecified) "rea-

31 *Ibid*., para. 43.

32 *Ibid*., para. 103.

33 *Ibid*., para. 48.

34 *2016 Report on Preliminary Examination Activities*, para. 217, see *supra* note 9.

35 For example, in the Guinea examination, the Office cites to the (re)appointment of a named Minister of Justice as signalling the "continued support of the authorities" for the investigations carried out by the Guinean panel of judges. *Ibid*., para. 272.

sonable delay" in domestic proceedings.[36] The PE Policy Paper makes clear that delays in national proceedings may be assessed in light of indicators such as "the pace of investigative steps and proceedings; whether the delay in the proceedings can be objectively justified in the circumstances; and whether there is evidence of a lack of intent to bring the person(s) concerned to justice".[37]

The above suggests that 'positive complementarity' is seen as a key ideal outcome of preliminary examinations, but also that the OTP has considerable flexibility as to how it conducts preliminary examinations, including the pace with which they proceed and the tools utilized to promote accountability at the domestic level. In the following sections, the chapter examines how the OTP has applied these goals and standards of preliminary examinations to the Iraq/UK examination, and how British authorities have responded thereto.

13.3. The Iraq/UK Preliminary Examination: Status and Crimes under Scrutiny

13.3.1. Closing and Re-opening of the Iraq/UK Examination and Broader Context

The ICC's preliminary examination in Iraq relates to war crimes allegedly committed by British troops in the context of the Iraq war and subsequent occupation in the period 2003-2008. Unlike several other examinations – including the Afghanistan examination, which is examining the conduct of US military forces and the CIA, the Taliban and their affiliated Haqqani

[36] The statement was made with regard to the Guinea examination. *Ibid*., para. 271. Some commentators are critical of the Office's apparent flexibility in this regard, noting that the OTP has "tolerated a slow pace of judicial action in relation to the Guinean Conakry massacre". See Louise Chappell *et al*., "The Gender Justice Shadow of Complementarity: Lessons from the International Criminal Court's Preliminary Examinations in Guinea and Colombia", in *International Journal of Transitional Justice*, 2013, vol. 7, no. 3, pp. 455–75, at p. 467. More generally, some scholars have criticised the Office for not being consistent in terms of the extent to which it is willing to 'wait' for domestic proceedings to advance. See Kai Ambos and Ignaz Stegmiller, "Prosecuting International Crimes at the International Criminal Court: Is there a Coherent and Comprehensive Prosecution Strategy?", in *Crime Law Soc Change,* 2013, vol. 59, pp. 415–437, at 427.

[37] The *PE Policy Paper* makes clear that delays in national proceedings may be assessed in light of indicators 'such as, the pace of investigative steps and proceedings; whether the delay in the proceedings can be objectively justified in the circumstances; and whether there is evidence of a lack of intent to bring the person(s) concerned to justice'. *PE Policy Paper*, para. 52, see *supra* note 10.

Network, and Afghan government forces[38] – the focus of the Iraq examination is limited to crimes allegedly committed by one actor only, namely British service personnel. Although Iraq is not a State Party, the ICC can exercise jurisdiction over crimes committed on its territory by British nationals since the UK is a State Party.[39]

In 2006, Moreno-Ocampo decided to close the preliminary examination into Iraq on the basis that, even if British soldiers appeared to be responsible for a number of war crimes, the gravity requirement in the Rome Statute was likely not satisfied due to the relatively low number of alleged violations. He further stated that "[i]n light of the conclusion reached on gravity, it was unnecessary to reach a conclusion on complementarity", but nevertheless noted that his Office had "collected information on national proceedings, including commentaries from various sources, and that national proceedings had been initiated with respect to each of the relevant incidents".[40]

On 13 May 2014, current Chief Prosecutor Bensouda announced that she had decided to re-open the preliminary examination.[41] This presents the first time that the Office has re-opened an earlier terminated examination. The decision to re-open the preliminary examination was made explicitly with reference to new information submitted to the Office on 10 January 2014 by the European Center for Constitutional and Human Rights ('ECCHR') together with Public Interest Lawyers ('PIL').[42] This

38 See *2016 Report on Preliminary Examination Activities*, para. 198, see *supra* note 9. For a detailed account of the Afghanistan examination, including the actors and type of crimes under examination, see further Carla Ferstman, "The International Criminal Court and Extraordinary Rendition", in Didier Bigo, Elspeth Guild and Mark Gibney (eds.), *Extraordinary Renditions and Secret Detentions: Challenges to Democratic Control of Intelligence Services and Human Rights Remedies*, Routledge (forthcoming 2018) (on file with author).

39 See the Rome Statute of the International Criminal Court, 17 July 1998, Article 12(2)(b) ('ICC Statute') (http://www.legal-tools.org/doc/7b9af9/).

40 See OTP, "OTP response to communications received concerning Iraq", 9 February 2006 (http://www.legal-tools.org/doc/5b8996/), see *supra* note 2.

41 OTP, "Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq", 13 May 2014, ICC-OTP-20140513 (http://www.legal-tools.org/doc/d9d9c5/).

42 Bensouda notes that the 10 January 2014 communication provided further information that was not available to the Office in 2006, emphasizing that the communication "alleges a higher number of cases of ill-treatment of detainees and provides further details on the factual circumstances and the geographical and temporal scope of the alleged crimes". *Ibid*. The January 2014 submission by ECCHR and PIL involves a 250-page document with a detailed factual and legal analysis of alleged war crimes in Iraq by British service person-

highlights the quite significant role NGOs and lawyers may have in bringing about the opening of a preliminary examination – particularly when they frame the allegations and legal analysis in ways that correspond with the OTP's analytical process.[43] Keeping in mind Moreno-Ocampo's earlier comments on gravity, ECCHR and PIL deliberately decided to include a large number of allegations and evidence supporting them to avoid a collapse of the examination on reasons of gravity.[44]

Following the initial communication by ECCHR and PIL in January 2014, PIL submitted a second communication in September 2015, which, in the words of the ICC Prosecutor, added "substantively" to the allegations contained in the first communication, including expanding the list of alleged crimes in relation to new cases of alleged detainee abuses and providing additional information in support of the allegations.[45] The Prosecutor is considering the "comprehensive response" made by the UK authorities to the Prosecution with respect to the allegations contained in the communications.[46]

Since the re-opening in May 2014 of the Iraq/UK examination and as of the time of writing, it has been placed in Phase 2, meaning that ICC prosecutors continue to focus on examining subject-matter jurisdiction. Taking into account the large number of alleged crimes and the level of details provided by ECCHR and PIL to support the allegations, the fact that the examination has remained in Phase 2 for more than three years suggests that the prosecutors are applying a high threshold (some would suggest too high a threshold) for determining whether there is a 'reasonable basis' to believe crimes within the jurisdiction of the Court have been

nel. See 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 (http://www.legal-tools.org/doc/8d151d/) (hereinafter '*ECCHR and PIL January 2014 communication*').

43 According to Bethany Shiner, a lawyer formerly working with PIL, the OTP expressed its view that the ECCHR and PIL submission was the "highest quality reports they have ever received". Author's interviews (Bethany Shiner) (on file with author – same hereinafter).

44 Author's interviews (Andreas Schüller).

45 See Office of the Prosecutor, *Report on Preliminary Examination Activities 2015*, 12 November 2015, paras. 26–27 (hereinafter '*2015 Report on Preliminary Examination Activities*') (http://www.legal-tools.org/doc/ac0ed2/).

46 *Ibid*., para. 25.

committed.[47] Arguably, the slow pace of the examination brings into question its ability to advance positive complementarity – to the extent that it is possible at all – as pressure on national authorities to conduct genuine proceedings ought in theory to be more pronounced in Phase 3 where ICC prosecutors explicitly focus on complementarity. However, the OTP has noted that even if questions relating to admissibility are formally examined only in Phase 3, the Office had received and is considering information on relevant national proceedings conducted by the UK authorities. Both the 2015 and 2016 reports on preliminary examinations note that the "Office is in particular mindful that domestic proceedings involving a judicial review of the [IHAT] activities are taking place in the UK".[48] This and other OTP activities during the preliminary examination, including its engagement with British authorities and the senders of the Article 15 communications, are discussed in more detail below.

The UK government has responded in multiple ways to the re-opening of the preliminary examination. On the same day that Bensouda publicly announced that the preliminary examination was re-opened, then Attorney General Dominic Grieve QC stated that the UK remains "a strong supporter of the ICC" and will co-operate with the Court on the examination.[49] At the same time, however, Grieve rejected the idea that British armed forces in Iraq carried out systematic abuses, seemingly suggesting that the ICC does not have subject-matter jurisdiction.[50] Director of the Service Prosecuting Authority ('SPA'),[51] Andrew Cayley QC, further suggested that ICC prosecutors would be unlikely to move ahead with an investigation due to the existence of domestic accountability processes, thus intimating that the complementarity principle would render

47 Author's interviews (various).

48 *2015 Report on Preliminary Examination Activities*, para. 43, see *supra* note 45; *2016 Report on Preliminary Examination Activities*, para. 106, see *supra* note 9.

49 Attorney General Dominic Grieve as cited in Ian Cobain, "ICC to examine claims that British troops carried out war crimes in Iraq", in *The Guardian*, 13 May 2014.

50 *Ibid*.

51 The SPA works independently from the military chain of command. For a description of the SPA's mandate, see its web site. See further UK, the Armed Forces Act 2006 (Chapter 52), 8 November 2006, which addresses issues relating to jurisdiction, offences, modes of liability, investigation and prosecution (https://www.legal-tools.org/en/doc/73ec98/).

any potential cases inadmissible.[52] These and other responses by the British authorities are further elaborated below.

Before outlining the alleged crimes, it should be briefly noted that public opinion in the UK on the war in Iraq predominantly relates to responsibility for a war now viewed widely as illegitimate and unlawful, as opposed to the crimes allegedly committed during this war. A number of politicians, including current Labour leader Jeremy Corbyn, have called for the prosecution of Tony Blair for unlawfully intervening in Iraq.[53] In contrast, few politicians have called for prosecuting those responsible for war crimes in Iraq.[54] Indeed, as will be detailed further below, Members of Parliament and government officials have often taken an outright hostile position towards the legal processes set up to address the allegations – not to mention the persons making submissions to these bodies.

Perhaps partly as a consequence of the above, statements made by politicians and the UK media reporting on the preliminary examination of Iraq/UK have frequently made incorrect assumptions about the ICC's ability to examine the legality of the war as such, often with reference to the need to prosecute Blair for invading Iraq.[55] As Chief Prosecutor Bensouda noted in a press statement in July 2016 following a particularly misleading article in *The Telegraph*, the potential illegality of the resort to

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52 Andrew Cayley as cited in Ian Cobain, "ICC to examine claims that British troops carried out war crimes in Iraq", in *The Guardian*, 13 May 2014, see *supra* note 49.

53 For example, in November 2016 Parliament voted on a motion accusing Tony Blair of misleading Parliament about Iraq and demanding a fresh investigation by a Commons committee into his conduct (the motion was defeated by 439 votes to 70). See Andrew Sparrow, "MPs vote down motion accusing Blair of misleading them over Iraq by majority of 369 - Politics live", in *The Guardian*, 30 November 2016. At the time of writing this chapter, a lawsuit brought by former Iraqi general Abdulwaheed al-Rabbat which claims that Blair can be prosecuted for the crime of aggression in the UK was pending before the High Court. See Owen Bowcott, "Tony Blair should be prosecuted over Iraq war, high court hears", in *The Guardian*, 5 July 2017.

54 Although there has been very limited political support for prosecuting war crimes in Iraq, it is noteworthy that Corbyn has called for an investigation of allegations that members of the elite SAS regiment executed civilians in Afghanistan and covered up the crimes. See The Sun, Natasha Clark, "'Risking our rep': Jeremy Corbyn demands investigation into claims SAS soldiers executed dozens of unarmed Afghan civilians and covered up the killings", in *The Sun*, 3 July 2017.

55 Such calls have been made, among others, by opposition leader Jeremy Corbyn and Scottish National Party leader Alex Salmond. See Mark Kersten, "Confused Partisan Bluster won't Bring Blair to Justice – Or Serve Accountability in Iraq", *Justice in Conflict*, 26 May 2016.

use of force by the UK and other States in Iraq in 2003 is not an issue that can be addressed by the ICC because the crime of aggression does not currently come under the Court's jurisdiction.[56]

13.3.2. The Alleged Crimes

The Iraq/UK preliminary examination involves inquiry into two main forms of war crimes, namely (1) abuse of detainees (including torture and other forms of ill-treatment, rape and other forms of sexual violence); and (2) unlawful killings.[57]

Concerning the first type of violations, the Prosecutor is examining allegations made by ECCHR and PIL that British forces "systematically abused hundreds of detainees in different UK-controlled facilities" across the territory of Iraq throughout their deployment from 2003 to 2008.[58] According to the 2016 report on preliminary examinations, the alleged abuses involve a total of 1,071 Iraqi detainees, of which the Office by November 2016 had analysed accounts relating to 831 "to assess the credibility of the allegations and identify any crime patterns".[59] The Office summarizes the most frequently reported methods of abuse as involving: beatings and other forms of battery, cuffing and other forms of restraining, sensory deprivation, sensory overstimulation, deprivation of clothes, deprivation of food, deprivation of medical care, deprivation of privacy, deprivation of sleep, deprivation of toilet facilities, deprivation of water, forced exertion, exposure to harsh environments, forced immobility and/or silence, prolonged solitary confinement/isolation, stress positions, sexual violence, sexual humiliation/other forms of sexual assaults, electrocution and burning, suspension, water techniques/waterboarding, in-

[56] Bensouda noted the Telegraph article was "aggravating the spread of inaccurate information concerning the ongoing preliminary examination carried out by my Office with respect to the Situation in Iraq". See OTP, "Statement of the Prosecutor correcting assertions contained in article published by The Telegraph", 4 July 2016 (http://www.legal-tools.org/doc/74578d/).

[57] The *2015 Report on Preliminary Examinations Activities* stated that ECCHR and PIL had also submitted allegations relating to failure to respect fair trial standards, noting that "at least 88 detainees were entitled to the protection of the Geneva Convention III until such time as their status would be determined by a competent tribunal in accordance with article 5 of the Geneva Convention III". See *2015 Report on Preliminary Examination Activities*, para. 37, see *supra* note 45. There is no suggestion in the 2016 Report that the Office is actively examining these allegations.

[58] *Ibid*., para. 33.

[59] *2016 Report on Preliminary Examination Activities*, para. 89, see *supra* note 9.

duced desperation, threats, religious and cultural humiliation, and verbal abuse.[60] The Office is examining allegations of rape of 21 male detainees and other forms of sexual violence against another 135.[61]

Concerning the second type of abuses, the Prosecutor is examining allegations made by ECCHR and PIL involving 319 cases of unlawful killings, of which 267 occurred in the course of military operations not relating to arrest or detention.[62] As of November 2016, the Office had analysed 204 of these allegations.[63] As noted in the 2016 report on preliminary examinations, the majority of alleged unlawful killings therefore "appear to have occurred in the context of conventional military or counterinsurgency operations by the UK forces".[64]

Although the reports on preliminary examinations address both types of crimes, the Office appears to be mainly focusing on the first type of allegations (that is, detainee abuse). This may in part be because under international humanitarian law "not every instance of killing necessarily amounts to a crime under the Statute".[65] Further, torture and other forms of ill-treatment of detainees – for which there is, in contrast, an absolute prohibition – if found to have occurred on a large-scale is more likely to be the result of a 'system failure', or even a deliberate policy of the military or the political leadership, as alleged by PIL and ECCHR.[66] To the extent the Office mainly focuses on ill-treatment of detainees, this will also be more in alignment with perceptions in the public, which now largely 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.[67]

60 Other forms of alleged ill-treatment include forced (unnecessary) medical treatment; collective punishment; forced labour; inadequate bedding; use of pepper spray; and forced feeding. See *ibid*., para. 91.

61 *Ibid*., paras. 93–94.

62 *Ibid*., para. 95.

63 *Ibid*., para. 96.

64 *Ibid*.

65 *Ibid*.

66 *Ibid*., para. 89.

67 Author's interviews (various).

The submission made by ECCHR and PIL strongly suggest that detainee abuse was systematic and argue that criminal responsibility "may attach all the way up the chain of command to the Chief of Defence Staff".[68] The submission specifically name former Defence Minister Adam Ingram and former Defence Secretary Geoff Hoon as being the most senior people responsible for the crimes on the basis that they "knew or consciously disregarded information about the abuse of Iraqi detainees by UK Services Personnel in Iraq".[69] The ECCHR and PIL submissions suggest that in the apparent absence of detailed regulation of interrogation techniques in Iraq, the "limits of interrogation were, in effect, set by those responsible for training the interrogators".[70] Many interrogators reportedly received only about two weeks' training lacking in important aspects before their deployment to Iraq.[71]

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68 Further noting that: "available evidence strongly indicates that the unlawful treatment of detainees during arrest and transit operations was systemic. This is apparent from the continuity of abusive and degrading treatment by UK Services Personnel despite changes of personnel on the ground". See *ECCHR and PIL January 2014 communication*, p. 169, see *supra* note 42.

69 Noting that they "either knew or recklessly and deliberately took no notice of information regarding serious ill treatment, and in some cases deaths, of detainees, despite credible and substantial evidence that war crimes had been committed and evidence which demonstrated that there was a significant risk that war crimes were about to be committed". *Ibid*., p. 198 (and further pp. 186–99 on the allegations against Hoon, Ingram and other senior figures in the MoD).

70 *Ibid*., p 22.

71 Author's interviews (various). For an overview of the findings of the Baha Mousa Inquiry on the topic and alleged criminal liability for those who allegedly failed to put in place adequate training, see further *ECCHR and PIL January 2014 communication*, pp. 172–76, see *supra* note 42. In one case forwarded to it by IHAT, the SPA reportedly decided against prosecuting an interrogator for using 'harshing' in an interrogation session because successful prosecution was seen to be "complicated by the training then provided to the suspect soldiers" and "appears to be in keeping with trained techniques albeit the decision as to how best to apply these techniques was left to the interrogator". *Ibid*., p. 233 (citing to a letter from the SPA to the lawyers representing the victim, namely PIL). The Commons Defence Sub-Committee noted as follows on the training provided to interrogators: "It is not disputed that there were incidents of abuse of Iraqi prisoners by British armed forces service personnel. However, it appears that this may have been at least partly because the training given to military interrogators was inaccurate and may have placed them, unwittingly, at risk of breaking the Geneva Conventions in their work." On this basis, the Committee concluded: "The admission that training material for interrogations contained information which could have placed service personnel outside of domestic or international law represents a failing of the highest order". See House of Commons Defence Sub-Committee, *Who guards the guardians? MoD support for former and serving personnel: Sixth Report of Session 2016–17*, 10 February 2017, paras. 83, 86 (hereinafter '*February*

The official reports by the OTP do not clarify whether, and if so how, the Office is examining whether the crimes were the result of plans or policies, direct orders from – or omissions by – the military or political leadership. In the Baha Mousa Inquiry,[72] Sir William Gage found that there had been a "gradual loss of the doctrine" prohibiting the use of the 'five techniques' – involving hooding, white noise, food and drink deprivation, painful stress positions, and sleep deprivation – in guidelines on interrogation,[73] in this regard pointing to a "corporate failure" in the MoD.[74] These techniques, previously used by the British army in the Northern Ireland campaign, were banned by the government in the early 1970s.[75] The European Court of Human Rights ('ECtHR') has held that the 'five techniques' breach the prohibition on inhuman and degrading treatment in Article 3 of the Convention,[76] and the House of Lords has more recently suggested that "it may well be" that such conduct would now be determined to amount to torture.[77]

2017 report by House of Commons Defence Committee') (http://www.legal-tools.org/doc/7a0253/).

72 The mandate of the Baha Mousa Inquiry – established under the Inquiries Act 2005 and chaired by a retired Court of Appeal judge, Sir William Gage – was: "To investigate and report on the circumstances surrounding the death of Baha Mousa and the treatment of those detained with him, taking account of the investigations which have already taken place, in particular where responsibility lay for approving the practice of conditioning detainees by any members of the 1st Battalion, The Queen's Lancashire Regiment in Iraq in 2003, and to make recommendations." See The National Archives, "The Baha Mousa Public Inquiry" (available on the Archives' web site).

73 See the Right Honourable Sir William Gage, *The Report of the Baha Mousa Inquiry*, vol. II, 2011, The Stationery Office, London, part IV, chap. 10, para. 4.174 (http://www.legal-tools.org/doc/8b8421/).

74 See *ibid*.; and the Right Honourable Sir William Gage, *The Report of the Baha Mousa Inquiry*, vol. I, 2011, The Stationery Office, London, part II, chap. 21, para. 2.1551 (http://www.legal-tools.org/doc/acafaa/). In the hearings before the Defence Sub-Committee, Peter Ryan admitted that "the MoD had 'lost the fact' that certain techniques had been banned and that it was lost somewhere 'between 1970-something and 2003'". See *February 2017 report by House of Commons Defence Committee*, para. 85, see *supra* note 71.

75 In the UK House of Commons on 2 March 1972 then Prime Minister Ted Heath stated that the Government had "decided that the techniques which the Committee examined will not be used in future as an aid to interrogation". As cited in *ECCHR and PIL January 2014 communication*, p. 16, see *supra* note 42.

76 ECHR, *Ireland v. UK*, 18 January 1978, Series A no. 25.

77 *R (A and Others) v Secretary of State for the Home Department* [2005] UKHL 71, para. 101. See further *ECCHR and PIL January 2014 communication*, pp. 17–18, see *supra* note 42.

SPA Director Andrew Cayley QC states that he has seen no evidence that the 'five techniques' – or any other interrogation technique that breach the Geneva Conventions – were officially authorized in the Iraq war: "The five techniques were never authorised by the MoD. If they were being used – [and] I've seen no evidence of that […] – it was because people were deciding to do it by themselves, but it certainly was never authorised".[78] However, Nicholas Mercer, who was the most senior legal adviser to the British Army when the Iraq war commenced in 2003, states that he witnessed detainees in stress positions and being hooded.[79] Mercer states that he reported to the military leadership that techniques against the Geneva Conventions were being used, but to no avail.[80] According to him, one key problem was that the usual chain of command was being bypassed, with interrogators claiming to "report to London" – assumedly meaning they referred directly to the Ministry of Defence ('MoD') and thus felt at liberty to ignore the advice given by Mercer and other military lawyers working within the ordinary chain of command.[81] Crucially, Mercer states that he saw written instructions to interrogators allowing the use of some of the 'five techniques', specifically hooding and stress positions.[82] If this is the case (the MoD denies such instructions existed) and detainee abuse was as systematic as claimed by PIL, ECCHR and others, this suggests that criminal liability could extend to senior civil servants in the MoD itself.[83]

78 Author's interviews (Andrew Cayley).

79 Author's interviews (Nicholas Mercer).

80 *Ibid*. For further details concerning how Mercer raised his concern about ill-treatment of detainees, see Witness statement of Nicholas Mercer to the Baha Mousa Inquiry, 9 September 2009 (http://www.legal-tools.org/doc/e3ea83/) (hereinafter *Mercer witness statement to Baha Mousa Inquiry*).

81 Mercer adds that prior campaigns, including the 1991 Gulf War, did not see the MoD "interfering" to the extent they did during the 2003 Iraq War where MoD lawyers "imposed themselves at the top of the pyramid". He also notes: "There's another issue, and that's the attorney general, the previous one, Lord Goldsmith was potentially implicated. There have been allegations that *he* gave the advice on interrogation […] The MoD lawyers, one of their favourite tricks in theatre, was to outmanoeuvre the military by saying they've been to the attorney general and taken his advice and whereas they heard what we had to say, the Attorney General said something different". Author's interviews (Nicholas Mercer). See further *Mercer witness statement to Baha Mousa Inquiry*, see *supra* note 80.

82 Author's interviews (Nicholas Mercer).

83 Even assuming that evidence pointing to authorization of (some of) the five techniques comes to the attention of ICC Prosecutors, it remains an open question whether they will

13.4. The OTP's Strategies, Expectations to Domestic Accountability Processes and Engagement with Other Actors

13.4.1. Best Case Scenario and Challenges to Positive Complementarity

The general view that emerges from this research is that the understanding of 'best case scenario' within the OTP is that the Iraq/UK preliminary examination can be terminated with reference to the existence of a genuine domestic accountability process in the UK.[84] If so, this could bolster the Office's policies on preliminary examinations and positive complementarity discussed above. This preference however is also likely to reflect that the OTP has little appetite for proceeding with a full investigation, as this would lead to a direct confrontation with a major power and key supporter of the Court.[85] At the same time, should the Office terminate the examination on the basis of a conclusion that the alleged crimes were not sufficiently large-scale, this could spark renewed critique of double standards from African States Parties, the human rights community, and others, especially since the ECCHR and PIL communications involve a much larger number of allegations compared to those that led Moreno-Ocampo to close the examination in 2006. From the perspective of the OTP, the ideal scenario therefore likely involves a situation where the 'hand-over version' of complementarity can be said to 'work': genuine domestic proceedings, targeting persons at a sufficiently high level, will take place in the UK, which renders further steps by the OTP unnecessary,

view such conduct as sufficiently grave to warrant investigation and prosecution. If one takes the starting point in the gravity of the nature of violations, other allegations contained in the *ECCHR and PIL January 2014 communication* relating, for example, to rape and beating to death detainees, as happened in Mousa's case, would appear 'graver' to most compared to sensory deprivation or stress positions. Yet, one might argue that the conception of gravity ought, at least partially, to depend on how systematic the crimes were. See e.g. Kevin Jon Heller, "Situational Gravity Under the Rome Statute", in Carsten Stahn and Larissa van den Herik (eds.), *Future Directions in International Criminal Justice*, TMC Asser/Cambridge University Press, 2009.

[84] Author's interviews (various). The understanding that the preliminary examination should make positive complementarity 'work' was also the rationale for the Article 15 communication senders to engage the ICC in the first place, but, as Andreas Schüller of the ECCHR emphasizes, if that did not occur within a reasonable timeframe – which he believes it has not – the expectation is that the ICC should proceed with an investigation. Author's interviews (Andreas Schüller).

[85] Author's interviews (various).

and this can at least partially be attributed to the ICC's preliminary examination.[86]

However, it is also clear that the Office has certain expectations to a domestic accountability process which may make it difficult to terminate the preliminary examination with reference to the complementarity regime, at least 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 are likely aware that there are significant political obstacles in the country to prosecuting members of the armed forces for humanitarian law violations, especially to the extent this involves senior commanders, or even MoD officials.[87] In short, the main challenge for making positive complementarity work is not 'ability' but 'willingness'.

At the same time, the OTP 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.[88] Proceeding with an investigation on the basis of unwillingness where some form of domestic 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, and perhaps even more so because accountability processes in the UK relating to the abuses in Iraq are headed by leading experts on international criminal law, notably SPA Director Andrew Cayley QC.[89] The OTP is assumedly also aware that the 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 the Office would be able to apply to an investigation, should one be

86 *Ibid*.

87 *Ibid*.

88 *Ibid*.

89 *Ibid*. This is certainly the understanding advocated by British government officials. Joyce Anelay, the minister with responsibility for the ICC, argues: "British justice has perhaps the best and longest tradition in the world of being able to be robust and independent. If anybody thinks British justice can be swayed by national prejudice, they will be 100 percent wrong." See Thomas Escritt, "'Robust' domestic probes would pre-empt ICC charges against UK soldiers: minister", in *Reuters*, 29 January 2016.

opened.[90] This above suggests that preliminary examinations are likely to proceed quite differently in situations involving States with significant resources and strong legal systems.

The OTP has in the past referred to IHAT as a process that is being considered for the purposes of complementarity.[91] The fact that the MoD decided to terminate this process by the end of June 2017[92] – together with most of the cases it was intended to investigate – may, at least on the face of it, complicate reaching a positive assessment of complementarity.[93] However, the OTP's determination will obviously depend, not on names, but on the nature and operations of the new system to be set up – referred to as the Service Police Legacy Investigations ('SPLI'), a mechanism discussed below.

13.4.2. Key Factors in the Complementarity Assessment

One particularly critical aspect of the complementarity assessment will be whether, and if so how, domestic processes are able to tackle 'systemic issues', understood to involve system failures such as poor supervision, lack of guidance and lack of training, some of which may potentially constitute criminal conduct in the form of omissions.[94] To the extent the OTP concludes that there is a reasonable basis to believe that crimes within the jurisdiction of the Court were committed on a large scale, the Office will expect domestic processes to address systemic issues for it to make a call that complementarity renders further steps by the Office unnecessary. For example, if the Office finds that specific units appear to have been consistently involved in the commission of crimes, it will be of particular importance for the complementarity assessment whether domestic pro-

[90] As SPA Director Andrew Cayley notes, ICC Prosecutors "know that if, theoretically, they were to take this on, they couldn't put as much [resources] […] this has always been an overarching factor for them […] they couldn't do that themselves and they know it". Author's interviews (Andrew Cayley).

[91] See *2015 Report on Preliminary Examination Activities*, at para. 43, see *supra* note 45; *2016 Report on Preliminary Examination Activities*, para. 106, see *supra* note 9.

[92] Curiously, by early August 2017, there was no indication at IHAT's website that IHAT had been closed.

[93] UK authorities informed ICC Prosecutors of the intended closure of IHAT before it occurred. Author's interviews (Andrew Cayley).

[94] Author's interviews (various).

cesses manage to address the conduct of persons in charge of such units, rather than examining only the conduct of direct perpetrators.[95]

IHAT has been criticized for approaching investigations of alleged crimes in Iraq on a case-by-case basis.[96] However, SPA Director Cayley states that UK investigators and prosecutors *are* "looking at systemic issues" and points to the existence of "a number of investigations that are specifically addressing systemic issues".[97] Cayley explains that a special team to address systematic issues was created already in 2013,[98] rendering meaningless any speculation that such investigations were *launched* as a consequence of the preliminary examination re-opened in 2014, though of course it remains a possibility that they *improved* due to the ICC's intervention. Should the preliminary examination proceed to Phase 3, the OTP's assessment of complementarity will for a large part depend on Cayley's ability to convince ICC prosecutors that domestic mechanisms are genuinely addressing systemic issues.[99] In simpler terms, the OTP hopes to push the UK authorities to adequately address systemic issues, and if ICC prosecutors feel they succeed, the preliminary examination will likely be terminated on that basis (if it is not already terminated in phase two on grounds of subject-matter jurisdiction).[100]

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95 *Ibid*.

96 *Ibid*. See also Roslyn Fuller, "ICC & British war crimes: The trial of Tony Blair?", in *RT*, 21 May 2014.

97 Author's interviews (Andrew Cayley). It is of interest in this regard that the Common's Defence Sub-Committee noted as follows: "We expect the MoD to confirm that no cases under consideration by IHAT are based on the actions of individuals who were following that flawed guidance. If there are, we ask the MoD to set out how it will support individuals who are subject to claims arising from actions which their training advised was lawful". See *February 2017 report by House of Commons Defence Committee*, para 86, see *supra* note 71.

98 *Ibid*.

99 Besides the IHAT/ SPA set-up, the MoD has created a 'Systemic Issues Working Group' (SIWG), chaired by the MoD's Director of Judicial Engagement Policy, and mandated to conduct a review of IHAT reports and issues relating to training and to review "the action that has been taken to address the issues identified, and determine whether such measures are appropriate and sufficient – or whether further action needs to be undertaken". See Ministry of Defence, Systemic Issues Working Group, "Systemic Issues Identified From Investigations Into Military Operations Overseas: July 2014" (http://www.legal-tools.org/doc/157c02/) (hereinafter '*MoD 2014 Report on Systemic Issues Identified From Investigations Into Military Operations Overseas*')*.*

100 Author's interviews (various).

Yet, there is a separate question concerning domestic processes' ability to address 'systematic issues', understood to involve potential plans or policies to commit crimes, such as authorizing or ordering interrogators to use techniques that breach the Geneva Conventions. If that is the case, this could trigger the criminal responsibility of high ranking officials who put in place any such plan or policy to abuse detainees. The UK authorities have made it clear that such allegations do not form part of domestic investigations within the context of the IHAT/SPLI/SPA set-up for the simple reason that they have seen no evidence of such plans or policies.[101] Similarly, the potential existence of plans or policies to use interrogation techniques or conditions of detention that violate the Geneva Conventions do not appear to currently be actively investigated by the OTP. However, should credible evidence pointing to such a 'systematic basis' for the crimes come to the Office's attention, one would expect ICC prosecutors to question the ability of the structures currently in place in the UK to adequately address such a situation.[102]

Another important aspect of a potential complementarity assessment relates to the timing of domestic processes. In essence, if the OTP comes to the conclusion that crimes within the jurisdiction of the Court are likely to have been committed on a large scale, and therefore proceeds to Phase 3 of the examination, should the complementarity assessment then await the final outcome of the judicial processes in the UK, or can a more holistic assessment be made that 'systems are in place' which are, in principle, capable of addressing war crimes in Iraq in a genuine manner?[103]

The first approach will likely result that the preliminary examination will be kept open for the years to come. In addition to increased pressure from the UK Government to end the examination, this could lead to

[101] Author's interviews (Andrew Cayley).

[102] The SPA can only prosecute service personnel. However, the ordinary civilian criminal processes also apply to service personnel at the time they are serving and subsequently.

[103] The *PE Policy Paper* does not address this specific issue. The Paper simply takes note that the Statute provides no timelines for bringing a preliminary examination to a close, and further that the Prosecutor must continue the examination until the information provides clarity on whether there is a reasonable basis to proceed with an investigation. The Paper clarifies that this may require gathering and analysing and assessing "specific relevant national proceedings, where they exist, over a long period of time in order to assess their genuineness and their focus throughout the entirety of the proceedings, including any appeals". *PE Policy Paper*, para. 90, see *supra* note 10.

the type of criticism levelled against the Office's lengthy examination in Colombia. Should the second approach be followed, the determination of whether the system in place is sufficient for terminating the examination with reference to complementarity is likely to be significantly influenced by the OTP's understanding of whether such a process appears capable of adequately addressing the 'systemic issues' relating to the commission of crimes discussed above.

However, an obvious risk of pursuing the latter strategy is that, even if the systems set up are nominally capable of pursuing accountability in a manner that satisfies OTP expectations, investigations could last for years, and there is of course no guarantee that any of these investigations will lead to prosecutions. The possibility that judicial processes at the national level look solid on paper but are dragged on endlessly and ultimately lead to no or only very limited prosecutions raises serious questions concerning the effectiveness of the regime for positive complementarity as it is currently conceptualized. The burden is clearly on the OTP – and perhaps overly so – in situations where there *are* ongoing domestic proceedings regardless of how slowly these proceed.[104]

13.4.3. OTP Engagement with Other Stakeholders

Although not unusual, it should be noted that ICC prosecutors notified UK government officials that a preliminary examination was to be opened before this information was made public.[105] More generally, the OTP has remained in close contact with UK government officials to "verify the seriousness of the information in its possession, discuss the progress of the Office's preliminary examination process, address methodological issues as well as to solicit updates and provision of additional relevant information".[106] This has involved several visits by OTP officials to the UK, including at the premises of IHAT and SPA. During these visits, the general progress of domestic proceedings was discussed and ICC prosecutors requested detailed information from the UK authorities concerning

[104] For the OTP to justify a request to open an investigation in such a situation, it would need to label a country unwilling to genuinely carry out the investigation with reference to the standards in Article 17(2)(b) which speaks to a situation where there has been "an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice".

[105] Author's interviews (various).

[106] See *2015 Report on Preliminary Examination Activities*, para. 40, see *supra* note 45.

the status of these processes. In a sense, as SPA Director Cayley observes, OTP officials "monitor" how the UK authorities conduct their investigations, and are keen to be kept up to date on all relevant developments.[107]

OTP officials have reportedly not requested access to material in the possession of IHAT and SPA which could help clarify the credibility of specific allegations included in the submissions by ECCHR and PIL. Significantly, most interrogations in Iraq were video recorded and are available to IHAT and the SPA, but OTP officials have reportedly not requested access to these recordings to date.[108] Some find this surprising because – in the words of Mercer – "it is a prosecutor's dream to have it all on film".[109] As noted above, the OTP does not enjoy investigative powers at the preliminary examination stage and can therefore not *compel* the UK authorities to share such material. It is disputed whether ICC prosecutors could *request* access to specific recordings at the preliminary examination stage.[110]

Another interesting aspect of the Iraq/UK examination relates to the Office's engagement with the civil society organizations and lawyers who submitted the Article 15 communications. The Office has regularly met with representatives of these organizations and law firms to clarify issues relating to the submissions, receive additional supporting information and related issues.[111] Involved lawyers have experienced their engagement

[107] Author's interviews (Andrew Cayley).

[108] Author's interviews (various). Geoff White, the former head of IHAT testified in *Ali Zaki Mousa* that over 3,500 such recordings exist. According to *ECCHR and PIL January 2014 communication*, videos disclosed during the judicial review proceedings in the UK show interrogation techniques such as sensory deprivation, food and water deprivation and sleep deprivation are being used, and some videos additionally show soldiers beating and kicking Iraqis outside of detention facilities. See *ECCHR and PIL January 2014 communication*, pp. 110–12, see *supra* note 42.

[109] Author's interviews (Nicholas Mercer).

[110] The *PE Policy Paper* emphasizes that although the Office does not enjoy full investigative powers at the preliminary examination stage, it "may seek additional information from States, organs of the United Nations, intergovernmental and non-governmental organisations, and other reliable sources that are deemed appropriate". *PE Policy Paper*, paras. 12, 85 and 102, see *supra* note 10. Some interviewees suggest that requesting access to material such as video recordings would amount to an investigative step, and is hence not permitted at the preliminary examination stage. Author's interviews (various).

[111] Bethany Shiner, formerly with PIL, explains that when ICC Prosecutors came to PIL offices, they were provided with full access to the relevant files and provided with "hundreds of pages worth of information to support the allegations". Author's interviews (Bethany Shiner).

with the OTP as "generally open" and "productive", though sometimes left with a feeling that OTP staff can be "hard to work out" because they do not share the assessments they make.[112]

The OTP has also conducted "a thorough evaluation of the reliability of sources and credibility of information received on alleged crimes", including a mission to PIL offices in October 2015 "for the purposes of screening the supporting material relating to the claims".[113] However, as will be discussed below, lawyers from PIL (and other law firms in the UK involved in Iraq suits) have been subject to allegations of misconduct, which potentially affect the credibility of the information they submitted to both national justice institutions and the ICC. In this regard, the OTP states as follows in the 2016 preliminary examination report:

> The Office is mindful of issues affecting in particular the reliability of the providers of information, including the closing-down of PIL, allegedly as a result of disruption of legal aid funding for breach of contractual requirements with the national competent agency; and allegations of misconduct against the PIL and other groups representing Iraqi's claimants in the UK, leading *inter alia* to an investigation before the Solicitors Regulation Authority ("SRA") and the subsequent referral of both PIL and Leigh Day to the Solicitors Disciplinary Tribunal ("SDT"). The Office has closely scrutinized and will continue to keep abreast of relevant developments at the national level in the context of the proceedings before the SDT.[114]

As will be discussed below, a key justification for closing IHAT relates exactly to the allegations made against PIL, and lead lawyer Phil Shiner's admission to counts of misconduct. Although Shiner's misconduct does not necessarily mean that the material submitted to the OTP lacks credibility, ICC prosecutors are likely to carefully consider its ramifications. It remains a real possibility that the examination could be terminated on exactly this basis. Looked at cynically, some might even suggest this could be the easiest 'way out' of a situation that could prove increasingly difficult for the OTP to manage. But it is also a strategy that is bound to raise questions concerning the Office's motivations for terminat-

[112] Author's interviews (Bethany Shiner).

[113] See *2015 Report on Preliminary Examination Activities*, para. 42, see *supra* note 45.

[114] See *2016 Report on Preliminary Examination Activities*, para. 105, see *supra* note 9.

ing the examination, unless it convincingly demonstrates a link between Shiner's misconduct and the credibility of the material provided by ECCHR and PIL.

Besides the Article 15 communication senders, the Office is also examining material provided by other NGOs, such as Redress, Amnesty International, and Human Rights Watch. The Office states that it uses such information to "cross-check allegations of unlawful killings of Iraqi civilians by UK personnel in situations outside of custody, such as in the course of military and counterinsurgency operations conducted by the British army".[115] However, it is not clear to what extent the Office actively pursues corroborating evidence at this stage. For example, one human rights organization has encouraged the OTP to contact Mercer, but the OTP has not done so to date, even if ICC prosecutors have been made aware that he is willing to provide evidence to the Office relating to the abuses he witnessed in detention facilities and other information that could prove crucial in determining whether there is basis to proceed with an investigation.[116]

13.4.4. Is the OTP Treating the Iraq/UK Examination Differently from Other Preliminary Examinations?

Much in the above raises the question whether the OTP treats the Iraq/UK examination differently from other preliminary examinations. Put otherwise: does the UK's international standing, diplomatic leverage and strong support for the ICC in general somehow impact how the Office conducts this preliminary examination? It seems clear that ICC prosecutors are sensitive to the ramifications of examining a major power, including the increased scrutiny this in turn creates of the Office's actions, and hence very carefully considers any action and statements it makes in this examination. However, the general view that emerges from this research is that the Office is committed to applying the same standards to this examination as it applies to others, including a principled willingness to proceed with requesting the Pre-Trial Chamber's authorization for an in-

[115] See *ibid*., para. 102.

[116] Author's interviews (Carla Ferstman and Nicholas Mercer). However, some interviewees believe doing so would amount to an investigative step that is not permissible at the preliminary examination stage. Author's interviews (various).

vestigation if the Office believes that the standards in Article 53 are met.[117]

One particularly important question in this regard is whether the Afghanistan examination, involving allegations of crimes by US military forces and the CIA, somehow affects the Iraq/UK examination. Simultaneously opening investigations that involve two major Western powers would self-evidently present an entirely new direction for international justice with significant ramifications for the OTP and the Court as whole. However, the timing of potential investigations is likely to be quite different. The Prosecutor stated in the November 2016 report on preliminary examinations that the decision on whether to request Pre-Trial Chamber authorization to commence an investigation into the situation in Afghanistan will be made "imminently".[118] As seen from the analysis in this chapter, any such decision in the Iraq/UK examination is likely to be far less imminent. Additionally, there is the question of resources. Moving ahead simultaneously with two new investigations involving extremely complex situations and what is likely to amount to hereto unseen pressure on the Office by States with significant diplomatic power could strain the Office beyond its capacity. Even if the OTP is committed to acting professionally and objectively determining whether there is basis for requesting the opening of a formal investigation of the Iraq/UK situation, it seems implausible that it will do so any time soon if an investigation into the situation in Afghanistan is to be opened in the near future.

13.5. UK Government Responses to the Preliminary Examination

13.5.1. Overall Responses to the ICC's Re-opening of the Preliminary Examination

The UK government has reacted to the re-opening of the Iraq/UK preliminary examination by deploying three overall strategies. First, the government has stated its intention to co-operate with the OTP – and it has

[117] Author's interviews (various). However, as noted elsewhere in this Article, some interviewees believe that the OTP is applying a new and higher threshold in this examination for determining whether there is a reasonable basis to determine whether crimes within the jurisdiction of the Court were likely committed. Author's interviews (various).

[118] See *2016 Report on Preliminary Examination Activities*, para. 230, see *supra* note 9. As of August 2017, the OTP was yet to make an announcement on whether it will proceed with requesting the authorization of an investigation of the situation in Afghanistan.

seemingly done so to date in all ways expected by the Office.[119] Second, the government has made it clear that it believes the preliminary examination should be closed, on three grounds: (1) the Court lacks jurisdiction since the crimes were not committed on a large scale and/or systematically; (2) due to the existence of judicial measures in the UK which address crimes in Iraq, the Rome Statute's complementarity regime renders the situation inadmissible; and (3) the information that the preliminary examination is based on is not credible.[120] Third, and closely connected to that, the British authorities have targeted the lawyers involved in the accountability processes, and have made broader moves aimed at avoiding a repeat of the legal processes that have emerged in this case, including a proposal to derogate from human rights law so that it no longer applies to situations of armed conflict.[121]

Concerning the first claim as to why the preliminary examination should be closed, government officials have continuously stated that the crimes committed in Iraq were not systematic, intimating that the ICC lacks subject-matter jurisdiction. For example, following the submission by ECCHR and PIL to the OTP in January 2014, an MoD spokesperson plainly stated that they "reject the suggestion the UK's Armed Forces – who operate in line with domestic and international law – have systematically tortured detainees".[122] Then Foreign Secretary William Hague similarly noted that whereas "there have been some cases of abuse that have been acknowledged and apologies and compensation have been paid appropriately", the "government has always been clear and the armed forces

[119] There is no suggestion by any of the persons consulted for this research that the UK government has in any way failed to live up to that promise to cooperate with the ICC.

[120] Government officials have communicated these views to ICC Prosecutors in no uncertain terms, and on that basis requested an end to the examination as soon as possible. Author's interviews (various).

[121] Prime Minister Theresa May has stated that the proposal, which would be "implemented by introducing a 'presumption to derogate' from the ECHR in warfare", aims at putting "an end to the industry of vexatious claims that has pursued those who served in previous conflicts". See Peter Walker and Owen Bowcott, "Plan for UK military to opt out of European convention on human rights", in *The Guardian*, 4 October 2016. For a further discussion of the proposal, see Marko Milanovic, "UK to Derogate from the ECHR in Armed Conflict", in *EJIL: Talk!*, 5 October 2016.

[122] Jonathan Owen, "Exclusive: Devastating dossier on 'abuse' by UK forces in Iraq goes to International Criminal Court", in *The Independent*, 12 January 2014, see *supra* note 1.

have been clear that they absolutely reject allegations of systematic abuses by the British armed forces".[123]

Concerning the second claim as to why the preliminary examination should be closed, government officials have continuously pointed to the existence of domestic judicial processes, in particular IHAT, as something that renders ICC action unnecessary and cases inadmissible.[124] For example, in January 2014, an MoD spokesperson noted that the allegations made by ECCHR and PIL are "either under thorough investigation or have been dealt with […] further action through the ICC is unnecessary when the issues and allegations are already known to the UK Government, action is in hand and the UK courts have already issued judgments".[125] Then Foreign Secretary William Hague similarly noted: "These allegations are either under investigation already or have been dealt with already in a variety of ways, through the historic abuses system that has been established, through public inquiries, through the UK courts or the European courts".[126] Notwithstanding the rejection that the ICC has subject-matter jurisdiction in this case, British diplomats have attempted to portray the above as "a clear demonstration of complementarity in action" in the context of the Assembly of States Parties.[127]

Concerning the third claim as to why the preliminary examination should be closed, government officials have contested the credibility of the information submitted to the ICC as well as the credibility of the senders of the Article 15 communications. Former Prime Minister David Cameron promised to crack down on "spurious" legal claims, and further stated in January 2016: "I want our troops to know that when they get

123 *Ibid*.

124 In his review of IHAT, Sir David Calvert-Smith suggested that the processes employed by the IHAT would "certainly satisfy the requirements of civilian investigation and prosecution organizations in England and Wales", and he "would be very surprised therefore if an international tribunal were to take a different view". See UK Attorney General's Office and Ministry of Defence, Sir David Calvert-Smith, *Review of the Iraq Historic Allegations Team*, 15 September 2016, p. 37 ('*Review of the Iraq Historic Allegations Team*') (http://www.legal-tools.org/doc/35793d/).

125 *Ibid*.

126 *Ibid*.

127 During the 2015 Assembly of States Parties, the UK stated that it had "demonstrated to the [ICC] Prosecutor that these matters are being thoroughly dealt with at national level – a clear demonstration of complementarity in action." See Catherine Adams, "Statement of the United Kingdom of Great Britain and Northern Ireland", 18 November 2015 (http://www.legal-tools.org/doc/bb9cc0/).

home from action overseas this government will protect them from being hounded by lawyers over claims that are totally without foundation".[128] Government officials and politicians have frequently referred to the lawyers involved in these legal processes using terms that are worrying from a rule of law perspective, especially since many of the allegations were made while legal proceedings against PIL and Phil Shiner were on-going. For example, Colonel Bob Stewart, a Tory MP on the Commons Defence Sub-Committee, noted: "Not only do we have civilian battlefield ambulance chasers, we now have MoD battlefield ambulance chasers. I'm fed up with our soldiers being chased and harassed and intimidated after they have put their lives on the line".[129] It is not clear whether the OTP would be considering statements of this nature for the purposes of assessing 'willingness' should the examination proceed to Phase 3. What is clear, however, is that rather than targeting the OTP for re-opening the preliminary examination, some politicians have in a sense "gone after the messengers".[130]

Taken together, the above suggests that the British government takes the preliminary examination – and more broadly the legal processes surrounding the alleged crimes in Iraq – quite seriously. Besides the reputational costs associated with being subject to an ICC preliminary examination for a leading democracy, the UK may be particularly sensitive to allegations of torture due the critiques arising out of previous military campaigns in Northern Ireland and in the context of de-colonization.

13.5.2. Judicial Processes in the UK Addressing Crimes in Iraq and their Connections to the Preliminary Examination

A variety of judicial processes in the UK address abuses committed during the Iraq war, but they do so in quite different ways, and not all of them are strictly relevant from the perspective of complementarity.[131] This sub-

[128] "Investigations into unlawful killings by British soldiers dropped", 25 January 2016, in *The New Arab*.

[129] Carri-Ann Taylor, "Ambulance-chasing lawyers handed taxpayers' cash to try to prosecute Iraq war heroes", in *The Sun*, 4 January 2016.

[130] This strategy is not unique to the Iraq claims, but has been previously used by British authorities, for example, in the context of lawyers and NGOs pursuing justice for abuses in Northern Ireland.

[131] A comprehensive analysis of these judicial measures is provided in Rachel Kerr's contribution to this volume. See Rachel Kerr, "The UK in Iraq and the ICC: Judicial Intervention, Positive Complementarity and the Politics of International Criminal Justice", in Morten

section will briefly outline these processes and point to their relevance to the ICC's preliminary examination, and then proceed to a more thorough analysis of the mechanisms that specifically address criminal liability, namely IHAT and the new mechanism set up following its closure – the SPLI – together with the SPA.

As such, three legally distinct processes in the UK address the crimes allegedly committed by British forces in Iraq, namely: (1) judicial reviews aimed at satisfying obligations under the European Convention on Human Rights ('ECHR') (and the implementing legislation in the UK, the Human Rights Act) to investigate violations of Articles 2 and 3 of the Convention;[132] (2) civil suits seeking compensation for Iraqi victims, leading to settlements in numerous cases;[133] and (3) criminal investigations, initially involving Royal Military Police ('RMP') investigations leading to a limited number of courts martial,[134] and more recently the investigations undertaken by IHAT – now the SPLI – in conjunction with the military's prosecuting authority, the SPA.[135]

In terms of connections between these legal processes and the ICC preliminary examination, it is noteworthy that the OTP reports on preliminary examinations cite the findings of the judicial review proceedings, noting that their outcomes are being considered in the assessment of whether crimes within the jurisdiction of the Court "were committed on a

Bergsmo and Carsten Stahn (eds.), *Quality Control in Preliminary Examination: Volume 1*, Torkel Opsahl Academic EPublisher, Brussels, 2018, chap. 14.

132 Kerr outlines the details of the 13 judicial review cases relating to abuses Iraq in her chapter in this volume. See *ibid*., appendix 3. Besides these reviews, there is also the Iraq Fatality Investigations, which is not discussed in detail in this chapter. See further http://www.iraq-judicial-investigations.org.

133 For a further analysis of these cases, see, for example, Monica Feria-Tinta, "Extra-Territorial Claims in the 'Spider's Web' of the Law? UK Supreme Court Judgment in Ministry of Defence v Iraqi Civilians", in *EJIL: Talk!*, 25 May 2016.

134 Altogether four Courts Martial relating to the situation in Iraq have been completed, with most defendants acquitted or the cases stopped by the Advocate General. One of these cases however, *R v. Payne* relating to Baha Mousa's death led to the conviction of Corporal Donald Payne, who pleaded guilty to a charge of inhumane treatment and was sentenced to 12-months imprisonment. The Courts Martial have been criticized for not being up to standards. Kerr, 2018, appendix 2, see *supra* note 131.

135 Additionally, the military has undertaken its own investigations, leading to the publication of the Aitken Report (2008) and the Purdy Report (2010). These reports are not addressed in this chapter. For some comments on these reports, see *ECCHR and PIL January 2014 communication*, pp. 226–27, see *supra* note 42.

large scale or pursuant to a plan or policy".[136] This suggests a more complex interplay between international and national justice processes than typically considered in the literature on complementarity, in that national justice processes which work independently and make findings concerning the nature and scope of crimes can potentially serve to bolster OTP activities, as opposed to simply advancing positive complementarity and making an escalation of ICC activities less likely. For the same reasons, it is of interest that the submission made by ECCHR and PIL rely heavily on the findings made by Sir William Gage in the Baha Mousa Inquiry as well as the evidence made available by the government during that inquiry.[137]

Moreover, the fact that more than 300 civil suits in which Iraqi victims have sued the MoD have been settled and led to more than £20 million being paid in compensation is seen by many as undermining the government's narrative that the abuses in Iraq were not systematic.[138] As Mercer argues: "anyone who has fought the MoD knows that they don't pay out for nothing […] clearly this isn't just one or two bad apples, as they have been characterised, this is on a fairly large and substantial scale".[139] Many of the allegations in the ECCHR and PIL submissions to the ICC involve victims who have also pursued civil suits. However, because the facts of these settled cases are not publicly available, they are unlikely to directly inform the ICC's preliminary examination.[140]

At the same time, the tendency of domestic legal processes to focus on individual abuses as opposed to systemic issues was a main reason for ECCHR and PIL to approach the ICC in the first place. Bethany Shiner, formerly with PIL, explains:

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136 See *2015 Report on Preliminary Examination Activities*, para. 44, see *supra* note 45.

137 The ECCHR and PIL submission notes that the Baha Mousa Inquiry "has facilitated the present communication", and relies extensively on the legal and factual findings of the judge leading the inquiry. For example, ECCHR and PIL cite to the contents of video recordings and detainees' medical records disclosed by the MoD during the inquiry as well as testimonies by government officials given in the context of the inquiry. The submission by ECCHR and PIL also cite to the Courts Martial, emphasizing that in *R v. Payne and Others* the Court accepted Colonel Mendonca's defence that he had genuinely believed that the Brigade had sanctioned the use of stress positions and hooding. See *ECCHR and PIL January 2014 communication*, pp. 20–22, 109–18 and 223–24, see *supra* note 42.

138 The Guardian reported in October 2016 that 326 cases had been settled with about £20m being paid in compensation. See Press Association, "British troops face investigation over ill-treatment of Iraqis", in *The Guardian*, 16 October 2016.

139 Author's interviews (Nicholas Mercer).

140 Author's interviews (Bethany Shiner).

> Essentially, in the judicial review proceedings, in Ali Zaki Mousa II […] the claim was advanced that this should be a single Iraq inquiry, which is essentially an overarching independent systemic issues inquiry […] the Secretary of State said, 'we'd refuse that inquiry on the grounds of cost, time, expertise, so forth' […] And the Secretary of State said, 'our decision can't be impugned by the court', and the court agreed. So, that quickly shot down the possibility of getting systemic issues outside of the Baha Mousa case aired. Because the system that was established, and is still in operation now, is clearly ineffective […] the Iraq Fatalities Investigations do have some worth, but they're really slow, it's a case by case basis; [Judge] Newman has got limited resources; and years later, there's no accountability. […] The ICC is clear about criminal accountability and command responsibility. So, I think the fact that the systemic issues wouldn't be aired by way of public inquiry meant that the only other way to ensure that the issues were analysed and that the individuals responsible were identified […] is through the ICC.[141]

13.5.3. The Establishment and Closure of IHAT

IHAT was established by the MoD in March 2010 to investigate allegations of criminal conduct by British military personnel during operations in Iraq between 2003 and 2009 as a way to comply with Britain's obligations to undertake independent investigations under human rights law.[142] This followed an application for judicial review filed by PIL in February 2010 in the case *Ali Zaki Mousa v Secretary of State for Defence (Mousa No. 1*) which challenged the ongoing RMP investigations in light of the government's obligations under Articles 2 and 3 of the ECHR, and demanded a single public inquiry into all instances of killing and mistreatment in Iraq.[143] In November 2011, the Court of Appeal found that IHAT was not sufficiently independent to conduct investigations for the purposes of Articles 2 and 3 of the ECHR, because of the inclusion of RMP personnel in the investigation of matters where the RMP had been involved in Iraq, and in March 2012, the MoD announced that RMP personnel were

[141] *Ibid*.

[142] MoD, "IHAT: What it is and what it does", in *Defence in the media*, 13 January 2016.

[143] See further *ECCHR and PIL January 2014 communication*, pp. 229–33, see *supra* note 42.

to be removed from IHAT and replaced by members of the Royal Navy Police.[144] However, victims pursued another judicial review, challenging the independence of the reformed IHAT in *R (Ali Zaki Mousa and others) v Secretary of State for Defence (Mousa No. 2)*, which led to a High Court ruling on 25 May 2013 that in turn resulted in some further reforms of IHAT.[145] It is beyond the scope of this chapter to discuss the details of how IHAT has changed over the years and why. However, it should be noted that the jurisprudence of the ECtHR has significantly impacted how British courts have approached the matter – and therefore also how IHAT has been re-structured over the years.[146]

Whereas IHAT was set thus up prior to the ICC's re-opening of the preliminary examination in 2014 and was not initially intended to function as a mechanism of complementarity but rather to satisfy the investigatory requirements under human rights law, it soon came to be viewed as part of the complementarity framework by politicians and others. IHAT's own website now states that its mission includes meeting the "requirements of the ICC",[147] and MoD statements explicitly note that "without IHAT's vital work, our Armed Forces would be open to referral to the International Criminal Court – something this Government is determined to avoid".[148] In February 2017, Mark Lancaster, the minister in charge of defence veterans, defended IHAT's continued existence as follows: "It was set up for entirely the right reasons. Without having [IHAT], potentially our troops could have been subjected to inquiries by the International Criminal Court".[149]

Regardless of such subsequently revised justifications, IHAT investigations – costing well above £50 million and originally scheduled to last

144 See further *ibid*.

145 The details are discussed in Jonathan Horowitz and Steve Kostas, "Case Watch: British Judges Raise Standards for Investigating Wartime Abuses", in *Open Society Foundations*, 29 May 2013 (available on the OSI web site).

146 In *Al-Skeini v. United Kingdom*, the ECtHR held that human rights law applies to the Iraq war and occupation in situations where UK forces were an occupying force or when they had custody over an individual and that the RMP investigations were not sufficiently independent to satisfy the standards in the Convention. See ECtHR, *Case of al-Skeini and others v. the United Kingdom*, Application no. 55721/07, 7 July 2011.

147 IHAT web site.

148 MoD, "IHAT: What it is and what it does", see *supra* note 142.

149 Robert Mendick, "Unanswered questions behind the failed witch hunt of Iraq veterans", 11 February 2017, in *The Telegraph*.

until 2019[150] – have largely failed to bring about accountability for war crimes in Iraq, raising serious questions concerning its effectiveness from a complementarity perspective. As of 31 December 2016, IHAT had received allegations of potential criminal behaviour relating to 3,392 victims. Of these, only two cases have been referred to the SPA for prosecution (the SPA decided not to proceed with either of them); two cases had been referred to the Royal Air Force police for further investigation but have been since closed; and one soldier was referred to his commanding officer for disciplinary action and was fined £3,000.[151] Accordingly, IHAT investigations have not led to a single prosecution for war crimes in Iraq. Ironically – as frequently pointed to in media reports on IHAT – the only criminal conviction resulting from IHAT's work to date involves an IHAT investigator who falsely impersonated a police officer in the course of his inquiries.[152]

Despite critique of the slowness of IHAT investigations, the prevailing view that emerges from this research is nonetheless that it has worked independently under professional leadership.[153] However, some question whether IHAT was ever 'fit for purpose' from the perspective of complementarity. As Andreas Schüller of ECCHR argues, IHAT originated in the requirement to investigate under the ECHR which justifies a case-by-case approach, "but if you also want to use IHAT to make ICC cases inadmissible, then you would have to frame it differently".[154] The ability of IHAT investigators – many of them private contractors (often retired police detectives working for the company Red Snapper Group) – to adequately investigate violations of international humanitarian law is disputed.[155] In his review of IHAT, Sir David Calvert-Smith emphasized that IHAT investigations have been carried out by investigators with "no experience of

[150] Lianna Brinded, "British Iraq War veterans may be prosecuted for war crimes", in *Business Insider*.

[151] IHAT, *The Iraq Historic Allegations Team (IHAT) Quarterly update*, October–December 2016 (http://www.legal-tools.org/doc/f923f0/).

[152] See, for example, "Bolton West MP Chris Green welcomes closure of investigation into Iraq veterans", in *Bolton News*, 18 March 2017.

[153] Author's interviews (various).

[154] Author's interviews (Andreas Schüller).

[155] See its web site for additional info: https://www.redsnappergroup.co.uk. Of IHAT's 145 staff, 127 are reported to be Red Snappers. See Matt Quinton, "'JUST APPALLING': Firm getting rich off the back of hounding brave British troops accused of bully boy tactics", in *The Sun*, 24 September 2016.

policing the Army and, although of course familiar with the other ordinary criminal offences, unfamiliar with the concept of a 'war crime'".[156] Bethany Shiner similarly notes: "IHAT's criminal investigation is very different from the ICC's investigation" in that they focus on service breaches, adding that notwithstanding SPA Director Cayley's expertise on and commitment to international criminal law, "he's not the one actually going through all the evidence" (implying this is done by IHAT investigators with no or limited experience in investigating war crimes).[157]

During the debate about IHAT's future in the Commons Defence Sub-Committee, the relevance of the ICC's preliminary examination to this process was commented on by several key actors, raising profound questions concerning the role of positive complementarity in this examination. Importantly, the Secretary of State for Defence argued that the preliminary examination required the continuation of the IHAT investigations: "If we were unable to demonstrate that these [criminal allegations] were being properly investigated, we could have ended up […] opening the way to the International Criminal Court. That would have got us into a far more difficult situation".[158] Peter Ryan, Director of the Directorate of Judicial Engagement Policy, though expressing confidence that the IHAT investigations would uncover "little evidence of serious criminal activity", similarly suggested that IHAT must continue its work in order to avoid an escalation of ICC intervention.[159] The Attorney General also addressed the likelihood of the ICC proceeding with an investigation and the role of IHAT in that regard, noting that given the huge volume of cases under consideration by IHAT, and the poor quality of evidence to support the majority of those cases, any such ICC inquiry would take "a very large

156 *Review of the Iraq Historic Allegations Team*, see *supra* note 124.

157 Author's interviews (Bethany Shiner). However, SPA Director Cayley states that "we are looking at all offences, including war crimes". Cayley further explains that four SPA lawyers are permanently based at IHAT's offices at Upavon to advice IHAT investigators on international criminal law, adding that he personally reviews many of the cases. Author's interviews (Andrew Cayley).

158 Adding that the UK was "being watched very closely" by the ICC. See House of Commons Defence Committee, *Who guards the guardians? MoD support for former and serving personnel: Sixth Report of Session 2016–17,* 10 February 2017, para. 117 (hereinafter '*February 2017 report by House of Commons Defence Committee*') (http://www.legal-tools.org/doc/7a0253/).

159 Noting: "I do not believe that when the IHAT completes its investigations this by and large will be borne out, but we just do not know". *Ibid*., para. 118.

amount of time" and would be "an inferior process to the one that we ran ourselves".[160] However, the Attorney General "did not believe that assuming the ICC would not intervene was a risk worth taking", and consequently recommended that IHAT "had to continue its work".[161] Nevertheless, the Defence Sub-Committee concluded:

> We are not convinced that the International Criminal Court would commit to investigate such a large case load which is based, to a great extent on discredited evidence. While due process must be seen to be done, *we recommend that the MoD presents a robust case to the ICC that the remaining cases would be disposed of more quickly and with no less rigour through service law rather than IHAT.*[162]

The final report issued by the Defence Sub-Committee in February 2017 (called *Who Guards the Guardians?*) concludes that IHAT has proved to be "unfit for purpose", and had become a "seemingly unstoppable self-perpetuating machine, deaf to the concerns of the armed forces, blind to their needs, and profligate with its own resources".[163] The report also concludes that the "focus has been on satisfying perceived international obligations and outside bodies, with far too little regard for those who have fought under the UK's flag".[164]

In short, perceptions regarding the likelihood of the ICC opening an investigation were a major factor deciding IHAT's destiny, but even if some stakeholders viewed the risk of the ICC opening an investigation as sufficiently serious to 'keep IHAT alive', the Defence Sub-Committee ultimately did not. It is hard to view the Committee's recommendations as anything but a significant blow to positive complementarity. Plainly, the political costs associated with keeping IHAT alive were seen to outweigh the risk that an ICC investigation will be opened. IHAT – seen as a 'necessary evil' to satisfy the procedural requirements under ECHR and later to 'keep the ICC away' – was never a popular enterprise among the military, many politicians and the tabloid press.[165] They opposed IHAT due to

[160] *Ibid*., para. 119.

[161] *Ibid*.

[162] *Ibid*., para. 120.

[163] *Ibid*., para. 122.

[164] *Ibid*., "Summary".

[165] For example, IHAT has been referred to as a "disgrace" in a Parliament petition (see petition entitled "[T]he Iraq Historic Allegations Team must be stopped as it is a national

the build-up of thousands of cases, the manner in which investigators approached service personnel deployed in Iraq, the financial costs of operating it, and – not least – the reputational damage it was seen to cause the armed forces as well as the threat it posed that British soldiers would be prosecuted. As Bob Stewart,[166] who sits on the Commons Defence Sub-Committee, so plainly puts it: "IHAT is irksome, irritating and upsetting for the Armed Forces".[167] The ICC's preliminary examination – albeit considered in the decision-making process – quite simply was not sufficient to prevent IHAT's closure.

However, the above does not mean that the preliminary examination has had no impact whatsoever on IHAT. Indeed, the general view that emerges from this research is that the ICC's preliminary examination positively – though subtly – impacted IHAT's operations. For example, Mercer argues that the opening of the preliminary examination "energized" IHAT to take a statement from him relating to conduct of security forces that he had previously unsuccessfully sought to give.[168] Several other respondents noted that the preliminary examination was sometimes pointed to by decision-makers when specific operational and structural decisions were made.[169] Although domestic legal scrutiny appears to have been the major concern, the directors of IHAT and SPA at times emphasised the ICC preliminary examination in witness statements before UK courts.[170] Further, IHAT would likely have been closed at an earlier stage

scandal.", available on Parliament's web site, no. 118038), and the tabloid press has referred to as "rotten" or a "witch-hunt". See David Willetts, "IRAQ PROBE TO GO: MPs to call for 'rotten' IHAT British troop witch-hunt to be scrapped", in *The Sun*, 6 February 2017.

166 Bob Stewart, who admitted to using techniques in Northern Ireland that would amount to torture when he served in the armed forces, recently stated that he believes torture is sometimes "justified" and can sometimes "work as an interrogation method". See Danny Boyle, "'I was kind of a torturer in Northern Ireland', admits Conservative MP and ex-Army officer Bob Stewart", in *The Telegraph*, 26 January 2017.

167 See Sam Greenhill, "Five years of lawyers sifting through abuse claims[…] and ONE guilty soldier: Allegations team has completed just 18 cases", in *The Daily Mail*, 11 January 2017. Prime Minister Theresa May has also expressed her frustrations with the "industrial scale" of claims lodged with IHAT. See Press Association, "British troops face investigation over ill-treatment of Iraqis", in *The Guardian*, 16 October 2016.

168 Author's interviews (Nicholas Mercer).

169 Author's interviews (various).

170 By way of example, SPA Director Cayley pointed to its existence of the preliminary examination in a witness statement to Judge Leggatt, who is providing judicial oversight of IHAT, in the context of explaining the test used by IHAT and the SPA for deciding whether

had it not been for the preliminary examination. As Carla Ferstman of Redress observes, the preliminary examination "forced them to keep [IHAT] open far longer than there was any political will to keep it open".[171] SPA Director Cayley's remarks on the topic are equally interesting:

> The government understood and supported our domestic obligation to address these allegations right from the start. It is true there have been pressures on our work from other quarters and for me, with a background in the international courts, the preliminary examination was a solid handrail, an impetus, so we could press on and complete this vital task in a proper and timely fashion. But the momentum is now firmly established and I would hope that the Court can now seriously look to completing its preliminary examination in the immediate future.[172]

More generally, the judicial processes arising out of the Iraq claims appear to have positively impact the UK's compliance with relevant international law regimes, though this impact appears to be mainly associated with domestic legal processes. Notably, the MoD revised its approach to the training of interrogators as a consequence of the findings of the Baha Mousa inquiry.[173]

specific allegations should be further investigated, noting that whereas he was "confident that IHAT and the SPA can fulfil the requirements of article 17 of the Rome Statute", he "would not wish to create any possible doubt about the willingness of the [UK] to investigate and prosecute cases by improperly abridging the criminal investigative process". See UK High Court of Justice, *Al-Saadoon and Others v. Secretary of State for Defence*, 7 April 2016, [2016] EWHC 773 (Admin), paras. 268–69 (http://www.legal-tools.org/doc/97d1d3/).

171 Author's interviews (Carla Ferstman).

172 Author's interviews (Andrew Cayley).

173 The MoD explains that the "interrogation course was redesigned in 2011 following the recommendations made by the Chairman of Baha Mousa Inquiry". Whereas the MoD makes no explicit reference to the ICC preliminary examination, it notes the need for a "robust process for identifying, reviewing, and correcting areas where its doctrine, policy and training have been insufficient to prevent practices or individual conduct that breach its obligations under international humanitarian law". See *MoD 2014 Report on Systemic Issues Identified From Investigations Into Military Operations Overseas*, see *supra* note 99.

13.5.4. How the Fall of PIL Became IHAT's Fall – Will it Become the Preliminary Examination's Fall Too?

To understand the rise and fall of IHAT, one needs to understand the rise and fall of PIL and its lead lawyer, Phil Shiner. Shiner – who was named human rights lawyer of the year in 2004 – had for years worked vigorously on bringing justice to Iraqi victims. For many, he became synonymous with the pursuit of justice for wrongdoing in the Iraq war.[174] PIL contributed in multiple ways to both the judicial reviews and IHAT investigations of British soldiers in Iraq. Working in tandem with another British law firm, Leigh Day, PIL also brought numerous civil suits against the MoD, many of which were settled and brought compensation to Iraqi victims.[175] The human rights community embraced Shiner for his passion and bravery. Many in the armed forces, the pro-military establishment and the right-wing press in turn despised him for pursuing the 'boys in Iraq'.[176] PIL – a relatively small law firm based in Birmingham – quickly got in the spotlight and gained significant influence on the process of investigating alleged crimes in Iraq through its submission of thousands of allegations and victims' statements to IHAT.[177] IHAT in turn depended on PIL for getting access to victims and witnesses. As the frustrations of the armed forces and its supporters grew over PIL and Shiner – often labelled 'ambulance chasing lawyers' and worse – so did their frustration with IHAT's inability to simply close the cases.[178]

The charges of misconduct brought against Shiner by the Solicitors Regulation Authority ('SRA') before the Solicitors Disciplinary Tribunal ('SDT') – and Shiner's admission to a number of counts of misconduct and subsequent SDT conviction relating to paying Iraqi middlemen to find

[174] See, for example, Owen Bowcott, "Phil Shiner: steep fall from grace for leading UK human rights lawyer", in *The Guardian*, 2 February 2017. See also interview with Shiner, Catherine Baksi, "'I'm just a lawyer doing my job. I've done nothing wrong'", in *Legal Action*, March 2015.

[175] Author's interviews (Bethany Shiner).

[176] Author's interviews (various).

[177] PIL was instrumental in passing on about two thirds of the 3,392 allegations dealt with by IHAT. See IHAT, "Allegations Under Investigation" (http://www.legal-tools.org/doc/a3f93e/).

[178] Accusations that PIL and other law firms are 'ambulance chasing lawyers' have been made on numerous occasions by numerous actors. By way of example, see Robert Mendick and Ben Farmer, "'Ambulance chasing' law firm that hounded British troops over false claims of Iraq abuse banned from public funding", in *The Telegraph*, 2 August 2016.

claimants – hammered the nail in IHAT's coffin.[179] The government's narrative – strongly supported by the tabloid press – quickly became that IHAT had to be closed because PIL had been closed.[180] According to this narrative, the vast majority of cases before IHAT were spurious by virtue of Shiner's misconduct (leaving aside the fact that one-third of IHAT's caseload had nothing to do with PIL). In a sense, the government succeeded in turning the narrative from one of justice for crimes in Iraq to one of justice for soldiers wrongly accused of misconduct. As Defence Secretary, Michael Fallon, stated after Shiner's conviction: "Justice has finally been served after we took the unprecedented step of submitting evidence on his abuse of our legal system. Phil Shiner made soldiers' lives a misery by pursuing false claims of torture and murder – now he should apologise".[181]

Though some human rights organizations have rightly made a call for differentiating between Shiner's wrongdoing and the credibility of the allegations he took forward,[182] it seems clear that the government narrative following his conviction has not only intimidated lawyers in Britain but also to a considerable extent undermined the broader support for accountability for crimes in Iraq and potentially in other contexts.[183] As Car-

[179] Shiner was found guilty of multiple professional misconduct charges, including dishonesty and lack of integrity, on the basis that he made "unsolicited direct approaches" to potential clients and for other grounds. See Solicitors Disciplinary Tribunal, case no. 11510-2016, SRA and Philip Joseph Shiner, Judgement, date of hearing 23 January 2017 – 2 February 2017. Proceedings were also commenced against the law firm Leigh Day, but the firm was cleared of all charges. See John Hyde, "Leigh Day and its lawyers cleared of all 19 charges", in *Law Society Gazette*, 12 June 2017.

[180] It should be noted that the government's campaign against lawyers involved in Iraqi claims had commenced earlier in the context of the publication of the Al Sweady public inquiry in December 2014, in which Sir Thayne Forbes held that vast majority of the allegations lacked credibility and were "the product of deliberate lies, reckless speculation and ingrained hostility". On the Al Sweady inquiry and its broader impact, see further Kerr, 2018, see *supra* note 131 (noting that the inquiry "marked the beginning of the end for PIL").

[181] As cited in Owen Bowcott, "Phil Shiner: Iraq human rights lawyer struck off over misconduct", in *The Guardian*, 2 February 2017.

[182] Redress argues: "It is important to recall that Mr Shiner's professional wrongdoing and serious misconduct does not mean that all the allegations of abuse by UK forces in Iraq are tainted or that there is not a need for a full investigation. To the contrary: allegations of detainee abuse do not come from a single source, the Iraq Historical Allegations Team has recorded allegations from a variety of individuals and groups". See *ibid*.

[183] Bethany Shiner argues that the narrative of ambulance chasing lawyers has proven "really effective" in part because it "gives the tabloids a soundbite to go to town on", adding that she has felt "very intimidated: We would receive phone calls of people shouting and

la Ferstman notes, "the whole international, the whole human rights consideration, of this matter became very quiet once Phil became a subject of interest".[184] Shiner's case may also have had a broader impact on the legal profession in the UK. Schüller observes: "This goes not only against two individual law firms, but against basically all lawyers doing this kind of work in the UK. And that's highly problematic […] if you try to stop representation of victims and so on at this level, that has a broader impact than on the Iraq war related cases".[185]

Some argue this is exactly what the government sought to achieve. Ferstman suggests that there was a "very deliberate" strategy to target lawyers involved in the processes, both to undermine the current accountability processes and to avoid lawyers pushing for new ones in the future.[186] Ferstman also believes that the ICC's preliminary examination may have added to the determination of these leaders: "A negative aspect of the preliminary examination, one could argue, is that may well have been the motivating factor for the very strong line in terms of referring everything to the Solicitor's Regulatory Tribunal. If I was being extra cynical, that strong push to connect the dots in that respect was really to discredit the persons who had been supplying information to the ICC".[187] Schüller similarly explains:

> I think it's not only in relation to the ICC communication, but it certainly plays a role there because [it is] the first time you go after the higher-ups in the higher military and political levels, so it's getting closer to those making the decisions. Whereas the inquiries [and] IHAT cases are basically on the low levels – I mean, politically for the government, you can live with it – I think with the ICC communication […] they see the dangers that goes [to] where they don't want to see any accountability debates […] And that's why the reaction is so harsh on all fronts.[188]

swearing down the phone […] I've had threats of being petrol bombed personally". Author's interviews (Bethany Shiner).

184 Author's interviews (Carla Ferstman).

185 Author's interviews (Andreas Schüller).

186 Author's interviews (Carla Ferstman).

187 *Ibid*.

188 Author's interviews (Andreas Schüller).

It remains an open question to what extent the closure of PIL and Shiner's disbarment from legal practice will directly impact the ICC's preliminary examination. As noted above, ICC prosecutors have continuously stated they are examining the credibility of the Article 15 communication senders. If nothing else, PIL's closure and Shiner's admissions and disbarment will surely impact that assessment. It is likely to also impact the evaluation of the evidence at hand already because the Office's ability to obtain clarifications from the Article 15 communication senders is now more limited. More broadly, the developments discussed here could put the OTP 'on the defensive'. Bethany Shiner suggests: "The problem is, the OTP sees the political, the OTP is fully aware of that. But, the OTP [has] to counter the allegation that these [claims] are all vexatious and the OTP is saying, 'okay, where's the evidence to counter that?'". Bethany Shiner continues: "they [the OTP] made a really good start, and it slowed down because […] they have to try and counter the state's allegation that these were false". According to Bethany Shiner, this creates "quite a bizarre situation" because she feels compelled to provide "counter evidence because […] they can't provide it themselves".[189]

In a sense, the campaign against the lawyers involved in the legal processes relating to the Iraq allegations demonstrates the efficiency with which a country with significant resources can undermine the pursuit of accountability without directly compromising its international legal obligations, as well as the challenges associated with pursuing accountability primarily on the basis of the work of a small group of lawyers that work at a relative disadvantage.

13.5.5. The Road Ahead for Accountability in the UK

The connections drawn between the closure of IHAT, the ICC's preliminary examination and the proceedings against PIL and Phil Shiner have ramifications for the new mechanism created to address the Iraq allegations, Service Police Legacy Investigations ('SPLI').

The caseload to be dealt with by SPLI is significantly smaller than IHAT's, and this largely boils down to – as Mercer so plainly puts it – that "anything that comes from PIL goes in the bin".[190] Immediately after

[189] Author's interviews (Bethany Shiner).

[190] Author's interviews (Nicholas Mercer). However, should such an approach ultimately be followed it would contradict the comments made by the Attorney General before the Parliamentary Defence Sub-Committee where he noted that it had *not* been demonstrated that "every

Shiner's disbarment, an IHAT spokesperson made clear that "the evidence presented at the SDT casts serious doubt on the reliability of some of the remaining allegations".[191] In April 2017, Defence Secretary, Michael Fallon, stated: "Now I can confirm that IHAT will close in June and the Service Police should complete investigations into the small number of remaining cases a year earlier than planned".[192]

Exactly how small is that number then, and how is it arrived at? A statement on the MoD website of 5 April 2017 notes that the remaining cases are "expected to number around 20",[193] a number also frequently cited in media reporting on the topic.[194] However, decisions as to what cases will be investigated by the SPLI assumedly does not rest with the MoD, but with investigators and prosecutors. An IHAT spokesperson explains: "We are working closely with the Service Prosecuting Authority to determine which of the remaining allegations originating from PIL should now not be investigated. We will reach decisions as quickly as we can".[195] According to SPA Director Cayley, "It is in fact difficult to give an answer to anyone on the total number of cases which the SPLI will deal with as the evolution of numbers of cases is an ongoing process". What is clear is that IHAT director Mark Warwick requested legal advice from Cayley as to how to proceed with the cases following the proceedings against PIL and Shiner, and that Cayley broadly advised that incidents should be prioritized so that all allegations which build exclusively on evidence submitted by PIL will be discontinued unless they involve the most serious

single one of the cases that Mr Shiner brought to the IHAT process was not a genuine case", further emphasizing that: "We can't assume—much as we might like to for administrative convenience—that everything [Shiner] brought to us is false. We cannot do that. Again, I'm afraid, the obligation to investigate still exists, even if it came from Mr Shiner and his company. The other point to make finally, of course, is that although quite a large proportion of the cases have come from him and his company, they have not all come from there, so it wouldn't deal with everything". See *February 2017 report by House of Commons Defence Committee*, at questions 214–17, see *supra* note 71.

191 Owen Bowcott, "Phil Shiner: Iraq human rights lawyer struck off over misconduct", in *The Guardian*, see *supra* note 181

192 As cited in MoD, "IHAT to close at the end of June", 5 April 2017.

193 *Ibid*.

194 David Willetts, "NO MORE TANK CHASING: Hated IHAT probe which hounded troops with war crime slurs FINALLY set to shut", in *The Sun*, 6 April 2017.

195 Owen Bowcott, "Phil Shiner: Iraq human rights lawyer struck off over misconduct", in *The Guardian*, see *supra* note 181.

offences, such as homicide and rape.[196] It is not obvious that implementing this advice would leave only about 20 remaining cases.

At the time of writing, there is no publicly available information concerning the structure and mandate of the SPLI. According to Cayley, the new regulatory framework for SPLI was yet to be published by July 2017, but the SPLI has made it clear that until further notice it will follow the prior directions of IHAT. This also means that the Joint Case Review Panel that was in place under the IHAT set-up, where investigators and the SPA met regularly to prioritize the handling of the caseload, will continue under SPLI, at least for now.[197] In several other ways, SPLI appears to materialize as a 'mini-IHAT', though there will be some important changes in personnel. According to Cayley, 40 Royal Navy Police and Royal Air Force Police members will be included in SPLI's work, who will be supported by 25 "experienced former civilian police officers who worked on IHAT". Cayley explains: "What's being done is that they are keeping very experienced retired civilian police officers in that residual number to provide support for the Navy and Air Force Police".[198]

At the time of writing, there are more unanswered than answered questions concerning the SPLI/SPA set-up and its operations. These will need clarification before one could provide a qualified guess concerning how ICC prosecutors will evaluate it. Key among these questions is the extent to which the SPLI will have operational independence. Human rights organizations have already expressed concerns in this regard. Redress states that it is troubled by the prospect of the Royal Navy Police taking on the remaining investigations, as "it removes any semblance of an independent investigation into any remaining cases".[199] It is also unclear whether there will be any judicial oversight of SPLI, as was the case with IHAT. Government officials have reportedly committed to finalizing all remaining investigations by end 2018.[200]

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196 Cayley adds that these discontinued cases "generally involve minor allegations". Author's interviews (Andrew Cayley).

197 *Ibid*.

198 *Ibid*. At the time of writing this Article, it was not clear whether the support staff includes members of the 'Red Snapper Group'.

199 Redress, "IHAT closure threatens proper investigations into allegations of torture by UK soldiers in Iraq", 10 February 2017 (http://www.legal-tools.org/doc/6b0078/).

200 David Willetts, "NO MORE TANK CHASING: Hated IHAT probe which hounded troops with war crime slurs FINALLY set to shut", in *The Sun*, 6 April 2017, see *supra* note 194.

13.6. Conclusions

There is little doubt that the OTP – perhaps particularly due to the UK's long-standing support for the Court and international standing – perceives the best-case scenario to be one where the UK takes effective measures to prosecute alleged perpetrators domestically, in ways that would render further ICC action unnecessary (that is, what has been referred to here as the 'hand-over' version of complementarity). Whereas the OTP is keen to make positive complementarity 'work', this chapter has pointed to a range of challenges for making that happen in the Iraq/UK examination. As such, to succeed, the Office must demonstrate a credible threat of proceeding with an investigation, which is seen to outweigh the political costs associated with prosecuting alleged perpetrators domestically. At the same time, it is in the interest of both the OTP and the UK to avoid direct confrontation entailed by a formal investigation. This creates a delicate situation, involving extensive consultation between the OTP and the British authorities. Among other important objectives, ICC prosecutors are trying to push for domestic proceedings to address the 'systemic' issues arising from the alleged crimes. Notwithstanding the absence of any on-going prosecution of commanders, the UK authorities claim they are doing exactly that, and more generally try to convince ICC prosecutors to terminate the preliminary examination on various grounds, including the claim that the Court lacks subject-matter jurisdiction as the crimes were not sufficiently large-scale or systematic.

From an accountability perspective, this approach has so far resulted in limited progress. Despite the existence of a comprehensive system to investigate and prosecute war crimes in the UK, there have been only very few successful prosecutions in domestic courts for war crimes in Iraq. Further, whereas the preliminary examination remains open, it has remained in the so-called Phase 2 for three years, meaning that ICC prosecutors continue to focus on subject-matter jurisdiction despite the extensive evidence forwarded by the Article 15 communication senders, particularly ECCHR and PIL. There are few signs that the preliminary examination will progress significantly in the near future, partly as a consequence of the events relating to PIL's closure and Shiner's admission of misconduct.

What is more, whereas British officials have in the past cited the ICC's preliminary examination as a justification for IHAT's existence, it is important to note that body was created as a response to the rulings of

domestic courts in light of the jurisprudence of the ECtHR and, arguably, was never equipped to function as mechanism addressing complementarity. Having openly speculated on the likelihood that the ICC would proceed to an investigation in the Iraq/UK situation, in early 2017, the Commons Defence Sub-Committee recommended that IHAT be dissolved. The MoD soon after announced that exactly such a decision had been made. Up till then, the existence of IHAT had been frequently cited by the UK authorities as a key reason why the preliminary examination should be closed with reference to the complementarity regime. At the time of writing, ICC prosecutors had avoided publicly commenting on IHAT's closure, and it remains to be seen how the Office will evaluate the new set-up under SPLI. In all events, it is hard to view IHAT's closure – and the decision-making process surrounding it – as anything but a significant blow to positive complementarity.

More generally, the above suggests that mainstream assumptions concerning the value of preliminary examinations for 'positive complementarity' may be overstated. Even if the UK's international standing combined with the country's long-lasting support for international justice in many ways make the dynamics surrounding this examination unique, the fact that the ICC's Iraq/UK preliminary examination has not 'triggered' a comprehensive and credible justice processes nationally, which could lead ICC Prosecutors to close the preliminary examination, is not exceptional. Indeed, none of the preliminary examinations that have been closed to date were terminated on the basis of an admissibility assessment that domestic processes rendered further ICC action unjustified.[201]

Regardless of how the OTP reacts to IHAT's closure and the issues surrounding the proceedings against Shiner, the government's campaign against PIL and other law firms in the UK involved in legal processes addressing crimes in Iraq has proven highly 'effective'. Not only did it largely change the narrative from one of justice for war crimes in Iraq to one of justice for soldiers wrongly accused by 'ambulance chasing lawyers', but it also appears to more broadly have created a climate where human rights lawyers and NGOs will become excessively careful about challenging the armed forces. Prime Minister Theresa May's statement during her party's conference in Birmingham in October 2016 will hardly

[201] See *2015 Report on Preliminary Examination Activities*, see *supra* notes 45; *2016 Report on Preliminary Examination Activities*, see *supra* note 9.

encourage anyone to think otherwise: "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".[202]

Notwithstanding all the challenges discussed in this chapter, the ICC's preliminary examination of the Iraq/UK situation has added to the debate about accountability for 'terror' crimes, such as detainee abuse, committed by major powers in the context of counter-insurgencies and counter-terrorism campaigns.[203] Importantly, the preliminary examination has brought with it increased scrutiny of the practices utilized by British forces in Iraq. This raises questions – which make the UK authorities uncomfortable and which would otherwise easily have been ignored – concerning the role of commanders in permitting a situation where especially detainee abuse appears to have been widespread, and even whether the military and political leadership at the time may have endorsed interrogation standards that breach international humanitarian law. Taken together with the preliminary examination of the situation in Afghanistan, involving scrutiny of US armed forces and the CIA, this suggests we may be witnessing the beginning of a move toward greater criminalization and 'judicialization' of counter-insurgency and counter-terrorism measures. What exactly the ICC's role will be in that regard remains to be seen, but the opening of preliminary examinations provides a necessary basis for any further contribution.

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

[203] For a discussion of the impunity surrounding these types of crimes, specifically in the US, see, for example, Louise Mallinder, "Power, Pragmatism, and Prisoner Abuse: Amnesty and Accountability in the United States", in *Oregon Review of International Law*, 2012, vol. 14, no 2, pp. 307–76.

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Quality Control in Preliminary Examination: Volume 1

Morten Bergsmo and Carsten Stahn (editors)

This is the first of two volumes entitled *Quality Control in Preliminary Examination*. They form part of a wider research project led by the Centre for International Law Research and Policy (CILRAP) on how we ensure the highest quality and cost-efficiency during the more fact-intensive phases of work on core international crimes. The 2013 volume *Quality Control in Fact-Finding* considers fact-finding outside the criminal justice system. An upcoming volume concerns quality control in criminal investigations. The present volume deals with 'preliminary examination', the phase when criminal justice seeks to determine whether there is a reasonable basis to proceed to full criminal investigation. The book does not specifically recommend that prosecutorial discretion in this phase should be further regulated, but that its exercise should be more vigilantly assessed. It promotes an awareness and culture of quality control, including freedom and motivation to challenge the quality of work.

Volumes 1 and 2 are organized in five parts. The present volume covers 'The Practice of Preliminary Examination: Realities and Constraints' and 'Case Studies or Situation Analysis', with chapters by the editors, Andrew T. Cayley, Runar Torgersen, Franklin D. Rosenblatt, Abraham Joseph, Matthias Neuner, Matilde E. Gawronski, Amitis Khojasteh, Marina Aksenova, Christian M. De Vos, Benson Chinedu Olugbuo, Iryna Marchuk, Thomas Obel Hansen, Rachel Kerr, Sharon Weill, Nino Tsereteli and Ali Emrah Bozbayindir, in that order, and with forewords by LIU Daqun and Martin Sørby.

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