



COMMUNICATIONS TO THE ICC REGARDING THE SITUATION IN IRAQ

The question as to whether United States and United Kingdom officials or soldiers would be prosecuted for some of their actions in the Iraq war has attracted much attention in recent years. This paper addresses the reasons why the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) decided not to launch a formal investigation into the crimes committed during the military operation in Iraq, and how some alleged crimes have been dealt with domestically.

Military operations in Iraq began on March 20, 2003 with the invasion of a multinational force led by troops from the US and the UK. Luis Moreno Ocampo, the Chief Prosecutor of the ICC, reported on February 10, 2006 that his office had received over 240 communications in connection with the March 2003 invasion of Iraq.¹ These communications expressed “the concern of numerous citizens and organizations regarding the launch of military operations and the resulting human loss.” In accordance with Article 15 of the Rome Statute, the founding treaty of the ICC, the Prosecutor must “analyze information received on potential crimes, in order to determine whether there is a reasonable basis to proceed with an investigation.”

The alleged crimes subsequently identified by the Prosecutor were aggression, crimes against humanity, genocide and war crimes.

The ICC cannot now try the crime of aggression because it is not yet one of the grounds which can be prosecuted under the Rome Statute. A review conference however, is scheduled to take place in May/June 2010 where an agreement on a conclusive definition of the crime of aggression, as well as on the conditions for the Court to take jurisdiction of it, may lead to its inclusion as the fourth crime. However, when the definition is finalized, the Court will not have retrospective jurisdiction. That is to say, the Court will not be able to investigate and prosecute crimes allegedly committed before the aggression amendment enters into force.

US participation in the review conference offers an opportunity for the US to share its concerns about the ICC and learn about the Court, including the negotiation to define the crime of aggression. The US is not required to ratify the Rome Statute in order to attend the review conference; it is already entitled to attend as an observer.

Alleged Crimes

With regards to the crime of genocide, the OTP determined that the communications that it received did not demonstrate the key element of the crime of genocide: the intent on the part of Coalition forces in taking the alleged actions. This is specified in Article 6 of the Rome Statute as “intent to destroy, in whole or in part, a national ethnic, racial, or religious group as such.” Likewise, the allegations of crimes against humanity did not meet the pre-requisite legal standard because the allegations did not demonstrate “widespread” or “systematic” attacks directed against a civilian population as required by Article 7 of the Statute.

Communications to the OTP also raised three specific allegations of war crimes, namely, the targeting of civilians, clearly excessive attacks and the willful killing or inhumane treatment of civilians. General

¹ <http://www.icc-cpi.int/Menu/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/Iraq/>





allegations included brutality against persons upon capture and initial custody, and causing death or serious injury.

Jurisdiction of the ICC

The ICC has jurisdiction over people from countries that have either joined the Court, or who have committed crimes on the territory of a country that has joined. The UN Security Council can also refer situations to the Court. Non-States Parties can voluntarily accept the Court's jurisdiction.

Since the US and Iraq are not State Parties to the ICC, the Court cannot exercise jurisdiction over the actions of US or Iraqi nationals and therefore cannot investigate or prosecute them on that basis. In the absence of a Security Council referral or an ad hoc acceptance of the Court's jurisdiction, the Court does not have jurisdiction over Iraq or US nationals and thus may not investigate the alleged war crimes committed by these troops.

In his response, the Prosecutor noted that among the communications, some did make the argument that nationals of States Parties to the ICC may have served as accessories to crimes committed by nationals of non-States Parties. For example, UK nationals may have assisted US and/or Iraqi nationals in the commission of war crimes. As explained below, this claim was rejected on the basis of lack of information and evidence, specifically on the gravity of the alleged crimes. However, the Prosecutor can still continue to receive information on this situation.

Admissibility of Cases

In order to assess the admissibility of these allegations, when a reasonable basis for war crimes committed under the Court's jurisdiction is found, such as in the form of willful killing and inhuman treatment of civilians, the Prosecutor must then determine both whether the alleged crimes meet the Court's gravity requirement and also whether national courts are willing and able to deal with them.

The gravity requirement

For a crime to be formally investigated by the Court, it must meet specific and general gravity thresholds. This is required by the Rome Statute.

As established by Article 17(d), a case is inadmissible if "the case is not of sufficient gravity to justify further action by the Court." According to the Prosecutor, the number of victims affected by the Iraq war was insufficient to satisfy the general gravity threshold. The general severity of the atrocity was not matched or in excess in terms of the number of deaths and displacements compared to the current situations under investigation by the Court.

In three of the cases then before the ICC – Darfur, Democratic Republic of the Congo and the Central African Republic – a combined number of hundreds of thousands of lives have been lost and five million displaced. A stark contrast can be drawn between these examples and that of Iraq in which fewer than 20 individuals were





the subject of war crimes. Therefore, the Prosecutor determined that the alleged crimes did not meet the general gravity threshold.

The specific gravity threshold for war crimes specified in Article 8(1) of the Rome Statute requires that “the Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large scale commission of such crimes.” The Prosecutor, in light of this, decided that the specific gravity threshold was not fulfilled. The evidence that was submitted to the OTP did not show clearly enough that the willful killing and inhumane treatment of civilians was part of a plan or policy or as part of a large scale commission of such crimes by coalition forces.

The OTP determined that the nationals of the UK, a State Party to the ICC and therefore subject to its jurisdiction, had not intentionally targeted civilians in Iraq. This determination was achieved on the basis of evidence supplied by the UK to the OTP. This evidence was in turn not contradicted by any other available evidence or information from other sources and was therefore considered viable.

Moreover, the OTP also concluded that there “was a lack of information indicating clear excessiveness” on the part of the UK military in its offensive in Iraq. With respect to the last charge, however, namely willful killing or inhumane treatment of civilians, the OTP found that there was a reasonable basis to believe that such war crimes within the jurisdiction of the Court had been committed. However, it determined that they were not of sufficient gravity since “the information available at this time supports a reasonable basis for an estimated number of 4-12 victims subjected to willful killing and a limited number of victims of inhumane treatment, totaling less than 20 persons.”

The complementarity requirement

On account of its determination that the alleged crimes were not of sufficient gravity, the OTP did not need to address the requirement of complementarity. Complementarity arises when national judicial systems are either destroyed, unable to handle the case or choose to deliberately shield the accused from justice. Article 17 establishes this principle. It provides that a case is inadmissible if the case is being or has been investigated or prosecuted by a State which has jurisdiction over it, unless the State is or was unwilling or unable genuinely to carry out the investigation or prosecution.

Under the principle of complementarity, the ICC cannot prosecute an individual when a country which has jurisdiction is willing to investigate the situation domestically. This domestic investigation can include the decision on the part of a military or federal judge whether or not there are sufficient grounds to move forward with a case. Complementarity therefore serves to protect military and diplomatic personnel from frivolous international cases.

National courts in the US, UK and Iraq have investigated alleged war crimes committed by their respective military personnel during the war in Iraq. Although the ICC Prosecutor did not consider the question of complementarity in this situation, analysis of these domestic proceedings is relevant because the Prosecutor collected information about them and would have next looked to that information if he had made a finding of sufficient gravity of the alleged crimes. Part of this analysis would be the ability of domestic jurisdictions to carry out such investigations and prosecutions, including corresponding legislation.





The UK, on its part, adopted the International Criminal Court Act of 2001 to carry out such domestic prosecutions. This is an Act of Parliament of the UK that implements the Rome Statute of the ICC into the domestic law of England, Wales and Northern Ireland. In order to invoke complementarity, a domestic court system needs to be able to try the same individuals for the same conduct alleged by the ICC. Although not required, domestic legislation can be useful for this. Under this act, persons wanted by the ICC can be tried within the UK for crimes committed abroad.

The principal aims of the Act are to fulfill the United Kingdom's obligations under the Statute, particularly in relation to the arrest and surrender of persons wanted by the ICC and the provision of assistance with respect to ICC investigations; and to create a legal framework so that persons convicted by the ICC can serve prison sentences in the UK.

Plans outlined by UK Justice Secretary Jack Straw indicate new proposals to extend and make retrospective the provisions of the International Criminal Court Act of 2001 to January 1, 1991. That is to say, UK nationals or residents suspected of war crimes and acts of genocide committed anywhere in the world since 1991 could be prosecuted in Britain. In creating retrospective jurisdiction, the new law would apply to anyone suspected of atrocities committed in the Balkans conflict or the Rwanda massacres.

The US does not have an act such as this, but uses its own military or federal courts to prosecute its service members and others suspected of such crimes. However, the US has recently passed legislation on genocide and child soldiers which allows for criminal trials in federal courts. Under the Child Soldiers Accountability Act of 2008, US Courts can prosecute individuals for the recruitment or use of child soldiers under the age of 15. This is a war crime under the Rome Statute. Prosecution is allowed so long as the crimes are committed in whole or in part in the US or if the offender is a US national, legal alien, habitual resident or is present in the US. The Genocide Accountability Act of 2007, allows prosecution for genocide by US courts if the crime is committed in whole or in part in the US or the offender is a US national, legal alien or habitual resident.

Proceedings and Convictions in the United Kingdom

Analysis by the OTP did result in finding a reasonable basis to believe that war crimes within the jurisdiction of the Court had been committed but that the alleged crimes were not sufficiently grave. With regards to British involvement in the war, in 2007, a British soldier was the first to be convicted and jailed for a war crime by a military jury. The charge related to the abuse of Iraqi civilians suspected of looting a humanitarian aid warehouse outside Basra in May 2003. The soldier admitted inhumanly treating Iraqi civilians – a war crime under the ICC Act of 2001. He was one of those in charge of a group of prisoners arrested after a raid on a hotel suspected of being a base for insurgents in Basra in September 2003. The prisoners under went “conditioning” to maintain the “shock of capture.”

At the start of the court martial in 2006, six other soldiers faced charges over their part in the ill treatment of Iraqi prisoners. The violence culminated with the death of one Iraqi who suffered 93 injuries, including fractured ribs and a broken nose. These six soldiers, including the most senior officer to be brought before a court martial in modern times, were found not guilty of manslaughter. However, a public inquiry is now





opening in London into the death of an Iraqi civilian, Mr. Baha Mousa, who died while in British army custody in Basra in 2003.

Provided that the proceedings were not intended to shield the accused from prosecution and the crimes sufficiently grave, domestic proceedings such as these would likely satisfy the ICC that the case had been dealt with domestically and thus it would not be admissible before the ICC.

Conclusion

The Prosecutor's decision not to open an investigation into the situation in Iraq was based on the fact that, while war crimes within the jurisdiction of the Court may have been committed, the crimes did not fulfill the gravity requirements under the Rome Statute. The Prosecutor did look into the situation because of the serious "concern to the international community" and impingement on the "conscience of humanity" that it provoked. This demonstrates clearly that the Prosecutor will not refrain from examining a situation that is of global concern even if it is out of the jurisdiction of the Court.

However, in accordance with the mandate of the Court, though it does look at atrocity crimes globally, it is only possible to launch investigation into the most serious of war crimes, crimes against humanity and genocide.

The ICC is a judicial body that is in operation to ensure justice and is not a politicized body with an aim to target US military and diplomatic officials abroad. Rather, the Court is a court of the last resort which aims to hold accountable individuals on behalf of the international community for the most serious atrocity crimes in places such as Darfur, Northern Uganda, the Democratic Republic of Congo and the Central African Republic.

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