



The Hague, 9 February 2006

Thank you for your communication concerning the situation in Iraq.

The Office of the Prosecutor has received over 240 communications concerning the situation in Iraq. These communications express the concern of numerous citizens and organizations regarding the launching of military operations and the resulting human loss.

While sharing regret over the loss of life caused by the war and its aftermath, as the Prosecutor of the International Criminal Court, I have a very specific role and mandate, as specified in the Rome Statute. My responsibility is to carry out a preliminary phase of gathering and analysing information. I can seek to initiate an investigation only if the available information satisfies the criteria of the Statute. The Rome Statute defines the jurisdiction of the Court and a limited set of international crimes.

#### **Mandate of the Office**

In accordance with Article 15 of the Rome Statute, my duty is to analyse information received on potential crimes, in order to determine whether there is a reasonable basis to proceed with an investigation.

Unlike a national prosecutor, who may initiate an investigation on the basis of very limited information, the Prosecutor of the International Criminal Court is governed by the relevant regime under the Rome Statute. Under this regime, my responsibility is to carry out a preliminary phase of gathering and analyzing information, after which I may seek to initiate an investigation only if the relevant criteria of the Statute are satisfied.

I am required to consider three factors.<sup>1</sup> First, I must consider whether the available information provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed.<sup>2</sup> Where this requirement is satisfied, I must then consider admissibility before the Court, in light of the requirements relating to gravity and complementarity with national proceedings.<sup>3</sup> Third, if these factors are positive, I must give consideration to the interests of justice.<sup>4</sup>

Systematic analysis of these questions can take time. Using the limited powers at its disposal in the analysis phase, the Office will seek to collect information until it is possible to determine that there is, or is not, a reasonable basis to proceed with an investigation in accordance with the criteria of the Statute.

Where the requirements are satisfied, I shall submit to a Pre-Trial Chamber of the Court a request for authorization to initiate an investigation.<sup>5</sup>

Where the requirements are not satisfied, I shall inform those who provided the information. This does not preclude me from considering further information regarding the same situation in the light of new facts or evidence.<sup>6</sup>

### **The analysis**

The analysis of Iraq-related communications was conducted in accordance with Article 15 of the Rome Statute, as no referrals from States have been received.

The Office reviewed all communications, identified those containing substantiated information, and examined the relevant documentation and video-recorded information. In addition, we conducted an exhaustive search of all readily-available open source information, including media, governmental and non-governmental reports. Significant additional material collected from open sources includes, among others, the findings of Amnesty International, Human Rights Watch, Iraq Body Count and Spanish Brigades Against the War in Iraq.

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<sup>1</sup> See Articles 15 and 53 of the Rome Statute and Rule 48 of the Rules of Procedure and Evidence.

<sup>2</sup> Article 53(1)(a).

<sup>3</sup> Article 53(1)(b) and Article 17. The term “proceedings” encompasses investigations and prosecutions (Article 17).

<sup>4</sup> The third consideration is whether “taking into account the gravity of the crime and the interests of justice, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice” (Article 53(1)(c)).

<sup>5</sup> Article 15(3) of the Rome Statute.

<sup>6</sup> Article 15(6) of the Rome Statute.

In order to fill identified gaps in information, the Office sought and received additional information from relevant States as well as from other entities identified with the interests of possible victims that could provide independent information.<sup>7</sup>

When new information came to light concerning alleged abuse of detainees, the Office collected information. National proceedings were initiated with respect to these allegations, and the Office collected information on those proceedings.

The Office produced a crime analysis of all the available information, in accordance with our standard methodology and rules of source evaluation and measurement. The analysis included preparation of tables of allegations, pattern analysis and examination of incidents. In addition, we conducted legal research and analysis on the main doctrinal issues. The process was overseen by the Executive Committee, composed of the Prosecutor and the heads of divisions.

### **Personal and Territorial Jurisdiction**

The events in question occurred on the territory of Iraq, which is not a State Party to the Rome Statute and which has not lodged a declaration of acceptance under Article 12(3), thereby accepting the jurisdiction of the Court.

Therefore, in accordance with Article 12, acts on the territory of a non-State Party fall within the jurisdiction of the Court only when the person accused of the crime is a national of a State that has accepted jurisdiction (Article 12(2)(b)). As I noted in my first public announcement on communications,<sup>8</sup> we do not have jurisdiction with respect to actions of non-State Party nationals on the territory of Iraq.<sup>9</sup>

Some communications submitted legal arguments that nationals of States Parties may have been accessories to crimes committed by nationals of non-States Parties. The analysis of the Office applied the reasonable basis standard for any form of individual criminal responsibility under Article 25.<sup>10</sup>

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<sup>7</sup> A standard method of the Office is to collect information from divergent sources, including from sources most likely to report substantiated allegations, for purposes of verification and evaluation.

<sup>8</sup> ICC Press Release, Office of the Prosecutor, "Communications Received by the Prosecutor of the ICC", 16 July 2003.

<sup>9</sup> The Office examined arguments submitted subsequently that were based on alleged connections to the territory of States Parties, but in light of the applicable law under Article 21, the peripheral connections indicated by the available information did not appear to satisfy the requirements for territorial jurisdiction.

<sup>10</sup> As noted below, the available information provided a reasonable basis with respect to a limited number of incidents of war crimes by nationals of States Parties, but not with respect to any particular incidents of indirect participation in war crimes. Conclusions may be reviewed in the light of new facts or evidence (Article 15(6)).

### **Allegations concerning Legality of the Conflict**

Many of the communications received related to concerns about the legality of the armed conflict.

While the Rome Statute includes the crime of aggression, it indicates that the Court may not exercise jurisdiction over the crime until a provision has been adopted which defines the crime and sets out the conditions under which the Court may exercise jurisdiction with respect to it (Article 5(2)). This arrangement was established because there was strong support for including the crime of aggression but a lack of agreement as to its definition or the conditions under which the Court could act. States Parties to the Court are currently deliberating on these two issues. In accordance with Article 121 and 123, the first opportunity for an amendment to include such provisions will be at a review conference in 2009.

In other words, the International Criminal Court has a mandate to examine the *conduct during the conflict*, but not whether the *decision to engage* in armed conflict was legal. As the Prosecutor of the International Criminal Court, I do not have the mandate to address the arguments on the legality of the use of force or the crime of aggression.

### **Allegations concerning Genocide and Crimes against Humanity**

Very few factual allegations were submitted concerning genocide or crimes against humanity. The Office collected information and examined the allegations. The available information provided no reasonable indicia that Coalition forces had “intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such”, as required in the definition of genocide (Article 6). Similarly, the available information provided no reasonable indicia of the required elements for a crime against humanity, i.e. a widespread or systematic attack directed against any civilian population (Article 7).

### **Allegations concerning War Crimes**

#### **1. Allegations concerning the targeting of civilians or clearly excessive attacks**

The Office received many allegations relating to civilian deaths, injuries and damage occurring during the military operations between March and May 2003.

Under international humanitarian law and the Rome Statute, the death of civilians during an armed conflict, no matter how grave and regrettable, does not in itself constitute a war crime. International humanitarian law and the Rome Statute permit belligerents to carry out proportionate attacks against military objectives,<sup>11</sup> even when it is known that some civilian deaths or injuries will occur. A crime occurs if there is an intentional attack directed against civilians (principle of distinction) (Article 8(2)(b)(i)) or an attack is launched on a military objective in the knowledge that the incidental civilian injuries would be clearly excessive in relation to the anticipated military advantage (principle of proportionality) (Article 8(2)(b)(iv)).

Article 8(2)(b)(iv) criminalizes:

Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

Article 8(2)(b)(iv) draws on the principles in Article 51(5)(b) of the 1977 Additional Protocol I to the 1949 Geneva Conventions, but restricts the criminal prohibition to cases that are “*clearly*” excessive.

The application of Article 8(2)(b)(iv) requires, *inter alia*, an assessment of:

- (a) the anticipated civilian damage or injury;
- (b) the anticipated military advantage; and
- (c) whether (a) was “clearly excessive” in relation to (b).

In addition to satisfying the elements of a crime, information also has to indicate the requisite involvement of a national of a State Party in order for the crime to fall within the jurisdiction of the Court.

Several communications expressed concerns about the use of cluster munitions. The Rome Statute contains a list of weapons whose use is prohibited *per se* (Article 8(2)(b)(xvii)-(xx)). Cluster munitions are not included in the list and therefore their use *per se* does not constitute a war crime under the Rome Statute. A war crime could, however, still be established where any weapon is employed in a manner satisfying the elements of other war crimes. Allegations concerning cluster munitions were therefore analyzed in accordance with Article 8(2)(b)(i) and (iv) (targeting of civilians or clearly excessive attacks).

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<sup>11</sup> Article 52 of Additional Protocol I to the Geneva Conventions provides a widely-accepted definition of military objective: “In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”.

The Office examined all communications and readily-available information, applied rules of source evaluation and measurement, prepared tables of allegations and conducted pattern analysis on 64 incidents of potential relevance.

The available information established that a considerable number of civilians died or were injured during the military operations.<sup>12</sup>

The available information did not indicate intentional attacks on a civilian population.<sup>13</sup>

With respect to Article 8(2)(b)(iv) allegations, the available material with respect to the alleged incidents was characterized by (1) a lack of information indicating clear excessiveness in relation to military advantage and (2) a lack of information indicating the involvement of nationals of States Parties.<sup>14</sup>

In an effort to close these gaps, additional information was sought and received from relevant governmental sources and from other sources that could have independent information and would be affiliated with the perspective of victims.

Publicly available information from the UK states that: lists of potential targets were identified in advance; commanders had legal advice available to them at all times and were aware of the need to comply with international humanitarian law, including the principles of proportionality; detailed computer modeling was used in assessing targets; political, legal and military oversight was established for target approval; and real-time targeting information, including collateral damage assessment, was passed back to headquarters. This information was taken into consideration by the Office, in accordance with the standards of critical evaluation. The information was not contradicted by any other available information.

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<sup>12</sup> Given the difficulties collecting data in the circumstances, it is difficult for any organization to produce reliable estimates, and thus available estimates vary widely. One organization applying a defined methodology, Iraq Body Count, estimated 6, 900 civilian casualties during the military operations from March to May 2003. Another, the Project on Defense Alternatives, estimated 3 750 (+/- 15%) non-combatant deaths. Other sources give higher estimates.

<sup>13</sup> The Office also examined allegations that Coalition forces had intentionally directed attacks against buildings dedicated to religion, education, art, science or charitable purposes (Article 8(2)(b)(ix)). The Office collected information from national and international sources but the available information did not indicate that any damage was done to the identified historical or cultural sites by Coalition activity.

<sup>14</sup> The available information suggests that most of the military activities were carried out by non-States Parties. As one example of available information, the reports of Coalition parties converged in indicating that 94-96% of air sorties were carried out by non-States Parties.

According to the UK Ministry of Defence, nearly 85% of weapons released by UK aircraft were precision-guided, a figure which would tend to corroborate effort to minimize casualties.<sup>15</sup>

The Office invited the United Kingdom to provide additional information with respect to selected allegations, and the United Kingdom furnished a detailed response.

The Office also sought additional information from sources that could have independent information and that would be affiliated with the perspective of victims. The Office invited them to report in particular any information on incidents that might constitute clearly excessive attacks within the jurisdiction of the Court.

Drawing on all the additional information collected, the Office examined several incidents in greater detail. A variety of techniques were employed in analyzing the information. The resulting information did not allow for the conclusion that there was a reasonable basis to believe that a clearly excessive attack within the jurisdiction of the Court had been committed.<sup>16</sup>

After exhausting all measures appropriate during the analysis phase, the Office determined that, while many facts remained undetermined, the available information did not provide a reasonable basis to believe that a crime within the jurisdiction of the Court had been committed. As stipulated in Article 15(6) of the Statute, the conclusion may be reviewed in the light of new facts or evidence.

## **2. Allegations concerning wilful killing or inhuman treatment of civilians**

During the course of analysis, allegations came to light in the media concerning incidents of mistreatment of detainees and wilful killing of civilians. General allegations included brutality against persons upon capture and initial custody, causing death or serious injury. In addition, there were incidents in which civilians were killed during policing operations in the occupation phase.

The Office collected information with respect to these incidents as well as with respect to the relevant national criminal proceedings undertaken by the governments of States Parties with respect to their

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<sup>15</sup> To place this reported figure in context, according to publicly available reports, parties to conflicts gave the ratio of precision-guided weapons to total weapons released as: 8% in the Persian Gulf (1991), 33% in Kosovo (1999), 65% in Afghanistan (2002), and 66% in Iraq (2003, Coalition as a whole). UK information also indicates the use of cluster munitions, as discussed above.

<sup>16</sup> Similarly, following its investigation into events prior to June 2003, Human Rights Watch reported that forces had “engaged in a number of practices that may have violated international humanitarian law” but “evidence did not emerge suggesting that coalition forces committed war crimes.”: <http://www.hrw.org/press/2003/12/ihl-qna.htm> ; the statement was in relation to the HRW report “Off Target” <http://www.hrw.org/reports/2003/usa1203/>

nationals. Analysis was conducted in the light of the elements of wilful killing (Article 8(2)(a)(i)) and torture or inhumane treatment (Article 8(2)(a)(ii)).<sup>17</sup>

After analyzing all the available information, it was concluded that there was a reasonable basis to believe that crimes within the jurisdiction of the Court had been committed, namely wilful killing and inhuman treatment. The information available at this time supports a reasonable basis for an estimated 4 to 12 victims of wilful killing and a limited number of victims of inhuman treatment, totaling in all less than 20 persons.

### **Admissibility**

Even where there is a reasonable basis to believe that a crime has been committed, this is not sufficient for the initiation of an investigation by the International Criminal Court. The Statute then requires consideration of admissibility before the Court, in light of the gravity of the crimes and complementarity with national systems.<sup>18</sup>

While, in a general sense, any crime within the jurisdiction of the Court is “grave”, the Statute requires an additional threshold of gravity even where the subject-matter jurisdiction is satisfied. This assessment is necessary as the Court is faced with multiple situations involving hundreds or thousands of crimes and must select situations in accordance with the Article 53 criteria.

For war crimes, a specific gravity threshold is set down in Article 8(1), which states 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”. This threshold is not an element of the crime, and the words “in particular” suggest that this is not a strict requirement. It does, however, provide Statute guidance that the Court is intended to focus on situations meeting these requirements.

According to the available information, it did not appear that any of the criteria of Article 8(1) were satisfied.

Even if one were to assume that Article 8(1) had been satisfied, it would then be necessary to consider the general gravity requirement under Article 53(1)(b). The Office considers various factors in assessing gravity. A key consideration is the number of victims of particularly serious crimes, such as

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<sup>17</sup> The Office took into account the Elements of Crimes for Article 8(2)(a), which refer to infliction of “severe physical or mental pain or suffering upon one or more persons”.

<sup>18</sup> Article 53(1)(b) and Rule 48.



wilful killing or rape. The number of potential victims of crimes within the jurisdiction of the Court in this situation – 4 to 12 victims of wilful killing and a limited number of victims of inhuman treatment – was of a different order than the number of victims found in other situations under investigation or analysis by the Office. It is worth bearing in mind that the OTP is currently investigating three situations involving long-running conflicts in Northern Uganda, the Democratic Republic of Congo and Darfur. Each of the three situations under investigation involves thousands of wilful killings as well as intentional and large-scale sexual violence and abductions. Collectively, they have resulted in the displacement of more than 5 million people. Other situations under analysis also feature hundreds or thousands of such crimes.

Taking into account all the considerations, the situation did not appear to meet the required threshold of the Statute.

In light of the conclusion reached on gravity, it was unnecessary to reach a conclusion on complementarity. It may be observed, however, that the Office also 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.

## **Conclusion**

For the above reasons, in accordance with Article 15(6) of the Rome Statute, I wish to inform you of my conclusion that, at this stage, the Statute requirements to seek authorization to initiate an investigation in the situation in Iraq have not been satisfied.

This conclusion can be reconsidered in the light of new facts or evidence. I wish to remind you, in accordance with Rule 49(2) of the Rules of Procedure and Evidence, that should you have additional information regarding crimes within the jurisdiction of the Court, you may submit it to the Office of the Prosecutor.<sup>19</sup> Bearing in mind the limited jurisdiction of this Court, as well as its complementary nature, effectively functioning national legal systems are in principle the most appropriate and effective forum for addressing allegations of crimes of this nature.

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<sup>19</sup> Article 15(6) of the Statute; Rule 49 of the Rules of Procedure and Evidence.

I thank you very much for providing information regarding alleged crimes to the Office of the Prosecutor of the International Criminal Court. For more information on our activities and our policies, I would invite you to visit our webpage at [www.icc-cpi.int](http://www.icc-cpi.int).

Yours sincerely,

Luis Moreno-Ocampo  
Chief Prosecutor of the International Criminal Court