

THE BAHA MOUSA PUBLIC INQUIRY

THE MINISTRY OF DEFENCE'S WRITTEN SUBMISSIONS DATED 27 NOVEMBER 2008 IN REPLY TO THE SUBMISSIONS OF OTHER PARTICIPANTS ON THE ISSUE OF UNDERTAKINGS

Introduction

1. Whether to seek undertakings is a matter for the Chairman, but the Ministry of Defence ("MOD") believes that the current undertaking provided by the Attorney-General should be sufficient to ensure that the Inquiry can properly discharge its function and get at the truth.

Undertaking in Relation to Administrative Action

2. A witness has no right not to answer a question the answer to which might tend to expose him, or others, to administrative action by his employer. The absence of an undertaking in relation to administrative action should not therefore prevent the Inquiry from eliciting relevant evidence.
3. It is suggested by those acting for potential witnesses that the lack of an undertaking in respect of administrative action might cause witnesses to be less forthcoming than they might otherwise be. An undertaking may not make reluctant witnesses more forthcoming. A witness with something to hide, or friends to protect, might well continue to seek to avoid speaking frankly. The appropriate tools with which to ensure that this does not happen are the power of compulsion, the giving of evidence on oath, and rigorous questioning.

4. It is of course possible that evidence will be given which indicates that administrative action ought to be taken against MOD personnel. For example, it would be highly regrettable if evidence emerged which clearly demonstrated conduct on the part of an individual, clearly deserving of discharge from the armed forces, which could not then be acted upon. In a less serious case it would be undesirable if an undertaking prevented administrative action being taken to ensure an improvement in performance.
5. For these reasons the MOD submits that no undertaking in respect of administrative action should be sought. Alternatively, if the Chairman is minded to request such an undertaking, then it asks that consideration is given to seeking a form of undertaking which would still permit administrative action to be taken in relation to gross misconduct.

Undertaking to Prevent Detriment

6. The MOD is unaware of any other public inquiry in which an employer has undertaken that a witness' evidence to a public inquiry would not be used to his detriment.
7. In any event, there is no need for an undertaking because any member of Her Majesty's Armed Forces who feels that he or she has been in any way wronged in relation to his or her service for having co-operated with the Inquiry can invoke the service complaints procedures under the Armed Forces Act 2006.

The Attorney General's Undertaking

8. The scope of the current undertaking mirrors that successfully used in a number of previous public inquiries. The fact that no evidence given by a witness to the Inquiry can be used against him in evidence in criminal proceedings will properly protect witnesses to this inquiry from self incrimination. However, should the Chairman wish to seek a revised undertaking akin to that given for the purposes of the Bloody Sunday Inquiry, the MOD would be content.

9. The MOD is unaware of any other public inquiry which has sought from the Attorney General an undertaking not to use evidence given to a public inquiry by a witness in criminal proceedings against another person. Such an undertaking would fetter the ability of the criminal justice system to bring a person suspected of criminal activity to account. It is not necessary in order for the Inquiry to get to the truth (because that can be achieved through the power of compulsion, the giving of evidence on oath, and the rigorous examination of witnesses). Neither is it necessary to safeguard a witness' right against self incrimination.

10. Mr Dingemans QC invites the Chairman to seek an undertaking from the DPP to adopt the Attorney-General's undertaking because the Attorney-General's role in prosecution may be changed in the future. The MOD's view is that this is unnecessary. It is difficult to imagine in any future prosecution the Crown would not feel bound by the Attorney-General's undertaking. Moreover, to rely on self incriminating evidence provided under compulsion in reliance upon an undertaking from the Attorney General would seem to provide substantial grounds for a successful claim of abuse of process.

Prosecution Outside the Jurisdiction by the International Criminal Court or a Foreign State

11. Mr Dingemans QC raises a number of issues concerning international criminal law. The steps in the MOD's argument in response are these:
 - 11.1. There is no material prospect of a witness to the Inquiry being prosecuted by the International Criminal Court ("ICC").

 - 11.2. There is a theoretical but not a material prospect of a witness to the Inquiry being prosecuted in a foreign state.

 - 11.3. The undertakings sought by potential witnesses to the effect that the United Kingdom would refuse any request by the ICC, or a foreign power,

- 11.4. The above undertaking would be in breach of the United Kingdom's obligations to cooperate with the ICC under Part 9 of the Rome Statute (Articles 86ff). See, in particular, Art.93(1)(a), (b) and (i): *"1. States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions: (a) The identification and whereabouts of persons or the location of items; (b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court; ... (i) The provision of records and documents, including official records and documents; ..."*
- 11.5. The undertaking sought by potential witnesses in relation to the cost of representation before the ICC or in criminal proceedings abroad is unnecessary because there is already a well established system for providing legal representation, in appropriate cases, for service personnel who are brought before foreign courts in relation to events arising during the course of their service: see Queen's Regulations for the Army, Chapter 6, Annex D. The system is administered by the Armed Forces Criminal Legal Aid Authority.
- 11.6. A witness has no automatic right not to give evidence that might incriminate him in foreign proceedings.

- 11.7. British soldiers operating in Iraq at the material time are immune from prosecution by the Iraqi authorities: see Coalition Provisional Authority Order Number 17, at s.2.4 (dated 26 June 2003)¹.
- 11.8. In the circumstances, the proposed undertakings should not be sought.
- 11.9. The Chairman has a discretion not to require a witness to answer a question the answer to which might self incriminate in a foreign court. However, absent any particular evidence of an intention by a third party to prosecute, or any real likelihood of it happening, it is submitted that the discretion should not be exercised in any blanket form at this juncture.
12. The first two steps in the Ministry's argument require further explanation which is set out below.

There is no material prospect of a witness being prosecuted in the International Criminal Court

13. The MOD submits that the reasons why there is no material prospect of a witness being prosecuted in the International Criminal Court are as follows:
- 13.1. The ICC must act in accordance with the principle of complementarity. The primary obligation falls upon a contracting state to ensure compliance with its UNCAT obligations. The ICC will only prosecute if a contracting state is unwilling or unable to do so: see Art.17(1)(a) of the Rome Statute. The United Kingdom has ratified the Rome Statute and is a committed party to UNCAT. The events which concern the Inquiry have already been investigated by the Royal Military Police. A prosecution has been mounted and a full public inquiry is being held. There is no question of the United Kingdom being other than willing and able to promote the objects of the Statute and comply with its obligations. It is emphasised that the Attorney-General's current undertaking is not an immunity from prosecution.

¹ Copy attached.

13.2. The ICC also applies a test of gravity in deciding whether to investigate alleged war crimes: Art.53 of the Rome Statute. The test is a high one. Situations which are being investigated by the ICC involve suspected atrocities on a massive scale which have been planned and orchestrated, i.e. in Northern Uganda, the Democratic Republic of Congo and Darfur. The ICC has already considered a wide range of complaints concerning the situation in Iraq in 2003. These have included allegations concerning the wilful killing or inhuman treatment of civilians. On the evidence then before it the Chief Prosecutor of the ICC concluded in February 2006 that the Statute requirements to seek authorisation to initiate an investigation in the situation in Iraq had not been satisfied: see the ICC's letter dated 9 February 2006². The allegations made in relation to the detention of Mr Mousa and others, and the criminal charges that were to be the subject of court martial proceedings were in the public domain from 3 February 2005. The events which are the subject of this Inquiry are very serious and properly a matter of public concern. However, they do not bear comparison with the scale of atrocities being investigated by the ICC.

13.3. The ICC has its own rules against self incrimination: see Art.55(1)(a) of the Rome Statute and Rule 74 of the ICC's Rules of Procedure and Evidence. These strongly suggest that any self incriminating evidence given to the Inquiry under compulsion would not be admitted before the ICC³. This is hardly surprising because the right against self incrimination is an international norm: see Art.14(3)(g) International Covenant on Civil and Political Rights (ICCPR).

There is a theoretical but not a real prospect of a witness to the Inquiry being prosecuted by a foreign state

14. The reasons why a prosecution by a foreign state is not a real prospect are set out below.

² Available on the ICC's website. A copy accompanies these submissions.

³ Respect for the privilege against self incrimination is also incorporated into the International Criminal Courts Act 2001: see s.29.

- 14.1. The hypothesis is that a foreign state would use self incriminating statements made under compulsion to the Inquiry to prosecute for torture. The prosecuting state would therefore have to be a state which did not have a rule against self incrimination. The right against self incrimination is an international norm: Art.14(3)(g) ICCPR. It is also enshrined in the European Convention on Human Rights (“ECHR”): see Art.6. The pool of potential prosecuting states is therefore greatly restricted.
- 14.2. Such a prosecution would also require the prosecuting authorities of a state to be motivated to mount such a prosecution. There is no evidence of any such motivation hitherto.
- 14.3. The foreign state’s authorities would have to take the decision to prosecute notwithstanding the comprehensive efforts in this jurisdiction to take action to reduce and eliminate torture, i.e. a court martial lasting seven months, Brigadier Aitken’s report and this Inquiry. This is inherently unlikely.
- 14.4. The suspect would either have either to travel to the territory of the foreign state or be extradited to it. Extradition in these circumstances seems to the MOD to be very unlikely.

Conclusion

15. For the reasons set out above the MOD submits that the current undertaking is sufficient.

SIR GEOFFREY NICE QC
DAVID BARR

27 November 2008

COALITION PROVISIONAL AUTHORITY ORDER NUMBER 17**STATUS OF THE COALITION, FOREIGN LIAISON MISSIONS, THEIR
PERSONNEL AND CONTRACTORS**

Pursuant to my authority as head of the Coalition Provisional Authority (CPA), and under the laws and usages of war, and consistent with relevant U.N. Security Council resolutions, including Resolution 1483 (2003),

Recalling that under international law occupying powers, including their forces, personnel, property and equipment, funds and assets, are not subject to the laws or jurisdiction of the occupied territory,

Conscious that states are contributing personnel, equipment and other resources to the Coalition in order to contribute to the security and stability that will enable the relief, recovery and development of Iraq,

Noting that states are sending Foreign Liaison Mission Personnel to Iraq,

Conscious of the need to establish and confirm the status of such Coalition and Foreign Liaison Mission Personnel in respect of the CPA and the local courts,

I hereby promulgate the following:

**Section 1
Definitions**

- 1) "Coalition Personnel" means all non-Iraqi military and civilian personnel assigned to or under the command of the Commander, Coalition Forces, or all forces employed by a Coalition State including attached civilians, as well as all non-Iraqi military and civilian personnel assigned to, or under the direction or control of the Administrator of the CPA.
- 2) "Foreign Liaison Mission Personnel" means those individuals who have been issued Foreign Liaison Mission personnel identification cards by the Iraqi Ministry of Foreign Affairs under the supervision of the CPA.
- 3) "Legal Process" means any arrest, detention or legal proceedings in the Iraqi courts or other Iraqi bodies, whether criminal, civil, administrative or other in nature.
- 4) "Parent State" means the state providing Coalition Personnel as part of the Coalition in Iraq or the state providing Foreign Liaison Mission Personnel.
- 5) "Coalition contractors" means non-Iraqi business entities or individuals not normally resident in Iraq supplying goods and/or services to or on behalf of the Coalition Forces or the CPA under contractual arrangements.

- 6) "Coalition sub-contractors" means non-Iraqi business entities or individuals not normally resident in Iraq supplying goods and/or services to or on behalf of Coalition contractors and in respect of Coalition or CPA activities under contractual arrangements

Section 2

Coalition and Foreign Liaison Mission Personnel

- 1) CPA, Coalition Forces and Foreign Liaison Mission, their property, funds and assets of shall be immune from Iraqi Legal Process.
- 2) All Coalition personnel and Foreign Liaison Mission personnel shall respect the Iraqi laws applicable to those Coalition personnel and Foreign Liaison Mission personnel in the territory of Iraq and the Regulations, Orders, Memoranda and Public Notices issued by the Administrator of the CPA.
- 3) Foreign Liaison Mission personnel shall be immune from Legal Process.
- 4) All Coalition personnel shall be subject to the exclusive jurisdiction of their Parent States and, they shall be immune from local criminal, civil, and administrative jurisdiction and from any form of arrest or detention other than by persons acting on behalf of their Parent States, except that nothing in this provision shall prevent Coalition Forces personnel from preventing acts of serious misconduct by Coalition personnel, or otherwise temporarily detaining Coalition personnel who pose a risk of injury to themselves or others, pending expeditious turnover to the appropriate authorities of the Parent State. In all such circumstances the national contingent commander of the detained person shall be notified immediately.
- 5) In respect of those Coalition personnel who commit an act or acts in Iraq for which there are no criminal sanctions in the Parent State, the CPA may request from the Parent State waiver of jurisdiction to try such act or acts under Iraqi law. In such cases, no Legal Process shall be commenced without the written permission of the Administrator of the CPA.

Section 3

Contractors

- 1) Coalition contractors and their sub-contractors as well as their employees not normally resident in Iraq, shall not be subject to Iraqi laws or regulations in matters relating to the terms and conditions of their contracts in relation to the Coalition Forces or the CPA. Coalition contractors and sub-contractors other than contractors and sub-contractors normally resident in Iraq shall not be subject to Iraqi laws or regulations with respect to licensing and registration of employees, businesses and corporations in relation to such contracts.
- 2) Coalition contractors and their sub-contractors as well as their employees not normally resident in Iraq, shall be immune from Iraqi Legal Process with respect to acts performed by them within their official activities pursuant to the terms and conditions of a contract between a contractor and Coalition Forces or the CPA and any sub-contract thereto.

- 3) In respect of acts or omissions of Coalition contractors and sub-contractors as well as their employees not normally resident in Iraq, which are not performed by them in the course of their official activities pursuant to the terms and conditions of a contract between them and the Coalition or the CPA, no Iraqi or CPA Legal Process shall be commenced without the written permission of the Administrator of the CPA.

Section 4
Duration of Immunity From Legal Process

The immunity from Legal Process provided by the present Order to Coalition personnel and Foreign Liaison Mission personnel as well as Coalition contractors, sub-contractors and their employees not normally resident in Iraq operates only in respect to acts or omissions by them during the period of authority of the CPA.

Section 5
Waiver of Legal Immunity and Jurisdiction

- 1) The immunity from Legal Process of Coalition personnel, Foreign Liaison Mission personnel, Coalition contractors and their sub-contractors as well as their employees not normally resident in Iraq is not for the benefit of the individuals concerned and may be waived by the Parent State.
- 2) Requests to waive jurisdiction over Coalition personnel or Foreign Liaison Mission personnel shall be referred to the respective Parent State.
- 3) Requests to waive the immunities with respect to Coalition contractors and sub-contractors and their employees not normally resident in Iraq as set forth in Section 3 of this Order shall be referred to the respective Parent State with which the contractor has contracted.

Section 6
Claims

- 1) Third party claims including those for property loss or damage and for personal injury, illness or death or in respect of any other matter arising from or attributed to Coalition personnel or any persons employed by them, whether normally resident in Iraq or not and that do not arise in connection with military combat operations, shall be submitted and dealt with by the Parent State whose Coalition personnel, property, activities or other assets are alleged to have caused the claimed damage, in a manner consistent with the national laws of the Parent State.

- 2) Third party claims for property loss or damage and for personal injury, illness or death or in respect of any other matter arising from or attributed to Foreign Liaison Mission personnel shall be submitted and dealt with by the Parent State whose Foreign Liaison Mission personnel, property, activities or other assets are alleged to have caused the claimed damage, in a manner consistent with the national laws of the Parent State.

Section 7
Entry Into Force

This Order shall enter into force on the date of signature.

 6/27/03

L Paul Bremer, Administrator
Coalition Provisional Authority



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.¹ 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.² 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.³ Third, if these factors are positive, I must give consideration to the interests of justice.⁴

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.⁵

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.⁶

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.

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

² Article 53(1)(a).

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

⁴ 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)).

⁵ Article 15(3) of the Rome Statute.

⁶ 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.⁷

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,⁸ we do not have jurisdiction with respect to actions of non-State Party nationals on the territory of Iraq.⁹

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 25.¹⁰

⁷ 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.

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

⁹ 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.

¹⁰ 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,¹¹ 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).

¹¹ 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.¹²

The available information did not indicate intentional attacks on a civilian population.¹³

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.¹⁴

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.

¹² 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.

¹³ 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.

¹⁴ 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.¹⁵

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.¹⁶

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

¹⁵ 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.

¹⁶ 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)).¹⁷

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.¹⁸

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

¹⁷ 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”.

¹⁸ 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.¹⁹ 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.

¹⁹ 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.

Yours sincerely,

Luis Moreno-Ocampo
Chief Prosecutor of the International Criminal Court