
The ICC and Situation in Iraq

المحكمة الجنائية الدولية والموقف في العراق

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ملخص:

يتناول البحث الموقف في العراق، وما يتصل بذلك من جرائم دولية مرتكبة في الأقليم العراقي، ومدى اختصاص المحاكم العراقية الوطنية بنظر تلك الجرائم ومحاسبة المسؤولين عنها، وبيان اختصاص المحكمة الجنائية الدولية، والدور الذي يمكن أن تضطلع به في سبيل تحقيق العدالة.

تسلم مكتب المدعي العام ماينيف عن (٤٠٤) جهات اتصال تخص الوضع في العراق وهذه الشكاوى وردت من مواطنين ومنظمات تعبر عن قلقهم حيال العمليات الحربية وما رافقها من خسائر بشرية.

قام مكتب المدعي العام في البداية بتحليل المعلومات الواردة إليه في ضوء الوقائع والأدلة المتوفرة والتي حصل عليها من مصادر مختلفة، كوسائل الأعلام الحكومية وغير الحكومية والمنظمات ومنها: منظمة العفو الدولية، وهيومن رايتس ووتش، والإحصاءات المقدمة من السلطات العراقية، وبعض المنظمات الإسبانية التي عارضت الحرب على العراق، ليقرر مدى توفر اختصاص المحكمة ومقبولية الدعوى ومتطلبات الخطورة والتكامل ومصالح العدالة، ويقدم تقريراً أما بعدم اختصاص المحكمة، أو الاستمرار في الإجراءات وعرض المعلومات على قضاة الدائرة التمهيدية؛ ليتخذوا القرار المناسب، وسنبحث ذلك في سياق البحث.

Abstract:

This article sets out the situation in Iraq, crimes committed in its territory, responsibility of the leaders, in spite of the court establish to fight the impunity, but we found the ICC did not do anything with respect to investigate or prosecute the persons who committed these atrocity, this result emphasis the impunity, and harm the victim who had found themselves without any protections (1).

1–Preface:

Due to The importance of the situation in Iraq, we have seen that we should discuss the analysis of the OTP, and the reasons behind his refusal to initiate an investigation into the situation in Iraq and the arguments in justifying this rejection, so we will discuss this with analysis and criticism in some points of the report of the prosecutor.

The (office of the prosecutor) OTP received about 404 communications concerning the situation in Iraq and these complaints received from citizens and organizations that expressing their concern about the military operations and what accompany these operations of loss of life (2).

2–US and Iraq:

At the beginning of 2003 the United States and a number of countries which are allied with them (Coalition Forces) shocked the International Criminal Court (ICC), and the principle of the rule of law by attacking Iraq in a clear challenge against the court and the international community, at a time when the Court was adopting its necessary services and facilities for its work, we found the United States committing crimes that shakes the conscience of humanity and oppose the international conventions.

The OTP initially analyzed the information he have in the light of the facts and evidence availability that its obtained from various sources, such as the governmental and non – governmental media (3) and from the

organizations, including Amnesty International, Human Rights Watch, the statistics provided by the Iraqi authorities and some Spanish organizations that rejected the war on Iraq (4) to decide the availability of the court's jurisdiction, the admissibility of the case, the dangerous and integration requirements and the interests of justice.

Then, report either to the jurisdiction of the court or continue the proceedings and display the information on the judges of Pre – Trial Chamber; to take the appropriate decision.

The Office analyzed the issue of personal and spatial jurisdiction, due to the fact that the Crimes committed in the territory of Iraq, and with reference to Iraq's position on the court, you found that Iraq is the state which neither join the court nor declared of acceptance of the Rome statute in accordance with paragraph (3) of Article (12) (5), the Iraqi delegation, with his counterpart of the United States which is one of the countries that voted against the draft of the Rome statute in 1998.

This means that the court is not able to exercise jurisdiction over the province, or citizens of a non – member, thus the perpetrators are members of the United States the non – member also, however, the office pointed out the possibility of accepting the case according to the crimes committed by citizens of states parties such as Britain and Australia, and can be the base of the individual criminal responsibility according to Article 25 of the statute.

As for the jurisdiction *ratione material*, the office has denied the aggression, so is the invasions of the US Troops an act of aggression or not? Based on the fact that the crime of aggression did not defined yet (6) 2, whereas the crimes against humanity and genocide, there is no evidence showing that the attacking forces had the intent to destroy in whole or in part, a national, ethnical, racial or religious group, as the office stated that there is not a reasonable evidence about the existence of a widespread or systematic attack directed against the civilians, and in connection with war crimes that took place in Iraq, killing many civilians between March and May 2003, the office, said the death of civilians during armed conflict, no matter how serious and unfortunate, Can't be considered as a war crime

according to international humanitarian law and the Statute, which allow the fighters equally to attack the military targets, even in the case of the death or injury of civilians, so the statute is not considering this crime as a war crimes, except in the case of intentionally attacking the civilian (art. 8/2, para. 1) and intentionally launching an attack in the knowledge that such attack will cause loss of life (art. 8/2, para/4), finally The Office concluded that there is no reasonable basis for believing that there was a decisive attack falls within the jurisdiction of the Court (7).

The prosecutor's office also receives complaints about atrocities of human rights, such as murder and inhumane treatment of detainees, therefore he concluded that these crimes falls within the jurisdiction of the court and can be a reasonable basis to start the investigation, but remains the question of admissibility of the case after fulfilling the requirements of complementarity and gravity threshold, including the number of victims that should be up to 4 – 12 victim; means the limited number of victims of inhuman abuse in Iraq, compared with the number of victims in the rest of the cases in which the Office has analyzed, including the situation in Uganda and the Central African Republic and Darfur, each position includes a large number of victims of murder, intended sexual violence, mass abductions and the displacement of more than 5 million people; thus commencing of the investigation is out of the question at this phase (8).

3–Report of the OTP in the situation in Iraq:

We will discuss the analysis of Prosecutor's Office for the crimes committed in Iraq and the conclusion he reached. As for the Territorial jurisdiction, the war crimes, crimes against humanity, aggression and genocide are committed in the territory of Iraq, which means this must be raised to the jurisdiction of the criminal courts of Iraq according to the provisions of Articles (6 and 7) of the valid penal code, the priority will be attributed to the Iraqi courts unless in the case of unwillingness or inability to exercise jurisdiction. Due to the fact of the situation after the war, the Iraqi courts at that time unable to exercise the jurisdiction as well as the absence of penal provisions charging the acts of genocide, crimes against humanity, war crimes and aggression in Iraqi laws, Whereas the International Criminal Court cannot exercise jurisdiction based on the

territory because Iraq did not ratify or announce its acceptance of the statute.

As for the personal jurisdiction, the U. S. , British and Australian national courts are specialized in chasing its citizens who committed serious crimes in addition to the specialization of the Criminal Court for the criminals who belong to the States Parties as perpetrator or accessories', according to Article 12, paragraph 2 of the statute (9) 1 and articles 25,8,7 and 6 of it.

For the temporal jurisdiction, the criminal court covers the crimes committed in Iraq, because these crimes committed after the entry into force of the statute (10) in accordance with Article 11 thereof.

As for the material jurisdiction, the crimes against humanity are clear in the acts committed by the forces which invaded Iraq as part of a widespread or systematic attack against the civilians represented by intended murder and imprisonment or severe deprivation from any other type of physical liberty that violate the fundamental rules of the international law, also the war crimes, genocide and aggression are quite clear in the criminal acts of those forces (11).

In connection with the gravity threshold, we found that the prosecutor's office based in determining the seriousness of the crimes on the number of victims, in our perception this is not enough, because the United States refer to the attacks of 9/11 as a terrorist attacks and has become a cause of international public opinion, although the number of victims were very little compared to victims in the countries referred to by the prosecutor, and the way of comparison between the victims of the situation in Iraq and the rest of the cases adopted by the court, is un – reasonable attitude to determine the seriousness of the crime (12). We have seen the Pre – Trial Chamber has taken several criteria in assessing the gravity threshold issue, including the leadership position of the suspect and the systematic act or large scale behavior and its impact on the international community which represented by the rejection and denunciation, or at least not support these criteria, as the Prosecutor's Office did not ask any employee to come to Iraq or send experts and investigators to get

acquaintance with the facts and the realities, therefore he will be able to consider the crimes committed in Iraq, as war crimes or crimes against humanity (13), in the time that the Office stating the absence of war crimes in Iraq (14), we found some academics confirm the existence of war crimes in Iraq, whereas some of them counting the war against Iraq is an unjust war, therefore it is a crime worthy of punishment, just killing civilians is a rejected idea (15). We noticed that the office mixing between the crimes committed following the occupation of Iraq and the crimes that followed from violations of international law in general and gave one report which indicates the confusion and lack of prudence in the study and analysis those crimes.

The prosecutor's decision provided immunity for the perpetrators and leave them unpunished, thus it become a type of the permissibility of such acts and encourage the perpetrators to repeat these crimes and reinforce the impunity which the court came mainly to fight (16), the Office based on the information issued by the forces committed these abuses, including the data of the British Ministry of Defense and the office missed a unique opportunity for the victims in order to obtain appropriate compensation to them. Who will compensate those victims? Does the prosecutor's decision represents a decline in the performance of the court and it is setback? The most important question Is the prosecutor's office consider the crimes that followed the presidential elections in Côte d'Ivoire and Kenya, are more dangerous than the crimes committed in Iraq, which entailed the destruction of infrastructure and services, natural and human one (17) ?

Contrary to the view of the Prosecutor's Office, we found that there are international courts says that the crimes committed in Iraq, are (international crimes), including the Grand Chamber Court of European Human Rights, which issued its judgment in the case of (al – Skeini and others v. U. K), condemned U. K for the killing of six civilians during military operations carried out by British soldiers in Iraq in 2003 (18) and its judgment in the case of (Hilal Abdul Razzaq Ali al – Jedda v. U. K) (19), condemned U. K for the internment three years of Iraqi civilian by British forces in Iraq so how does the Prosecutor Office refer to the acts committed in Iraq as unserious crimes ?

Also, many international organizations deemed what is happening in Iraq, of atrocities of the international humanitarian law, a crimes against humanity, including Amnesty International, which cited reports to those atrocities committed by military and civilian overseas forces in Iraq, particularly the case of arbitrary detention for long periods without trial, and torture or inhuman treatment, and causing widespread destruction to property and seizes them, as well as attacking and bombing the cities and hospitals (20), also another report indicates that (unlike the air Force, the U. S. and the U. K land forces used bombs and cluster ammunitions widely in civilian populated areas along the way to Baghdad), and these weapons explode and spread hundreds of small bombs, which covers an area of 2,3 of a football field (21), not to mention what resulted from the war of the migration of large numbers of citizens till this event described by the UN High Commissioner for refugees (UNHCR) that the world is witnessing a dangerous process of displacement since the tragic events that occurred in 1948 (22).

The responsibility of military and civilian leaders of the forces that swept Iraq for the committed crimes can't be denied, therefore we found the United States has issued several laws that protect its soldiers from criminal responsibility, such as (23), the Military Commissions Law in 2006; which grants retroactive immunity to those responsible for war crimes and sign treaties with the countries that joined the court to prevent Extradition over the US officers responsible for committing crimes.

The Australian forces also committed war crimes and crimes against humanity and none of its perpetrators has been punished yet (24). The responsibility extends to those who gave aid, instigation, assistance, ordered or urged committing such serious crimes without prejudice to the responsibility arising from the responsibility of States according to the International Law (25).

Eventually, we should punish those responsible for these crimes, in terms of civil and criminal, if we want to maintain a sound and just track for the International Criminal Court (26).

So we hope the new Attorney General (Fatou Bensouda) will reconsider the analyzes that were conducted by the Division of Jurisdiction (27), complementarily and Cooperation, to reinforce the justice march toward the right track and to ensure the independency of the prosecutor's office, which repeated by the prosecutor during taking his oath when he was elected (28).

Conclusion:

The OTP is responsible for the investigation and prosecution of those who responsible for committing serious crimes, the prosecutor responsible for collection the evidences and perhaps may be found problems in his mission, because the evidence may be destroyed or kept secret by the state which the perpetrator followed it, and this state try to protect him.

We hope from the Assembly of States parties in the next review Conference to define the concept of (gravity threshold) is clearly, and avoid the interpretations of the OTP.

We also believe that the principle of complementarity is not enough; we can ask what it is the solution if the local court refuses to do their obligations to prosecute the national perpetrator? As the situation in Iraq? and hope that the prosecutor (Fatou Bensouda) to review the examining of the decision of the division of (jurisdiction, complementary, cooperation) especially when the new evidence that has emerged recently, here I mean the pictures and document that show the horror of the crimes committed against the Iraqi people, and secure appropriate compensation for victims and access to justice sought by the International Criminal Court, to achieve the purpose of the establishment of the Court to fight impunity.

Resources

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- 6– Essam Abdel – Razzaq al – Attiyah: the extent of the responsibility of the coalition forces to compensate the damage to the civilian in Iraq, the Journal of Legal Sciences, Faculty of Law/University of Baghdad, issue 2,2008.
- 7– OTP, The Hague, Feb. 2006.
- 8– Report of the Iraqi delegation at the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of the International Criminal Court in Rome, unpublished report.
- 9– Angley Comet and Sally Eberhard and Amel Pasha: Iraqis alliance after the sudden change of the position of Iraq from the International Criminal Court, the Journal of the Court, a periodical published by the Office of the Middle East and North Africa for the Alliance of the International Criminal Court in collaboration with the Arab Brotherhood Forum for human Rights, issue 1, August, 2005.
- 10– ICC Monitor, the newspaper of the NGO coalition for the ICC, issue 25, Sep. 2003.

- 11– The gravity threshold of ICC, war crimes research office, ICC legal analysis and education project, Washington College of Law, American University, USA, March 2008.
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- 13– Ali Ouattara (The victims must restore their rights). Ali Ouattara (ci – cpi): (Il faut que les victimes soient rétablies dans leurs droits) an article published in French, available at: [http://news.abidjan.net/h/446278.html?utm_source=CICC+Newsletters&utm_campaign=790739f342 – CDI+digest +12+Dec+ENG+%28 copy +0 3% 29 &utm_medium=email](http://news.abidjan.net/h/446278.html?utm_source=CICC+Newsletters&utm_campaign=790739f342%20copy%203%2029&utm_medium=email).
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- 16– ICC monitor, the newspaper of the NGO coalition for the ICC; issue 26, Feb. 2004.

References

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 - 2- () OTP, The Hague, 9, Feb. 2006, P. 1.
 - 3- () See: Alexander Smoltczyk, Are US Munitions to Blame for Basra Birth Defects? Spiegel on line international, 18,12,2012,,: <http://www.spiegel.de/international/world/researchers-studying-high-rates-of-cancer-and-birth-defects-in-iraq-a-873225.html>, last accessed on 18/12/2012.
 - 4- () Alexander Smoltczyk, *ibid*, p 2.
 - 5- () See the recommendations of the Iraqi delegation at Rome Conference, Report of the Iraqi delegation at the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of the International Criminal Court in Rome, unpublished report, p 45, para. 1, who recommended not to sign and ratify the ruling law in its current form; But the idea of joining the court reappeared again in 2005, where the Iraqi interim Prime Minister issued on February 15,2005, the order No. 20 for 2005, provides the Iraq's accession to the Rome statute, then after less than two weeks the decision canceled suddenly without any cause, it seems that the effects of Iraq's accession to the statute might cause problems to the coalition forces in Iraq, especially in relation to the crimes committed by these forces against Iraqi citizens.
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- 6- () The crime of aggression has been adopted in Kampala conference in Uganda in 2010.
 - 7- () OTP, The Hague, OP. cit, p. 4.
 - 8- () Ray Murphy, gravity issues and the ICC, CLF, vol, 17,2006, p. 309.
 - 9- () Paragraph 2, Article 12 of the statute: In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3: B – the state of which the person accused of the crime national.
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 - 11- () For more see, D. Khalid Mohammed Hamad Al Juma'a: legal basis for the illegal invasion and occupation of Iraq, the Journal of Sharia &law, the United Arab Emirates, Faculty of Law, issue 48, November 2011, p. 305 et seq.
 - 12- () See: the gravity threshold of ICC, war crimes research office, ICC legal analysis and education project, Washington College of Law, American University, USA, March 2008, p. 23 et seq.
 - 13- () See: Articles 7 – 8 of the Rome statute.
 - 14- () ICC Monitor, the newspaper of the NGO coalition for the ICC, issue 25, Sep. 2003, p. 3.

- 15- () J. Angelo Corlett, US responsibility of war crimes in Iraq. *Res publica*, 2010, pp. 231 – 132.
- 16- () A number of activists belonging to one of the organizations in Côte d'Ivoire expressed the same meaning (impunity encourages the return), See, Ali Ouattara (The victims must restore their rights). Ali Ouattara (ci – cpi): (Il faut que les victimes soient rétablies dans leurs droits) an article published in French, available at: http://news.abidjan.net/h/446278.html?utm_source=cicc+newsletters&utm_campaign=Ign790739f342-cdl+digest+12+dec+eng+%28copy+03%29&utm_medium=email-last accessed in 12/18/2012.
- 17- () Mohamed Elzeidy Surprised and said: How would the OTP estimate enlisting and conscripting of children under the age of 15 years and using them to participate actively in hostilities in the Congo is a serious crime in the case of the accused to (Thomas Lubanga Dyilo) which he was sentenced for 14 years, while not a deliberate wilful killing of children and the rape of British troops serious crimes against Iraqis!!!
- See: Mohamed M. Elzeidy, op. cit, pp. 40 – 41.
- 18- () Amnesty International: Amnesty International's report for 2012, the United Kingdom, the armed forces in Iraq, available at: [www.amnstry.org/ar/region/uk/report – 2012](http://www.amnstry.org/ar/region/uk/report-2012), last accessed in 12/12/2012 ; also see the judgment of the German Federal Administrative Court issued on July 21, 2005, which deemed the U. S. invasion of Iraq, a crime of aggression, D. Khalid Mohammed Hamad Aljuma'a, op. cit, p 270 et se, also see the web site of the ECHR, press releases Grand Chamber judgment Al – SKeini v. United Kingdom 07,07,2011, doc. no. (095L2011) p. 1, available at: [http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx#{"display":\["1"\],"dmdocnumber":\["887951"\]}](http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx#{) last accessed on 2/8/2014.
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- 22- () D. Ali Jamil Harab: the international system of penalty, the international sanctions against states and individuals, presented by D. Mohammed Majzoub, Habli legal publications, Beirut, 2010, p. 580.
- 23- () Amnesty International: the ICC, U. S. efforts to win impunity for genocide, crimes against humanity and war crimes, August 2002, Index No: 2002/025/40, IOR, p. 3.
- 24- () Chris Doran, Tim Anderson, *ibid.* pp. 284 – 293.
- 25- () See Article 25 of the Rome statute.
- 26- () See: D. Essam Abdel – Razzaq al – Attiyah: the extent of the responsibility of the coalition forces to compensate the damage to the civilian in Iraq, the *Journal of Legal Sciences*, Faculty of Law/University of Baghdad, issue 2, 2008, p. 103 et seq.
- 27- () recently the prosecutor issued that its received a new communication from the European Center for Constitutional and Human Rights ("ECCHR") together with the Public Interest Lawyers ("PIL") alleging the responsibility of officials of the United Kingdom for war crimes involving systematic detainee abuse in Iraq from 2003 until 2008, so we supports her to commence an investigation in the situation in Iraq, for more see: http://www.icc-cpi.int/EN_Menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/iraq/pages/iraq.aspx, last accessed on 2/8/2014.
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