

IN SEARCH OF JUSTICE

Why Australians should be prosecuted for war crimes committed in Iraq

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Justice in a shattered land

On 1 June 2008, at Camp Terendak in southern Iraq, the Australian flag was ceremonially lowered. It marked the end of our nation's combat role in a conflict condemned by much of the international community as illegal and unjustified. With United States' troops now expected to withdraw from the war-ravaged land by September 2010,¹ it is perhaps timely to consider the challenge of post-conflict justice. Should individuals responsible for egregious crimes committed in Iraq, including Australian nationals, be prosecuted at the International Criminal Court ('ICC') in The Hague? What would be the cost of allowing coalition war crimes to go unpunished?

This article looks primarily at Australia's participation in the war, from the initial bombardment of Baghdad in 2003 to the withdrawal of combat troops last June. It examines whether there is a legal and factual basis for the ICC to investigate and prosecute Australian leaders and soldiers for war crimes, and explores the philosophical underpinnings and political realities of our nascent system of international criminal justice. It argues that members of coalition forces in Iraq must be punished for their crimes if we are to prevent offences of the same nature and magnitude from being perpetrated again. It is well beyond time that we challenged the culture of impunity among western political and military leaders.

The quest to end impunity

In March 2003, the US, with the backing of Britain and Australia, launched an offensive military assault against the sovereign state of Iraq. The executive arm of the Australian Government, with Prime Minister John Howard in charge, authorised our country's participation in the conflict. Throughout the invasion and the ensuing occupation, Australian commanders were aware that, if they were to commit acts which violated the laws of war, they could be held criminally responsible as individuals before the ICC.²

The purpose of the Court, established in 1998 and operating since 2002, is to help end impunity for the perpetrators of the most serious crimes of concern to the international community. In 2007, its chief prosecutor, Argentine jurist Luis Moreno-Ocampo, remarked in an interview with a British newspaper that he had no trouble envisaging a scenario in which former British Prime Minister Tony Blair, and presumably also Australia's John Howard, might one day face charges

at the ICC for crimes committed in Iraq.³ A year earlier, however, he had concluded after a preliminary assessment of information received in relation to the war that there was not, at that stage, a 'reasonable basis' for an investigation.⁴

Have new facts and evidence come to light since then? Under the *Rome Statute*, which establishes the ICC, the chief prosecutor may initiate an investigation into alleged crimes at any time despite his earlier decisions.⁵ For practical reasons, the push for an ICC investigation is perhaps more likely to succeed once coalition forces have entirely withdrawn from Iraq and violence in the embattled nation has come to a stop.

This article argues that there is clearly a reasonable basis on which to proceed with an investigation into crimes committed by Australians and other members of coalition forces in Iraq. As the Australian Government has not yet conducted its own trials for crimes committed by its nationals in Iraq and has shown no inclination to do so,⁶ the ICC prosecutor should not deem ICC cases against Australians inadmissible for reasons related to domestic proceedings. Furthermore, an investigation is in the interests of international justice and the interests of the war's many victims,⁷ and the alleged offences are surely of sufficient gravity to warrant prosecutions, even when compared with the crimes committed in northern Uganda, the Democratic Republic of Congo and Darfur, where the ICC currently has investigations.

Crimes committed in Iraq

According to research conducted in 2007, the Iraq war has claimed more than a million lives, many of them civilian.⁸ Millions more have been permanently scarred by the conflict, both physically and psychologically. But under the laws of war, the death and injury of civilians in armed conflict, no matter how regrettable, is not in itself a war crime. The *Geneva Conventions* permit belligerents to carry out 'proportionate' attacks against military targets even in the knowledge that civilians will die or be severely injured as a consequence. The question we must ask, in determining the criminal culpability of Australian officials in relation to the Iraq war, is whether they played the 'game' of war according to its internationally agreed 'rules'. Evidence indicates that very often they and their coalition partners did not.

As Iraq is not a party to the *Rome Statute*, the ICC's jurisdiction over the territory is limited to crimes

REFERENCES

1. US President Barack Obama, 'Responsibly Ending the War in Iraq' (Remarks Delivered at Camp Lejeune, North Carolina, 27 February 2009).
2. Australia became a State party to the Court's constitutive document, the *Rome Statute*, in July 2002: *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002).
3. Gethin Chamberlain, 'Court "Can Envisage" Blair Prosecution', *Daily Telegraph* (London, UK), 17 March 2007.
4. 'OTP Response to Communications Received concerning Iraq,' Open letter, Office of the Prosecutor, ICC, 9 February 2006, 7.
5. *Rome Statute* art 15(5)–(6).
6. Australians can be prosecuted by Australian courts for war crimes under the *Geneva Conventions Act 1957* (Cth) and *Criminal Code Act 1995* (Cth).
7. The ICC prosecutor is required to consider these two factors, among others, in determining whether to initiate an investigation: *Rome Statute* art 53(1)(c).
8. Opinion Research Business, 'More than 1,000,000 Iraqis Murdered' (2007) <www.opinion.co.uk>.

committed by the nationals of states which are parties to the treaty,⁹ which include Australia and the United Kingdom but not the US. The court currently has the power to hear cases involving three categories of crimes: genocide, crimes against humanity and war crimes.¹⁰ It has received few factual allegations that either genocide (which requires an intent 'to destroy, in whole or in part, a national, ethnical, racial or religious group') or crimes against humanity (which involve certain acts 'committed as part of a widespread or systematic attack directed against any civilian population') have been committed.¹¹ This article therefore focuses on the third category of offences — war crimes.

Under the *Rome Statute*, war crimes are defined as grave breaches of the *Geneva Conventions* of 1949 and any other serious violations of the laws and customs applicable in international armed conflict.¹² Allegations of war crimes committed by coalition forces in Iraq are well substantiated by the reports of human rights organisations and the media.¹³ Such crimes include attacks against civilians with no clear military objective, the torture and inhuman treatment of detainees at the notorious Abu Ghraib Prison, and the widespread use of cluster bombs causing severe humanitarian harm. A thorough investigation by the ICC prosecutor into these and other alleged crimes would perhaps reveal many more, as well as help to clarify exactly who was responsible.

Cluster bomb attacks

Legal experts, politicians and medical doctors have accused Australians and their coalition partners in Iraq of using excessive force, particularly through cluster bomb strikes.¹⁴ Under the *Rome Statute*, it is an offence to launch an attack knowing that it will cause incidental loss of life or injury to civilians, damage to non-military objects, or 'widespread, long-term and severe damage' to the environment where the attack is 'clearly excessive' in relation to the 'concrete and direct overall military advantage anticipated'.¹⁵ The use of cluster bombs — large canisters containing hundreds of smaller 'bomblets' — around the built-up areas of Basra and Baghdad, among other places, was clearly a war crime within this definition.

Human Rights Watch has reported that cluster bomb strikes represented one of the leading causes of civilian deaths in the invasion period.¹⁶ Though it is perhaps doubtful that civilians were specifically targeted in any cluster bomb attack, all 50 acknowledged cluster bomb attacks carried out by the United States with the aim of killing Iraqi leadership failed: 'While they did not kill a single targeted individual, the strikes killed and injured dozens of civilians.'¹⁷ Cluster bomblets pose a particular danger to civilians because of their wide dispersal area and high 'dud rate'. Bomblets which fail to explode upon impact become, in effect, anti-personnel landmines — hiding in long grass or bombed-out buildings until hapless civilians detonate them. A particularly deadly cluster bomb attack was carried out against al Hilla, a town 80km from Baghdad,

on 31 March 2003. British journalist Anton Antonowicz described a scene at the local hospital:

Among the 168 patients I counted, not one was being treated for bullet wounds. All of them, men, women, children, bore the wounds of bomb shrapnel. It peppered their bodies. Blackened the skin. Smashed heads. Tore limbs. A doctor reported that 'all the injuries you see were caused by cluster bombs ... The majority of the victims were children who died because they were outside.'¹⁸

The US has admitted using 10 782 cluster bombs in Iraq, containing more than 1.8 million bomblets, and the UK has admitted using 2170, containing 113 190 bomblets.¹⁹ Many were dropped in residential neighbourhoods, even though the humanitarian risks associated with their use were well known, and very few of the bomblets were individually guided. While cluster bombs are not listed as a prohibited class of weapon under the *Rome Statute*, the International Court of Justice, which is the highest authority on general matters of international law, stated in 1996 that it is unlawful for any nation to use weapons that are 'incapable of distinguishing between civilian and military targets'.²⁰ The same year, the International Criminal Tribunal for the Former Yugoslavia convicted Milan Martić, a political leader of Croatian Serbs, for ordering cluster bomb attacks against targets in Zagreb in violation of international law.²¹

In demonstrating that the cluster bomb strikes carried out by coalition forces in Iraq were indeed war crimes, the important question is whether the use of these indiscriminate weapons was disproportionate to the military advantage anticipated. Under the first additional protocol of 1977 to the *Geneva Conventions*, the expected military benefit must be weighed against the likely civilian harm, and offensive forces are required to take 'all feasible precautions' in choosing the means and methods of attack with a view to avoiding or minimising civilian harm.²²

The US and UK, in carrying out their cluster bomb strikes, clearly failed to meet this obligation. Other more precise weapons were readily available to them and could have achieved the same military objectives, perhaps more effectively, without causing such extreme civilian harm. Contrary to the ICC chief prosecutor's preliminary conclusion in 2006, there is surely a reasonable basis to believe that coalition forces carried out excessive attacks causing unnecessary loss of civilian life.

The extent of Australia's participation in the cluster bomb attacks remains unclear, but would no doubt come to light in the course of an ICC investigation. A federal parliamentary inquiry in 2007 stated that Australia had never directly 'used' cluster bombs in a military conflict.²³ This may be true. However, the Royal Australian Air Force has admitted providing cover for US ground troops in Iraq who were launching cluster bombs, and the defence minister at the time, Robert Hill, refused to denounce the use of these weapons by Australia's coalition partners.²⁴

In 2007, government Senator Chris Ellison informed the Parliament that, although the Department of Defence

9. *Rome Statute* art 12(2)(b).

10. *Rome Statute* arts 5–8.

11. Moreno-Ocampo, above n 4, 4.

12. *Rome Statute* art 8(2)(a), (b).

13. See especially Human Rights Watch, *Off Target: The Conduct of the War and Civilian Casualties in Iraq* (2003).

14. See, eg, 'Howard Accused of War Crimes over Iraq Troop Deployment', *ABC News*, 2 June 2008.

15. *Rome Statute* art 8(2)(b)(iv).

16. Human Rights Watch, above n 13, 80.

17. *Ibid* 6.

18. Anton Antonowicz and Mike Moore, 'Bombs Fall on Babylon', *The Mirror* (London, UK), 3 April 2003.

19. Human Rights Watch, above n 13, 6.

20. *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 225, 226 [78].

21. *The Prosecutor v Martić*, Case No IT-95-11-R61, [31] (8 March 1996).

22. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3, art 57 (entered into force 7 December 1978).

23. Standing Committee on Foreign Affairs, Defence and Trade, *Cluster Munitions (Prohibition) Bill 2006* (2007) 4.

24. Paul Bongiorno, Interview with Defence Minister Robert Hill, *Meet the Press*, Network 10, 6 April 2003.

Australian nationals were willing participants in the Iraq war, and cannot avoid criminal liability for particular war crimes simply by arguing that they were not principals.

was 'not aware' of any instances of Australian Defence Force ('ADF') personnel being 'directly involved' in the use of cluster bombs in Iraq, 'actions by non-Australian units in wider battles may have involved cluster munitions, and it is possible that ADF personnel have been involved in those operations'.²⁵ The deliberate vagueness of his answers is telling. If the Senator had confirmed Australia's involvement in the strikes, he would likely have implicated our officials in the commission of war crimes.

Other attacks on civilians

The US-led coalition of the willing has also committed war crimes in Iraq using ordinary, non-cluster weapons. During the initial invasion, for example, coalition forces violated the laws of war by attacking media outlets with no apparent military objective.²⁶ Britain's *Guardian* newspaper reported on 8 April 2003 that coalition forces had shelled the *Al-Jazeera* and Abu Dhabi television offices in Baghdad killing a cameraman and wounding a correspondent, and had carried out a separate attack the same day killing two Reuters and Tele Five cameramen.²⁷

A fortnight earlier, on 24 March, a bus travelling near the Syrian border was struck by a US aircraft-launched missile, killing five civilian passengers.²⁸ In the days following, coalition forces bombed a marketplace in the Al-Shaab district of Baghdad, resulting in the death of 14 Iraqi civilians and severe injuries to many more.²⁹ They also bombed a marketplace in the Shula district of Baghdad, killing more than 50 Iraqi civilians.³⁰ None of these attacks — a mere sample of the crimes committed — had any clear military objective. It is likely that all were in violation of the *Rome Statute*, and those responsible should be brought to justice before the ICC.

Coalition forces have also committed serious war crimes during the occupation phase of the war. The second assault on Fallujah, a city 70km west of Baghdad, in late 2004 provides one of the most horrific examples. Major General Jim Molan, an Australian national seconded to the US armed forces in April 2004, was in charge of planning and carrying out the assault, whose stated aim was to clear out Sunni insurgents suspected of using the city as a base.³¹ Coalition troops instructed women and children to flee the city in advance of their three-week-long bombing campaign, but forced all males between 15 and 45 years to stay. As bombs began falling, between 30 000 and 50 000 people remained in Fallujah with no option of escape.³²

Coalition forces cut off water, electricity and humanitarian aid to the civilian population in flagrant violation of the *Rome Statute*.³³ The UN Special Rapporteur on the Right to Food, Jean Ziegler, accused the coalition of committing a war crime by using 'hunger and deprivation of water as a weapon of war against the civilian population'.³⁴ Then, when images of civilian casualties at Fallujah's only hospital were broadcast across the globe, coalition forces seized the building: 'Patients and hospital employees were rushed out of the rooms by armed soldiers and ordered to sit or lie on the floor while troops tied their hands behind their backs'.³⁵ The city's two other medical clinics were destroyed — a breach of the fourth *Geneva Convention*.³⁶

The US has also admitted using white phosphorus during the assault,³⁷ even though its use as an incendiary weapon in populated areas is strictly prohibited under international law. Designed to illuminate an enemy's positions or to create a smokescreen, this deadly chemical weapon disperses flaming phosphorous balls which cling to anything they touch and can burn for hours inside a human body. Ironically, the US had listed Saddam Hussein's alleged use of white phosphorus against civilian Kurds in 1991 as a war crime adding weight to the legal case for the US invasion of Iraq in 2003.³⁸

The culpability of Australians

The ICC may hold Australian leaders and lower-ranking officials criminally responsible for war crimes committed during the war.³⁹ However, it does not have jurisdiction to prosecute individuals for the illegal act of invading Iraq. Where American and British nationals were principally responsible for committing war crimes, Australian nationals may be prosecuted if it can be shown that they ordered, solicited or induced a crime, or aided, abetted or otherwise assisted in the commission or attempted commission of the crime, including by providing the means for its commission.⁴⁰

Aiding and abetting the commission of a crime involves providing practical assistance, encouragement or moral support which has a substantial effect on the perpetration of the crime. Importantly, it is not necessary for the prosecutor to prove that the offence would not have occurred had it not been for the involvement of the accused.⁴¹ It is clear that Australian forces did indeed participate, as accessories if not principals, in a number of the war crimes referred to in this article. For example, the act of providing aerial

25. Federal Parliament, *Hansard*, 21 March 2007, 167 (Chris Ellison).

26. *Rome Statute* art 8(2)(b)(ii), (iv), (v).

27. Jason Deans, 'Al-Jazeera Cameraman Killed in US Raid', *The Guardian* (London, UK), 8 April 2003.

28. 'Civilians Killed in Northern Air Assault', *ABC News Online* (Australia), 25 March 2003.

29. Hamza Hendawi, 'At Least 14 Dead in Baghdad Neighborhood Cruise Missile Attack', *Associated Press*, 26 March 2003.

30. "'Many Dead' in Baghdad Blast", *BBC Online* (UK), 29 March 2003.

31. Patrick Walters, 'Advance with Caution', *The Australian* (Sydney), 20 August 2005.

32. Rory McCarthy and Peter Beaumont, 'Civilian Cost of Battle for Fallujah Emerges', *The Observer* (London, UK), 14 November 2004.

33. *Rome Statute* art 8(2)(b)(xxv).

34. 'UN Food Envoy Says Coalition Breaking Law in Iraq', *Reuters*, 14 October 2005.

35. Richard Ooppel, 'Early Target of Offensive Is a Hospital', *New York Times* (New York, US), 8 November 2004.

36. *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287, art 18 (entered into force 21 October 1950).

37. 'US Forces Used "Chemical Weapon" in Iraq', *Independent* (London, UK), 16 November 2005.

38. Peter Popham and Anne Penketh, 'US Intelligence Classified White Phosphorus as "Chemical Weapon"', *The Independent* (London, UK), 23 November 2005.

39. *Rome Statute* art 25(2).

40. *Rome Statute* art 25(3)(b) and (c).

41. *Trial of Feurstein and Others*, Proceedings of a War Crimes Trial held at Hamburg, Germany (4–24 August 1948), Judgment of 24 August 1948.

cover for US ground troops launching cluster bombs in densely populated civilian neighbourhoods arguably falls within the ambit of the *Rome Statute*. The principles of secondary liability for criminal activities are familiar to most if not all domestic criminal justice systems. Australian nationals were willing participants in the Iraq war, and cannot avoid criminal liability for particular war crimes simply by arguing that they were not principals.

The rationale for prosecutions

Prosecutions for international crimes have much the same aim as prosecutions for ordinary crimes: to bring a degree of comfort to the victims and to deter others from committing similar offences. In the case of international crimes, prosecutions can also help to restore the rule of law and provide a forum for the recording of historical facts which might otherwise go undocumented. Just as the victims of crimes committed in times of peace can reasonably expect that those responsible will be prosecuted and punished, so should the victims of crimes committed in times of war.

The reality, however, is that war criminals are seldom brought to justice. Despite the great promise of the Nuremberg trials of 1946, countless atrocities have been carried out with impunity in the decades since by governments throughout the world. The simple act of punishing Nazi leaders for their crimes was not enough to deter would-be aggressors from committing murder on an unthinkable scale. Nevertheless, the struggle for global justice has had some notable victories, chief among them the establishment of the ICC. We have also seen ad hoc criminal tribunals convict leaders responsible for genocide and crimes against humanity in the Balkans and Rwanda.

Yet there has been little serious discussion within civil society or among nations about the possibility of war crimes trials for Iraq. Indeed, the international community has been generally unwilling even to entertain the idea of apprehending, trying and punishing westerners responsible for egregious acts. The forces of *realpolitik* have prevented any serious moves to prosecute leaders such as Britain's Tony Blair and Australia's John Howard at the ICC. A decision by the chief prosecutor to initiate an investigation would, of course, be highly contentious. But if the Court is to retain any legitimacy and relevance in coming decades, it must apply justice even-handedly. To date, it has indicted only African leaders.⁴² Selective prosecutions undermine the very notion of international justice.

The price of impunity

Our collective failure to challenge the unlawful actions of western forces in Iraq, either through prosecutions or some lesser form of accountability, could prove costly. Impunity for any war criminal encourages the future perpetration of similar crimes. It is a sad reality of the international legal system that, despite important advances towards genuine international justice, a person still stands a better chance of being tried and judged for killing one human being than for killing hundreds or thousands. Geoffrey Robertson QC

has recounted in his book *Crimes against Humanity* a popular joke told in Sarajevo around 1994:

When someone kills a man, he is put in prison. When someone kills 20 people, he is declared mentally insane. But when someone kills 200,000 people, he is invited to Geneva for peace negotiations.⁴³

Today, six years after the invasion of Iraq, no serious attempt has been made to bring to justice any of the war's principal instigators either for the crime of aggression or for crimes committed during the invasion and occupation. They remain free men. In the interests of peace and international justice, we must ardently and fearlessly challenge the deadly culture of impunity which allows their actions to go not only unpunished, but also largely unquestioned. By ignoring or forgetting the great misery inflicted on the Iraqi people, we allow state-sanctioned violence to continue unimpeded. War crimes trials at the ICC for Australian nationals would send a powerful message to western leaders contemplating illegal military action: you are not above the law — you will pay the price for your crimes.

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42. ICC <www.icc-cpi.int> at 10 August 2009.

43. Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice* (2nd ed, 2002) 372.