

Ocampo Turns Down Iraq Case: Implications for the U.S.

By Golzar Kheiltash, Legal Analyst, International Law and Justice

In a move that sends a strong signal about the future direction the Court will take, the Prosecutor of the International Criminal Court (ICC), Luis Moreno Ocampo, announced on Friday, February 10, that his office will not investigate alleged war crimes committed in Iraq by Coalition forces. His decision reinforces his commitment to ensure that the ICC adheres to its statute and addresses only the gravest violations when national courts fail to do so.

The Bush Administration has been less than shy about voicing its staunch opposition to the ICC. President Bush has alleged that ICC will unfairly target U.S. military personnel serving abroad. As Commander in Chief, he is worried that the thousands of U.S. military forces currently deployed around the world will face trumped up charges of war crimes and the like by a politicized Court. Yet countless officials, both American and European, have assured President Bush that the Court is politically impartial. The [latest decision](#) by the Office of the Prosecutor (OTP) at the ICC gives further proof of the Court's impartiality, demonstrating its commitment to investigate and prosecute only the most severe instances of war crimes, crimes against humanity and genocide being committed around the world.

Since 2003, Ocampo's office has received over 240 communications from victims, NGOs and other entities regarding the situation in Iraq. The vast majority of these communications have addressed the launching of military operations and the resulting loss of human life in the country, offering information and evidence for specific alleged offences.

Under Article 15 of the [Rome Statute](#), the treaty that establishes the ICC, Ocampo is legally bound to analyze all communications and supporting information received and determine whether there is a "reasonable basis" to proceed with a formal investigation based on that information.

Ocampo's announcement carefully discussed these communications and provided detailed legal reasoning for why his office has ultimately decided not to investigate the situation in Iraq. While some aspects of the reasoning are standard, other aspects of it are critical to the Court's credibility and demonstrate to even the staunchest critics that the ICC is truly a Court of last resort. Indeed, Ocampo's decision effectively undermines the U.S. administration's position that the ICC is a politicized Court that will be used to unfairly target U.S. servicemembers and personnel.

The Allegations

The Office of the Prosecutor (OTP) identified four general allegations of crimes committed in Iraq, namely the crime of aggression, crimes against humanity, genocide and war crimes.

With respect to aggression, Ocampo made clear that the Court is unable to determine whether the alleged crime of aggression, in this case the decision on the part of the U.S.-led Coalition to engage in armed conflict, was legal. This is because the crime of aggression is not yet one of the grounds for prosecution under the treaty establishing the Court's jurisdiction. It is widely

speculated that once a conclusive definition is reached at the Court's Review Conference in 2009, the crime of aggression will officially be added as the fourth crime that the Court can investigate and prosecute. It is therefore critical for the U.S. to attend the Review Conference in order to weigh in on the definition and inclusion of the crime of genocide in the ICC's mandate. The U.S. does not have to ratify the ICC's treaty to attend the meeting, but may do so as an observer.

In the case of genocide, the OTP determined that the few communications alleging genocide did not meet the threshold legal standard for this crime, namely an intent on the part of Coalition forces "to destroy, in whole or in part, a national, ethnic, racial, or religious group as such" (Article 6).

Similarly, the allegations of crimes against humanity also did not meet the requisite legal standard; according to the OTP, the allegations did not demonstrate "widespread" or "systematic" attacks directed against a civilian population (Article 7).

Some of the allegations of war crimes, however, did meet the legal threshold and were thereby intensively analyzed by the OTP. There were three specific allegations of war crimes, namely the targeting of civilians, clearly excessive attacks and the willful killing or inhumane treatment of civilians. After legal analysis, the OTP determined that the UK (a member of the Court and thus subject to the Court's jurisdiction) had not intentionally targeted civilians in Iraq. This determination was based in large part on information relayed to the OTP by the UK, and was not contradicted by any other available evidence or information. The OTP also concluded that there was a "lack of information indicating clear excessiveness" on the part of the UK military in its offensive in Iraq. With respect to the last charge, however, namely willful killing or inhumane treatment of civilians, the OTP's analysis did result in finding a reasonable basis to believe that war crimes within the jurisdiction of the Court had been committed. The OTP stated that "the information available at this time supports a reasonable basis for an estimated 4 to 12 victims of willful killing and a limited number of victims of inhuman treatment, totaling in all less than 20 persons."

Jurisdiction

Significantly, Ocampo did not address potential war crimes committed by U.S. or Iraqi troops in Iraq, as the Court does not have personal or territorial jurisdiction over U.S. or Iraqi servicemembers. This is because neither the U.S. nor Iraq are members ("state parties") of the Court—the ICC only has jurisdiction over people from countries that have joined the Court or have committed crimes on the territory of a country that has joined (non-state parties can also voluntarily accept the Court's jurisdiction). Ocampo noted that some communications made legal arguments that nationals of states party to the ICC may have served as accessories to crimes committed by nationals of non-state parties (e.g., UK nationals assisted U.S. and/or Iraqi nationals in the commission of war crimes). This claim was also ultimately rejected on the basis of lack of information and evidence.

Admissibility

Having found a reasonable basis for war crimes committed under the Court's jurisdiction in the form of willful killing and inhumane treatment of civilians, the next issue was whether the

evidence supporting the commission of these crimes was admissible. In making his admissibility determination, Ocampo articulated two requirements, namely gravity and complementarity.

Gravity

While the commission of war crimes itself invokes the Court's jurisdiction, a requisite gravity threshold must be met before such crimes can be formally investigated by the OTP. In deciding the gravity requirement, Ocampo reasoned that neither the specific nor general gravity threshold was met. The specific gravity threshold requires that "the Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes." The information and evidence available from the communications submitted to the OTP did not demonstrate that the willful killing and inhumane treatment of civilians was part of a plan or policy or as part of a large-scale commission of such crimes by Coalition forces. Ocampo further reasoned that even if the specific gravity threshold had been met, the general gravity threshold, which looks to factors such as the number of victims of particularly serious crimes, would still not be met. Indeed, the contrast between the Court's current cases involving three conflicts which, combined, have resulted in over hundreds of thousands of lives lost and five million people displaced, and the total of under 20 individuals subjected to war crimes in Iraq in the specific cases over which the court would have jurisdiction, demonstrates that the situation in Iraq, while abhorrent, is simply not as grave as the kinds of situations the Court is currently investigating.

Complementarity

Because of the determination on gravity, the OTP did not need to address the requirement of complementarity. Complementarity refers to the principle that the Court cannot take up a case unless national judicial systems are destroyed or unable to handle the case, or are deliberately shielding the accused from justice.

The Prosecutor noted that "effectively functioning national legal systems are in principle the most appropriate and effective forum for addressing allegations of crimes of this nature," Ocampo's statement demonstrates his explicit understanding of the Court's mandate and its limitations, and should significantly dispel the U.S. administration's fears that the Court would investigate U.S. servicemembers accused of war crimes, crimes against humanity or genocide. Under the principle of complementarity, the ICC is statutorily barred from prosecuting a U.S. servicemember when the U.S. is willing to investigate the situation domestically. Furthermore, a domestic investigation is not limited to federal courts—a military tribunal is also sufficient. The soldiers implicated in the Abu Ghraib scandal is a case in point. It is also critical to note that while an investigation is required, prosecution is not—a military or federal judge could decide that there are insufficient grounds to move forward with the case. Thus the principle of complementarity is one of the strongest safeguards embedded in the Rome Statute that serves to protect, not endanger, U.S. personnel. Currently, national courts in the U.S., UK, and Iraq are investigating alleged war crimes committed by their respective military personnel during the war in Iraq. In fact, the UK has investigated at least three British servicemembers accused of war crimes in Iraq under its International Criminal Court Act of 2001—a domestic law that integrates the ICC Statute.

The most significant aspect of the OTP's announcement from the U.S. perspective is Ocampo's analysis of the gravity requirement. The OTP could have easily refused to investigate the situation in Iraq on grounds of complementarity. Instead, Ocampo's central reason for rejecting the case was that the crimes committed by Coalition forces in Iraq, while considered war crimes and thus within the jurisdiction of the Court, did not rise to the level of gravity required for the Court to investigate. This reasoning is of critical significance to the U.S.—it demonstrates the very specific and limited mandate of the Court as a legal body that only investigates the most severe cases of war crimes, crimes against humanity, and genocide. Thus while the acts committed by Coalition forces in Iraq do constitute war crimes and are worthy of the strongest condemnation by the international community, they are simply not grave enough to form a legal basis for investigation by the ICC. Rather, the Court has now made clear that cases of rampant, widespread war crimes such as the ones committed in Darfur, Sudan, Northern Uganda and the Democratic Republic of Congo will invoke the Court's authority.

Conclusion

Since its establishment in July 2002, the ICC has invoked both fear and resentment among key officials in the U.S. administration. Convinced that the Court will be a politicized body designed to “punish” the U.S. for its foreign policy by prosecuting its servicemembers abroad, the current administration has taken drastic measures to undermine the authority, credibility, and legitimacy of the Court. Turning a deaf ear to countless human rights groups, foreign policy officials, and key European allies, the U.S. administration has refused to believe that the ICC is a court of last resort, bound by a laudable yet very specific and limited mandate. Now, in light of Chief Prosecutor Luis Moreno Ocampo's announcement regarding the situation in Iraq, the administration should rethink its ideological position vis-à-vis a Court that 100 countries around the world have embraced.

In particular, the U.S. administration should find great comfort in Ocampo's analysis of the gravity requirement. The decision to turn down the situation in Iraq on grounds of lack of gravity is particularly significant as it demonstrates the Court's understanding of its own mandate and the direction that future investigations will take. The ICC is the only hope for many of the victims of the world's worst crimes—it operates to ensure justice, not play politics. It is time for the U.S. administration to acknowledge this fact.