

**Rethinking International Criminal Justice:
A Collaborative, Interdisciplinary Research and Policy Project Strategy Meeting, University of
Sydney 22-23 October 2010**

Research Questions Submitted:

Submitted For Consideration For Adoption For Ongoing Research:

By ICCACTION Melbourne ICC Report Of 13 June 2008: ICC Ref: ICC: OTP-CR-425/07

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QUESTIONS:

Preamble:

Specifically relating to reporting of alleged criminality of the 20 March 2003 Iraq conflict, the ICC Prosecutor issued 9 February 2006 Guidelines. http://www.icc-cpi.int/NR/rdonlyres/F596D08D-D810-43A2-99BB-B899B9C5BCD2/277422/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf Such reporting is referred to in the '**Mandate of the Office**' section covering his statutory duty and powers to analyse information submitted. The guidelines explicitly indicate his Rome Statute duty extends to the following report analysis criteria limits.

In any reports of alleged criminality he is required to consider three factors:

1. Whether the information submitted 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, he must then consider admissibility before the Court, in light of requirements relating to gravity and complementarity with national proceedings,
3. If these factors are positive, he must give consideration to the interests of justice

The Guidelines provide 'specific focus' on **Allegations Concerning War Crimes**. This focus specifically relates to deaths, injury and damage, **occurring during the military operations between March and May 2003 (the initial Iraq invasion)**.

The guideline states in paragraph 1, page 5, (inter alia), "a crime occurs: when 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)

In considering past war crimes reports analysed by his office, his conclusions drawn with regard to (Article 8(2)(b)(iv) allegations - **show the available material with respect to the alleged incidents was characterized by a lack of information** indicating clear excessiveness in relation to military advantage.

RESEARCH QUESTIONS:

Research Question 1.

With respect to improving analysis and assessments, specifically of (Article 8(2)(b)(iv) war crimes allegations, it would strongly assist claimants wishing to pursue justice in the report process **if more definitive guideline definitions were available to assist an understanding of specific evidential critical parameters the Prosecutor requires in his Rome Statute analysis obligations.**

In other words, because most, if not all reports fail to reach his standards required for him to recommend an investigation of war crimes to the Pre Trial Chamber, there may be systemic failure in the reporting process itself. Ipso facto, the reporting process itself would benefit from clearer and deeper levels of analysis criteria needed to be issued which would assist claimants prepare alleged war crime reports for submission to the Prosecutor for analysis.

In order to provide the ICC Prosecutor with the standard of sufficient depth and clarity of information required to provide an indication of alleged war crimes in an attack potentially involving (Article 8(2)(b)(iv) war crimes (principle of proportionality) a research grant may provide valuable focus on examining the following areas:

- Specifically in what explicit or precise areas of past evidence has evidence fallen short of indicating clear excessiveness in relation to military advantage
- By what explicit or precise prosecutorial analysis measures used, has evidence fallen short of indicating clear excessiveness in relation to military advantage
- Whether the evidence which fell of short indicating clear excessiveness in relation to military advantage, was a measure of absence of factual specifics and in what explicit or precise areas
- Whether the evidence which fell of short indicating clear excessiveness in relation to military advantage was a result of insufficient limited and costly court investigative resources being available to conclude decisions
- Whether the evidence which fell of short indicating clear excessiveness in relation to military advantage was a result of insufficient limited and costly court investigative time being available to conclude decisions

Research Question 2.

In the U.N. Authorised Persian Gulf War (August 2, 1990 – February 28, 1991), 'Desert Storm' campaign http://en.wikipedia.org/wiki/Gulf_War the decision 'at international law' was taken 'not' to attack major densely civilian populated Iraqi cities because it was declared such an attack would cause incidental civilian injuries that **would be clearly excessive in relation to the anticipated military advantage** (principle of proportionality) (Article 8(2)(b)(iv). Because of this **legal precedent at international law**, the decision makers **at the political level** that committed forces in this conflict avoided any risk whatsoever of death/injury/destruction war crimes. This was a Jus In Bello 'proportionality' decision, not a Jus Ad Bellam decision.

A case potentially exists for a research study to show why that same legal precedent does/does not apply in considering and international law war crimes violation may have occurred in the 20 March 2003 conflict. Such a research study finding may well allow the war crimes allegation to be sustained at a different level of conflict and for the overall conflict itself, and indeed at higher levels of military command; perhaps reaching to the politicians initiating the combined attack if excessive.

Submitted Glenn Floyd Director ICCACTION 23 October 2010