

**REPORT OF THE INQUIRY INTO THE
ALLEGED COMMISSION OF WAR
CRIMES BY COALITION FORCES IN
THE IRAQ WAR DURING 2003**

INTRODUCTION

1. The Context of the Inquiry

The war in Iraq has raised significant questions of international law, the specific legal context of which has framed the scope of this Inquiry. Key aspects of the context are set out below.

1.1 The Institution of the International Criminal Court

1.1.1 The Statute of the International Criminal Court was adopted in Rome in 1998 (ICC Statute). This treaty established an international criminal court with the authority to examine and prosecute serious violations of human rights and international humanitarian law. Specifically, it was given the power to 'exercise jurisdiction over persons for the most serious crimes of international concern', these being (a) genocide (b) crimes against humanity (c) war crimes, and (d) the crime of aggression. The International Criminal Court's (ICC) cannot exercise jurisdiction over the crime of aggression pending the adoption of further provisions.

1.1.2 The ICC came into existence on 1 July 2002, when the requisite number of ratifications or accessions had been obtained. Those States which are parties have accepted the Court's jurisdiction thus opening the way for the ICC to try and to punish persons responsible for the most serious crimes against international law. The United Kingdom is party to the ICC statute but the USA is not.

1.1.3 Although the ICC Statute was drafted with the commission of well documented mass abuses of human rights in mind, the institution of the ICC provided a radical new avenue for the scrutiny and prosecution of those responsible (in either a military or governmental capacity) for serious crimes arising in the course of military action. Thus, the actions of powers engaged in armed conflict could be examined for any crimes within the ICC's jurisdiction.

1.1.4 As regards the UK, the ICC Statute was signed on 30 November 1998 and ratified on the 4 October 2001. Thus, in accordance with the ICC Statute the Court can exercise jurisdiction over genocide, crimes against humanity and war crimes committed on the territory of the UK or elsewhere in the world by nationals of the UK subsequent to 1 July 2002, the date the ICC Statute came into force. The invasion of Iraq by a Coalition of States, including the UK, took place in 2003. The UK government was well aware of the potential relevance of the ICC in relation to all its military operations.

1.1.5 As noted above, however, the ICC cannot yet exercise jurisdiction over the crime of aggression. Under Article 5(2) ICC Statute it can only exercise its jurisdiction in the event that an amendment to the Statute is adopted defining

the crime of aggression and detailing how the ICC may exercise such jurisdiction.

1.2 The Legal Questions Raised through Public Debate

1.2.1 By July 2002 it was clear from public statements of representatives of the UK and US Governments that an invasion of Iraq was a serious and imminent possibility. This provoked a debate in the UK about the legality of such military intervention without the express authorisation of the UN Security Council. In particular, a group of UK based practising and academic lawyers and non-governmental organisations (NGOs) held an independent inquiry in October 2002 into whether the use of force by the UK against Iraq would be lawful. The various opinions and skeleton arguments that emerged were published in *The Case Against War*.²

1.2.2 On 22 January 2003, lawyers for CND and 16 other NGOs launched a related challenge to the undertaking of military operations by serving formal letters concerning war crimes on the Prime Minister and the Secretaries of State for Defence and Foreign and Commonwealth Affairs.³ The letters set out various concerns that war crimes might be committed in Iraq by UK and US forces, particularly through the use of inherently indiscriminate weapon systems or attacks on civilian infrastructure. A specific warning was given that evidence would be gathered and that an independent inquiry would be instituted to examine these questions.

1.2.3 When military action against Iraq subsequently commenced on 20 March 2003, Peacerights, an NGO formed by activists and academic and practising lawyers to promote educational initiatives on international humanitarian and human rights law, agreed to fulfil the commitment made by the letter of 22 January. It collected publicly available reports on the conduct of the war and sought eye-witness testimony in relation to the bombing campaign in Baghdad. It also obtained expert evidence on weapons systems deployed, specifically cluster munitions and depleted uranium shells.

1.2.4 In order to consider the evidence collated and the relevant legal issues arising, a public legal inquiry (the Inquiry) was arranged and took place on 8-9 November 2003.

1.3 Tradition of People's Tribunals

1.3.1 The Inquiry finds its roots in the tradition of people's tribunals that originally gained inspiration from the Bertrand Russell War Crimes Tribunal of 1966. Then, in the context of public concerns over the conduct of the Vietnam war by US forces, a public meeting was called so that the 'crime of silence', as Bertrand Russell described it, should not be allowed to accompany suffering inflicted in contravention of standards of international humanitarian law.

² G. Farebrother & N. Kollerstrom (eds), *The Case against War: The essential legal inquiries, opinions and judgments concerning war in Iraq* (The Legal Inquiry Steering Group, 2003).

³ The text of these letters can be found in *ibid*, 235-264.

1.3.2 Since that time people's tribunals have established the right and duty of concerned people to investigate, to examine the evidence found, and to reach judgment on the actions of States through a process of independent and objective enquiry.

1.3.3 The Inquiry held in London on 8-9 November 2003 into the alleged commission of war crimes by the UK and US during the invasion of Iraq in 2003 was similarly based on the ethos of people's tribunals. It represented a contribution to the line of public inquiries that have sought to shed light on the lawfulness of actions that might otherwise remain unexamined.

2. Organisation of the Inquiry

The Inquiry was called to enable a Panel of international legal experts to examine legal issues regarding the conduct of military operations against the Republic of Iraq and the subsequent occupation of that State in 2003. Its particular focus was to examine the role played by the UK as one of the coalition powers and a Party to the ICC Statute.

2.1 Aims of the Inquiry

The Inquiry was established with the following aims:

- to examine the actions of the UK during its attack on Iraq in March and April 2003 in the context of the ICC Statute; and
- to decide whether a recommendation to the Prosecutor of the ICC to investigate the actions of the UK under Article 15 of the ICC Statute would be justified.

In order to reach a conclusion on these questions, the Panel to the Inquiry was specifically requested to:

- examine and report on the general principles which apply to the consideration of whether the actions taken by UK political and/or military leaders and/or soldiers in Iraq amounted to war crimes; and
- apply those principles to the evidence presented to the Inquiry on specific actions taken by UK forces in Iraq in order to reach a determination on whether war crimes may have been committed and/or whether further investigation was necessary.

2.2 Inquiry Terms of Reference

The Panel's function was limited to answering the following question:

'Is there sufficient cause and evidence for the International Criminal Court Prosecutor to investigate members of the UK Government for breaches of the

ICC Statute in relation to crimes against humanity and/or war crimes committed during the Iraq conflict and occupation 2003?’

The Panel was requested to:

- examine oral and documentary evidence. The documentary evidence was submitted to Panel members before the Inquiry in two bundles annexed to this report and labelled Evidence Bundle 1 and Evidence Bundle 2. The oral evidence was provided by eye-witnesses and technical experts;
- consider and discuss the legal issues relevant to the evidence presented;
- respond to any questions from a public audience;
- provide a preliminary brief opinion on the issues raised during the consideration of evidence and identify the matters of particular importance for the continuing reflection on the subject matter of the Inquiry;
- deliberate in closed session the matters raised during the Inquiry and determine the method for writing this report.

2.3 Process of Selection of the Panel

Aware of the importance of constituting an objective panel, Peacerights contacted a variety of internationally renowned legal academics based in a number of countries and specialised in international law disciplines.

2.4 Identity and Qualifications of Panellists

The Panel consisted of:

Upendra Baxi, Professor of Law, University of Warwick

Bill Bowring, Professor of Law, London Metropolitan University

Christine Chinkin, Professor of International Law, London School of Economics and Political Science

Guy Goodwin-Gill, Senior Research Fellow, All Souls College, Oxford

Nick Grief, Steele Raymond Professor of Law, Bournemouth University

René Provost, Professor of Law, McGill University, Canada

William Schabas, Professor of Law, National University of Ireland, Galway and Director of the Irish Centre for Human Rights

Paul Tavernier, Professor of Law, *Faculté Jean Monnet* and Director of *Centre de recherches et d'études sur les droits de l'Homme et le droit humanitaire* at the University Paris-Sud, France.

2.5 Appointment of Counsel to the Inquiry

2.5.1 In accordance with the aim of Peacerights to conduct the Inquiry with the highest standards of independence and scrutiny, counsel to the Inquiry were duly appointed (Mr Nicholas Blake QC and Ms Charlotte Kilroy of Matrix Chambers, London).

2.5.2 Counsel's brief was similar to that of counsel to the Hutton Inquiry proceeding in the UK at the same time,⁴ namely to assist the Panel in identifying the relevant legal questions, examining witnesses, summarising written evidence, and summarising the public proceedings. In addition, counsel produced a volume of relevant legal material,⁵ and assisted the Panel with their deliberation during the closed session on 9 November.

3. Compilation of the Report.

This report is based on the findings of the eight member tribunal of legal enquiry, following the sitting of the Inquiry on 8/9 November 2003, and their unanimous formulations concerning the justification for investigation by the ICC Prosecutor. This overall final text has been written and compiled by three members of the Executive Committee of Peacerights, Solange Mouthaan,⁶ Phil Shiner,⁷ and Andrew Williams⁸ whose task has been to introduce the report and to set in context the conclusions of the Panel. The Panel, while acknowledging fully the important initiative of Peacerights, endorses the text for further appropriate action by Peacerights. Accordingly, in the first instance the Executive Summary of the Report was launched in the House of Commons, London, on 20 January 2004 and at the headquarters of the United Nations, New York, on 26 January 2004.

⁴ Lord Hutton was appointed by the UK government to investigate and report on the circumstances surrounding the death of Dr David Kelly, a scientific advisor to the government on weapons of mass destruction in Iraq. The Hutton Inquiry findings were published in January 2004.

⁵ This material is enclosed with this report.

⁶ Lecturer in law at the University of Warwick.

⁷ Public Interest Lawyers.

⁸ Lecturer in law at the University of Warwick.

INQUIRY REPORT

The Panel has arranged its findings into six sections. These are presented in the following order:

1. Threshold for Investigation
2. Specific Issues Relating to Article 8(2) ICC Statute
3. Issues of Responsibility
4. Military Objectives and the Proportionate Use of Force
5. Supplementary Concerns Regarding Occupation
6. Rationale for an Investigation by the ICC Prosecutor.

1. Threshold for Investigation

- 1.1 Counsel to the Inquiry correctly summarised the question of the ‘threshold’ for investigation by the Prosecutor as follows:

‘The approach to be adopted by the Prosecutor under the ICC Statute in relation to initiating an investigation is set out in Article 53 of the Statute which provides as follows:

1. *The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:*
 - (a) *The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;*
 - (b) *The case is or would be admissible under Article 17; and*
 - (c) *Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.*

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

2. *If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:*
 - (a) *There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;*
 - (b) *The case is inadmissible under article 17; or*
 - (c) *A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime;*

the Prosecutor shall inform the Pre-Trial Chamber and the State making the referral under article 14 or the Security Council under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion...’

- 1.2 The Prosecutor's powers once an investigation has been initiated are set out in Article 54 and include the power to conduct investigations on the territory of a State and the power to collect and examine evidence and to request the presence of and question persons being investigated, victims and witnesses. The Prosecutor can also agree not to disclose documents or information and can take necessary measures to ensure the confidentiality of information.
- 1.3 This report will fall within the 'third class' of *notitia criminis* - information referred to the Prosecutor by any other source (Articles 13(c) and 15). This category of *notitia criminis* normally leads to the so-called investigation *proprio motu*, which cannot be initiated without a specific authorisation issued by the Pre-Trial Chamber. Furthermore the investigation *proprio motu* may be subject to Security Council deferral pursuant to Article 16, and has to be notified to the States Parties pursuant to Article 18.⁹
- 1.4 The expression 'having evaluated the information made available to him or her' (Article 53(1)) clearly emphasises that the need for a decision whether to initiate an investigation is always to be based on a careful preliminary examination about the seriousness of the information, i.e. of *any* information - see Rule 104 Rules of Procedure and Evidence. As Cassese states: 'On the other hand, a *notitia criminis* referred by any other source, and also a reference by a State Party, are likely to require a more careful preliminary examination, since the possibility of an insidious referral generated by suspect political interests, or even by the intention to produce an international crisis, cannot be *a priori* excluded...'¹⁰
- 1.5 It is clear, and the Panel accepts, that not every apparent or reported violation of the war crimes provisions of the ICC Statute will warrant investigation by the Prosecutor. Nevertheless, it is submitted that the detailed and credible testimony, oral and written, received by the Inquiry provides ample *prima facie* evidence of the commission of war crimes as defined in Article 8 ICC Statute.
- 1.6 The Prosecutor will wish to turn for guidance to the extensive experience of the International Criminal Tribunal for the former Yugoslavia (ICTY). It should be noted that in comparison with the ICC Statute, the ICTY Statute is brief and vague. Nevertheless, and significantly, it uses a phrase which is twice repeated in Article 53 of the ICC Statute, namely 'sufficient basis to proceed'. Article 18(1) provides:

'The Prosecutor shall initiate investigations *ex-officio* or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organisations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.'

⁹ Cassese, Gaeta, Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (OUP, Oxford, 2003) Vol.II, p.1145

¹⁰ *Ibid*, p.1148.

1.7 The Prosecutor may well wish to seek further guidance from the “Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia”¹¹ prepared at the request of the ICTY Prosecutor. The Review Committee gave the following opinion as to the threshold test for the ICTY:

‘In the course of its review, the committee has applied the same criteria to NATO activities that the Office of the Prosecutor (OTP) has applied to the activities of other actors in the territory of the former Yugoslavia. The committee paid particular heed to the following questions:

- a. Are the prohibitions alleged sufficiently well-established as violations of international humanitarian law to form the basis of a prosecution, and does the application of the law to the particular facts reasonably suggest that a violation of these prohibitions may have occurred? and
- b. upon the reasoned evaluation of the information by the committee, is the information credible and does it tend to show that crimes within the jurisdiction of the Tribunal may have been committed by individuals during the NATO bombing campaign ?’

1.8 This latter question reflects the earlier approach in relation to Article 18(1) of the ICTY Statute taken by the Prosecutor when asserting her right to investigate allegations of crimes committed by Serb forces in Kosovo.¹² The threshold test expressed therein by the Prosecutor was that of ‘*credible evidence tending to show that crimes within the jurisdiction of the Tribunal may have been committed in Kosovo*’ (emphasis added). That test was advanced to explain in what situation the Prosecutor would consider, for jurisdiction purposes, that she had a legal entitlement to investigate. (As a corollary, any investigation failing to meet that test could be said to be arbitrary and capricious, and to fall outside the Prosecutor’s mandate.) Thus formulated, the test represents a negative cut-off point for investigations. The Prosecutor may, in her discretion, require that a higher threshold be met before making a positive decision that there is sufficient basis to proceed under Article 18(1). (In fact, in relation to the situation on the ground in Kosovo, the Prosecutor was in possession of a considerable body of evidence pointing to the commission of widespread atrocities by Serb forces.) In practice, before deciding to open an investigation in any case, the Prosecutor will also take into account a number of other factors concerning the prospects for obtaining evidence sufficient to prove that ‘the crime has been committed by an individual who merits prosecution in the international forum.’

1.9 As to the use of cluster bombs by NATO, the Review Committee decided as follows:

‘27. Cluster bombs were used by NATO forces during the bombing campaign. There is no specific treaty provision which prohibits or restricts the use of cluster bombs although, of course, cluster bombs must be used in compliance with the general principles applicable to the use of all weapons. Human Rights Watch has condemned the use of cluster bombs alleging that the high “dud” or failure rate of the submunitions (bomblets) contained inside cluster bombs converts these submunitions into antipersonnel landmines which, it asserts, are now prohibited under customary international law. Whether antipersonnel landmines are prohibited

¹¹ To be found at: <http://www.un.org/icty/pressreal/nato061300.htm>

¹² *Request by the Prosecutor, Pursuant to Rule 7 bis (B) that the President Notify the Security Council That the Federal Republic of Yugoslavia Has Failed to Comply With Its Obligations Under Article 29*, dated 1 February 1999.

under current customary law is debatable, although there is a strong trend in that direction. There is, however, no general legal consensus that cluster bombs are, in legal terms, equivalent to antipersonnel landmines. It should be noted that the use of cluster bombs was an issue of sorts in the *Marti_* Rule 61 Hearing Decision of Trial Chamber I on 8 March 1996. In that decision the Chamber stated there was no formal provision forbidding the use of cluster bombs as such (para. 18 of judgment) but it regarded the use of the Orkan rocket with a cluster bomb warhead in that particular case as evidence of the intent of the accused to deliberately attack the civilian population because the rocket was inaccurate, it landed in an area with no military objectives nearby, it was used as an antipersonnel weapon launched against the city of Zagreb and the accused indicated he intended to attack the city as such (paras. 23-31 of judgment). The Chamber concluded that “the use of the Orkan rocket in this case was not designed to hit military targets but to terrorise the civilians of Zagreb” (para. 31 of judgment). There is no indication cluster bombs were used in such a fashion by NATO. It is the opinion of the committee, based on information presently available, that the OTP should not commence an investigation into use of cluster bombs as such by NATO.’

1.10 The Prosecutor accepted the Review Committee’s conclusion that

‘On the basis of the information reviewed, however, the committee is of the opinion that neither an in-depth investigation related to the bombing campaign as a whole nor investigations related to specific incidents are justified. In all cases, either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly heinous offences.’

1.11 This decision by the Prosecutor has been widely criticized. For example, Ronzitti argued that this was ‘equivalent to a *non liquet*.¹³ Difficulties in interpretation are not a good reason for not starting an investigation. There are fields of humanitarian law, as with any body of law, which are not *sufficiently* clear. However, the task of law interpretation and “clarification” is entrusted to the Tribunal, which thus cannot conclude by saying that it cannot adjudicate the case, since the law is “not clear”. The *non liquet* is not part of the jurisprudence of the Hague Tribunal nor of any other tribunal.’¹⁴

1.12 And Professor Benvenuti submitted that ‘...notwithstanding the recommendation of the Review Committee, an in-depth investigation should be started because the above-mentioned grounds, as summarized by the Review Committee, are insufficient to exclude that grave breaches of IHL within the competence of the Tribunal may have occurred. If, in the opinion of the Review Committee, “the law is not sufficiently clear”, this ought to be the very reason for starting an in-depth investigation, thus allowing the ICTY to clarify the law... If, in the opinion of the Review Committee, “investigations are unlikely to result in the acquisition of sufficient evidence of charges” (though such an opinion does not exclude the possibility that grave breaches of IHL may in fact have occurred), this would be a good reason for the Prosecutor to start an investigation making use of the very strong powers she (and the Tribunal) have resorted to in other cases (such powers were not at the disposal of or used by the Review Committee).’¹⁵

¹³ The Latin phrase ‘*non liquet*’ literally means ‘it is not clear’, that is the facts (and/or law) are insufficient to provide the basis for a decision. It is the technical term given to a verdict given by a jury when a matter is to be deferred to another day of trial.

¹⁴ Ronzitti “Is the Non Liqueur of the Final Report by the Committee Established to Review the NATO Bombing Against the FRY Acceptable?”, 840 *International Review of the Red Cross* (2000) 1020-1021

¹⁵ Paolo Benvenuti “The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia” *European Journal of International Law*, 12 (2001), 504-505

- 1.13 In its response to the ICTY's decision not to investigate NATO actions, Amnesty International (AI) noted the admission by the Review Committee that in answering the allegations of war crimes made against it, NATO had 'failed to address the specific incidents' with which it was charged. Five of these are among the incidents identified by AI in its 7 June 2000 report.¹⁶ The Committee's report documenting why a criminal investigation should not be conducted into NATO also revealed that it had 'not spoken to those involved in directing or carrying out the bombing campaign'. Nonetheless, it came to the conclusion set out above. Amnesty International pointed out that the Review Committee's report did not explain what difficulties it anticipated in gathering evidence against NATO or its officials.
- 1.14 The Panel agrees with these criticisms of the decision of the ICTY Prosecutor. The Panel submits that this Report contains ample credible evidence of the commission of war crimes as specified in Article 8 ICC Statute and the *Elements of Crimes*.¹⁷ The Report also refers to evidence in the possession of the UK Government which the Inquiry could not obtain but which the Prosecutor could. In particular, access to targeting data, legal advice obtained in the selection of targets, rules of engagement and other relevant military information could be reviewed. The threshold for commencing an examination has, it is submitted, been amply surpassed.

2. Specific Issues Relating to Article 8(2) of the ICC Statute

A review of available factual descriptions of operations carried out by British forces in Iraq leads the Panel to find that there is credible information reasonably suggesting that violations of Article 8(2) of the ICC Statute may have occurred. The most significant of these relates to the deployment of cluster bombs. Other possible violations were suggested by information provided on attacks against the media in Baghdad and other civilian targets.

2.1 Cluster Bombs

- 2.1.1 The United Kingdom acknowledges that it has made use of both land-based and airborne cluster bombs. More specifically, RAF Harrier jets dropped approximately 70 RBL 755 cluster bombs, each containing 147 bomblets, mainly in the vicinity of Baghdad. On land, British howitzers with a range of 30 km fired over 2000 L20 cluster shells containing 49 bomblets, mostly around Basra.¹⁸
- 2.1.2 Cluster bombs open before reaching their target to scatter bomblets or submunitions over a large area, with a devastating effect. All cluster weapons suffer from failure to detonate some of their bomblets, with reported average failure rates varying between 2% and 20%. In the context of the British use of

¹⁶ See <http://www.amnesty.org/ailib/intcam/kosovo/>

¹⁷ Knut Dormann, Louise Doswald-Beck, Robert Kolb, *Elements of War Crimes Under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge University Press, Cambridge, 2003).

¹⁸ Ministry of Defence, *First Reflections*, para. 4.9 (Item 10a, Evidence Bundle 1).

cluster weapons in Iraq the relevant issue is whether they were deployed against military objectives known to be located in urban areas.

- 2.1.3 The British Armed Forces Minister declared during an interview with the BBC that cluster weapons had been used against concentrations of military equipment and Iraqi troops in and around built-up areas around Basra, Iraq's second largest city.¹⁹ In addition, the United States in its air and ground operations used considerably more cluster weapons, including many reported uses during the prolonged bombing campaign of Baghdad. Some US air attacks were carried out using British platforms, in which case the UK was required to give its approval of both the target and weapon selection.²⁰ This decision clearly falls under the jurisdiction of the ICC.
- 2.1.4 While cluster weapons do not appear to be prohibited *per se* by the law of armed conflict at this time, the issue is whether the use of cluster weapons against military objectives located in urban areas violates either the prohibition of intentionally targeting civilians (Article 8(2)(b)(i) ICC Statute) or the prohibition of attacks causing disproportionate incidental loss of life or injury to civilians (Article 8(2)(b)(iv) ICC Statute).
- 2.1.5 Turning first to Article 8(2)(b)(i), the ICC Statute provides that 'intentionally directing attacks against the civilian population as such' constitutes a violation of the laws and customs of war and, in turn, a war crime subject to the jurisdiction of the ICC. This reflects a similar prohibition found in Article 51(2) of 1977 Additional Protocol I, defined as a grave breach of the Protocol by Article 85(3)(a) of the latter. While there is no credible information that UK forces meant specifically to target civilians, the intent requirement under this provision covers cases in which the perpetrator is aware that 'a consequence will occur in the ordinary course of events' (Article 30 ICC Statute).
- 2.1.6 Evidence presented to this Inquiry by weapons experts suggests that cluster weapons disperse their bomblets over a wide area which cannot be precisely targeted. Specifically, it was explained that, depending upon wind conditions and the altitude at which the main container opens to scatter its submunitions, bomblets can drift up to three kilometres away from the intended target. While some of the cluster bomb containers may have been precision guided or 'smart', bomblets used in the recent Iraq campaign were essentially never so.²¹ This type of ordnance, when used in an urban setting, can reasonably be described as indiscriminate. In its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice stated that:

¹⁹ Armed Forces Minister Adam Ingram's BBC Radio 4 Interview (Item 28, Evidence Bundle 2).

²⁰ Testimony of Air Marshal Burridge Q251-253 (Item 3, Bundle 2). General Myers confirmed that cluster munitions were used against "many" military assets in populated areas: US Dept. Of Defense Press Briefing, 25 April 2003 (quoted in House of Common Research Paper 03/50 at 75 – Item 1, Bundle 2).

²¹ Testimony by Landmine Action experts David Taylor and Richard Lloyd; *Briefing: Indiscriminate Attack? The Potential Use of Landmines and Cluster Bombs in Iraq* (Item 17, Bundle 1).

The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attacks *and must consequently never use weapons that are incapable of distinguishing between civilian and military targets* [emphasis added].²²

- 2.1.7 The prohibition against indiscriminate attacks is given precise meaning by Article 51(4) of 1977 Additional Protocol I, which provides that such attacks include those which employ a method of combat which cannot be directed at a specific military objective and, as a result, ‘are of a nature to strike military objectives and civilians or civilian objects without distinction’. The ICTY in a Review of Indictment against Milan Martić found that, given their accuracy and striking force, the use of cluster bombs against targets in Zagreb could not be designed to hit military targets and was as such contrary to customary and conventional international law.²³
- 2.1.8 Given the inaccurate nature of cluster weapons, their use by UK forces or under UK approval reasonably suggests that violations of Article 8(2)(b)(i) ICC Statute may have occurred and should be investigated by the ICC Prosecutor.
- 2.1.9 Article 8(2)(b)(iv) ICC Statute provides that war crimes prohibited by the laws and customs of war include ‘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 [...] which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.’
- 2.1.10 Reports of civilian casualties or damage to civilian objects following an attack do not in themselves suggest that an illegal act has occurred. However, Article 8(2)(b)(iv) is a reflection of Article 51(5)(b) of 1977 Additional Protocol I which lays down the principle that there must be proportionality between collateral casualties and the anticipated military advantage. As noted by the International Committee of the Red Cross in its commentary, this implies that the weapons selected ‘are not disproportionate in relation to the objective but are suited to destroying only that objective.’²⁴ The ICTY in its *Kupreskić* judgment noted that repeated attacks could produce a cumulative effect, which excessively jeopardize the lives and property of civilians, contrary to the demands of proportionality.²⁵
- 2.1.11 The question is whether cluster weapons can ever be considered proportionate to attack military objectives located in inhabited urban areas given their propensity to produce many needless casualties that could be avoided with more precise weapons. Further consideration of this question is contained in section 4 below. On the basis of that analysis and the information available to the Inquiry, the Panel has concluded that violations of Article 8(2)(b)(iv) ICC

²² ICJ Reports 1996, p. 226, para. 78.

²³ *The Prosecutor v. Martić*, (Case no. IT-95-11-R61, para. 31) Review of the Indictment Pursuant to Rule 61, 8 March 1996.

²⁴ Sandoz et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC/Nijhoff, 1987) para. 1979.

²⁵ *The Prosecutor v. Kupreskić*, (Case no. IT-96-16-T), Judgment, 14 January 2000 para. 256.

Statute may have occurred in respect of the use of cluster weapons and should be investigated by the ICC Prosecutor.

2.2 Other Possible Violations

- 2.2.1 Above and beyond the use of cluster weapons, there have been credible reports of attacks producing many civilian casualties with no manifest military advantage.
- 2.2.2 There were a number of attacks against media outlets during the 2003 armed conflict in Iraq. These include the coalition bombing of the Al-Jazeera and Abu Dhabi TV offices causing the death of an Al-Jazeera cameraman and the wounding of a correspondent, and the shelling of the Palestine Hotel used by many western media causing the death of two cameramen working for Reuters and Tele 5 of Spain, both of which took place on 8 April 2003.²⁶
- 2.2.3 In both cases, US CENTCOM (US Central Command) stated that troops had acted in self defence after coming under fire.²⁷ Perhaps more controversially, Iraq's main state broadcaster was the object of a US missile attack on 26 March 2003, affecting broadcasting by state-run TV. The US indicated that the attack was intended to damage Iraq's command and control assets.²⁸
- 2.2.4 On 26 March 2003 two bombs fell on a marketplace in the Al-Shaab district of Baghdad, killing at least 14 Iraqi civilians and wounding many others. A further bombing incident at a market in the Shula district of Baghdad killed more than 50 Iraqi civilians on 29 March 2003. In both cases no apparent military objective was identified.²⁹
- 2.2.5 Several air attacks were directed against civilian targets, including specifically a restaurant, based on intelligence that Saddam Hussein or other leading members of the Iraqi regime were present. These aerial strikes caused many civilian casualties without achieving the intended objectives. These strikes did not distinguish between civilians and combatants.³⁰
- 2.2.6 Electricity supplies were intentionally targeted both in Basra and in Baghdad with severe knock-on effects on water supplies and the humanitarian situation generally.³¹
- 2.2.7 On 24 March 2003 a bus crossing a bridge close to the Syrian border was struck by a US aircraft launched missile resulting in the death of five civilian passengers.³²

²⁶ Guardian Report (Item 9, Bundle 1); various Guardian stories (Item 18, Bundle 2).

²⁷ CENTCOM News Release 8 April 2003 (Item 19, Bundle 2).

²⁸ Various Guardian stories (Item 17, Bundle 2).

²⁹ See various reports from The Guardian (Item 12, Bundle 2) and the Spanish Brigade Report (Item 8, Bundle 1).

³⁰ For further information see Human Rights Watch Report, note 1 above.

³¹ *Ibid.*

³² Item 1 Bundle 1.

- 2.2.8 On the basis of the information relating to the above matters, the Panel has concluded that violations of Article 8(2)(b)(ii)(iv) and (v) of the ICC Statute may have occurred and should be investigated by the ICC Prosecutor.

3. Issues of Responsibility

- 3.1 Consideration of the criminal liability of individual members of the UK government and military raises a number of issues of joint and individual responsibility for the commission of acts within the jurisdiction of the ICC.
- 3.2 Jurisdiction under the ICC Statute is applicable only to crimes committed on the territory of States parties to the Statute, or to crimes committed by nationals of States parties to the Statute. Since Iraq is not a party to the ICC Statute, war crimes and crimes against humanity allegedly committed in Iraq during the 2003 war and subsequent occupation are only within the jurisdiction of the Court to the extent that they were committed by nationals of States parties. The UK ratified the ICC Statute on 4 October 2001. Accordingly, the Court has jurisdiction over war crimes committed by nationals of the UK since the entry into force of the Statute on 1 July 2002.
- 3.3 To the extent that UK troops themselves might have committed war crimes or crimes against humanity, in breach of Articles 7 and 8 of the ICC Statute, there should be little difficulty in understanding why they can be held individually responsible. Article 25(2) of the ICC Statute says that ‘A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.’
- 3.4 However, many of the alleged war crimes about which the Panel received evidence (the use of cluster bombs over Baghdad, the bombing of the restaurant where Saddam Hussein was allegedly present and more generally the conduct of the war in Iraq, as indicated in section 2 above) involved the UK acting in conjunction with the US, which is not a party to the ICC Statute. Nevertheless, in addition to those who actually perpetrated such crimes, the ICC also has jurisdiction over those who may have ordered, solicited, induced, aided or abetted or otherwise assisted in their commission or attempted commission, including providing the means for their commission.
- 3.5 Thus the relationship of two partners in a military Coalition, where one partner is subject to the jurisdiction of the Court and the other partner is not, must be determined. In particular, two separate questions arise:
- Can UK nationals be found criminally responsible for acts within the jurisdiction of the ICC committed jointly with the US (and as the junior partner)?
 - Can the ICC exercise jurisdiction over US nationals on the basis of the UK’s acceptance of the ICC Statute?
- 3.6 Article 19 ICC Statute requires the Court to satisfy itself that it has jurisdiction in any case brought before it. The ICC’s jurisdiction is over individuals and it

cannot determine state responsibility for the commission of an internationally wrongful act as can the International Court of Justice at The Hague. Nevertheless, since the Inquiry seeks to establish whether the ICC Prosecutor should investigate crimes allegedly committed by senior members of the UK government, whose acts under international law are attributable to the UK,³³ it is suggested that the principles of state responsibility are also relevant.

3.7 Article 16 of the International Law Commission's Articles on State responsibility 2001 provides:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) that State does so with knowledge of the circumstances of the internationally wrongful act and
- (b) the act would be internationally wrongful if committed by that State.

3.8 There is no doubt that condition (b) is satisfied: the commission of war crimes under Article 8 of the ICC Statute, if established, constitutes an internationally wrongful act. The question is then whether condition (a) is satisfied, that is whether the UK had knowledge of the internationally wrongful act. The evidence presented (that UK commanders were informed by the US of their military activities, and the selection of targets, and that they were concerned about the use of cluster bombs) suggests that the UK did have knowledge of the circumstances of the internationally wrongful act.

3.9 If the UK could be held responsible for the commission of an internationally wrongful act for aiding and abetting another state in so doing, it strengthens the argument that individual senior members of the UK government could be held criminally responsible before the ICC for the commission of international crimes through joint activities with other individuals, including those from the USA.

3.10 Unlike the NATO operation against Serbia in 1999, the military action against Iraq was not a common purpose within the framework of an international or regional organisation and thus subject to treaty provisions and accepted command and organisational structures. However, the US and UK, with other members of the coalition of the willing, acted with a common purpose in the military action against Iraq.

3.11 If it is shown that the common purpose or design involved the commission of war crimes under the ICC Statute, Article 8, individuals from the UK can be held liable under Article 25(3)(d).

3.12 In *Prosecutor v. Tadić* the ICTY Appeals Chamber stated that there are two central issues in establishing culpability for a common criminal design or purpose:

³³ Articles on Responsibility of States for Internationally Wrongful Acts, adopted at the 53rd session of the International Law Commission, 2001, GA Res. 56/83, 12 December 2001, article 4. 'Thus the head of State or government or minister of foreign affairs is regarded as having authority to represent the State without having to present full powers.'

- (a) whether the acts of one person can give rise to the criminal culpability of another where both participate in the execution of a common criminal plan; and
- (b) what degree of *mens rea* is required in such a case.³⁴

3.13 In considering these questions Professor Antonio Cassese (a member of the Appeal Chamber in *Tadi_*) has assessed the various kinds of joint actions which can lead to liability for a crime at international law.³⁵ These include:

- (a) Participation in a common purpose or design, where all the participants in a common criminal action are equally responsible if they (i) participate in the action, whatever their position and the extent of their contribution; and in addition (ii) intend to engage in the common criminal action. In this scenario all the participants are to be treated as principals;
- (b) Participation in a common criminal design where although all participants share from the outset the common criminal design, one or more perpetrators commit a crime that had not been expressly or implicitly agreed upon or envisaged at the beginning and therefore was not part of the joint criminal enterprise. In *Prosecutor v. Tadi_* the Appeals Chamber held that ‘responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk’;³⁶
- (c) Assistance (aiding or abetting) in the commission of the crime, by providing practical assistance, encouragement or moral support which has a substantial effect on the perpetration of the crime, knowing that the actions assist the perpetrator in the commission of the crime;
- (d) Inducement or incitement of the commission of the crime, when the inducement actually has an effect on the commission of the crime. The ICTY held in *Prosecutor v. Blaski_* that ‘both positive acts **and omissions** may constitute instigation.’³⁷ The subjective element of the crime is that (i) the person intended to induce the commission of the crime by the other person; or (ii) the person was at least aware of the likelihood that commission of the crime would be a consequence of his action; (iii) the person must possess the *mens rea* concerning the crime he is instigating.

3.14 These principles which were expounded in the jurisprudence of the ICTY are brought within the ICC Statute, Article 25(3) of which states that a

‘person shall be criminally responsible ... if that person:

³⁴ *Prosecutor v. Tadi_* (Case no. IT-94-1-A) Judgment, 15 July 1999, para. 185.

³⁵ A. Cassese, *International Criminal Law* (OUP, Oxford, 2003), 179-199.

³⁶ *Prosecutor v. Tadi_* (Case no. IT-94-1-A), Judgment, 15 July 1999, para. 228.

³⁷ *Prosecutor v. Blaski_*, (Case no. IT-95-14-T), Judgment, 3 March 2000, para. 280.

- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- (b) ...
- (c) For the purpose of facilitating the commission of such a crime, aids, abets, or otherwise assists in its commission or attempted commission, including providing the means for its commission.
- (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose.'

3.15 These provisions make it clear that there is a duty on individuals not to assist others in the commission of crimes under the ICC Statute, or to engage in joint activities that involve a common criminal purpose. The Judge Advocate in the *Ponzano case* referred to:³⁸

'the requirement that an accused, before he can be found guilty, must have been concerned in the offence. [T]o be concerned in the commission of a criminal offence ... does not only mean that you are the person who in fact inflicted the fatal injury and directly caused death, be it by shooting or by any other violent means; it also means an indirect degree of participation ... [In] other words, he must be the cog in the wheel of events leading up to the result which in fact occurred.'

3.16 The Judge Advocate went on to say that it is not necessary that the participation of the accused be a *sine qua non*, or that the offence would not have occurred but for his participation. The Panel considers that the involvement of UK military and government officials in the military operations in Iraq certainly amounted to at least a 'cog in the wheel.'

3.17 Driven by developments before the ICTY, the law in this area has further evolved in recent years so as to 'catch' foreign nationals who are directly or indirectly involved in a 'joint criminal enterprise' with nationals of another state. Much of the prosecution's case against Slobodan Milosevic is based upon this concept. Milosevic, former leader of the State of Yugoslavia, is being prosecuted for acts perpetrated by Bosnian Serb forces in neighbouring Bosnia and Herzegovina. Similarly, former Liberian ruler Charles Taylor is being prosecuted before the Special Court for Sierra Leone with respect to crimes committed by forces with which he was allied in a neighbouring country. In other words, this concept of 'joint criminal enterprise' is now well-accepted in international criminal law and is, indeed, at the core of important prosecutions. It is particularly useful in the case of a joint criminal enterprise in which one of the parties goes beyond what was originally agreed, even if the other party did not have full knowledge of this, provided that the act was a necessary and foreseeable consequence of the agreed joint criminal enterprise.

3.18 It might be noted that Article 25(3)(a) ICC Statute penalises individuals who use other persons as a tool to commit the crime, while not physically perpetrating it themselves.³⁹ It is not spelled out that the lack of criminal responsibility encompasses the ICC's lack of jurisdiction over individuals, nationals of states that are not parties to the ICC Statute, in this instance US

³⁸ *Trial of Feurstein and others*, Proceedings of a War Crimes Trial held at Hamburg, Germany (4-24 August, 1948), Judgment of 24 August 1948 cited in *Prosecutor v. Tadi_* (Case no. IT-94-1-T), Judgment, 15 July 1999, para. 199.

³⁹ Albin Eser, 'Individual Criminal Responsibility', in A. Cassese et al (ed.), *The Rome Statute of the International Criminal Court: A Commentary* (OUP, Oxford, 2003) at 767, 793-5.

nationals. However, the Panel is of the opinion that it would. The clause ‘regardless of whether that other person is criminally responsible’ is broadly worded. The provision must, for example, be intended to cover the use of persons under 18 as tools, and those persons whose criminal responsibility is also excluded on jurisdictional grounds in the Statute (Article 26).⁴⁰ The same would be true of people who lack the mental capacity to be found guilty of criminal acts. In the case of US nationals, it is not their criminal responsibility for proven offences that is excluded (such individuals could for example be tried by a court that does have jurisdiction such as a US national court) but the jurisdiction of the ICC.

- 3.19 With the above in mind, the Panel perceives a common purpose in the members of the Coalition in their military activities against Iraq, that is, the selection of targets, strategies and the use of particular weapons. Without detailed information about the planning and design of the military operations, and the level of knowledge on the part of the various sections of the coalition forces, the Panel considers that it is not possible to rule out the liability of UK officers or commanders as accessories to or co-participants in war crimes committed by US officers or commanders. This material is likely to be in the hands of military authorities and is not available to the public, and thus to members of the Panel. It may be, for example, that an agreement was reached between UK and US military forces that where there was doubt about whether a particular use of force or action would constitute a war crime the US would carry out that action since its officers or commanders were not liable to prosecution under the Statute. This could give rise to liability for UK commanders or officers under one of the subsections of Article 25(3). Equally, the UK’s forces may have been involved in operational decisions taken in relation to the action under consideration even if they did not themselves participate in the attacks. The bombing of the Iraqi TV station on 26 March 2003, for example, may have involved decision-making by both UK and US commanders. Did UK officials ever question, express concern about or seek to veto, the choice of targets for US activities? Did they ever seek to disengage themselves from any aspect of the military operations? The Rules of Engagement may shed light on the relationship between the members of the Coalition. The use of UK air bases for the launch of attacks may constitute ‘practical assistance’ with the knowledge that the actions assist the perpetrator in the commission of the crime. These are matters which require detailed examination and investigation by the Prosecutor in order to assess criminal responsibility.
- 3.20 These principles of complicity are broadly similar to those applicable to the national laws in force in the UK, and are hardly surprising or controversial. The ICC Statute also provides for the liability of military and civilian superiors who may not have been accomplices in the traditional sense, but who failed to exercise proper control over their subordinates (Article 28).
- 3.21 Accordingly, nationals of the UK can be prosecuted before the ICC for crimes that were physically perpetrated by troops of the US to the extent that they

⁴⁰ *Ibid.* at 794.

aided or abetted or otherwise assisted in their commission or attempted commission, including providing the means for their commission.

3.22 To conclude, to the extent that acts perpetrated by US troops constituted crimes against humanity or war crimes, in violation of Articles 7 and 8 ICC Statute, the ICC can prosecute nationals of the UK who ordered, solicited, induced, aided or abetted or otherwise assisted in their commission or attempted commission, including providing the means for their commission. It is, however, necessary to prove that the UK nationals had knowledge that these acts were being perpetrated.

3.23 In the alternative, failing evidence that UK nationals had knowledge that specific crimes against humanity or violations of the laws and customs of war were being committed, they may be held accountable to the extent that they were participants in a joint criminal enterprise and that the acts were necessary and foreseeable consequences of that enterprise. It can be argued that the criminal enterprise was the actual invasion of Iraq. The waging of aggressive war was held to be an international crime in the Charter of the Nuremberg Tribunal in 1945, which was adopted by the United States of America, the UK, France and the Soviet Union. These countries cannot now argue that the waging of aggressive war is not prohibited as a crime under international law. Moreover, the ICC Statute itself, in Article 5(1), identifies aggression as one of the crimes within its jurisdiction. Article 5(2) says that the ICC shall not exercise its jurisdiction over aggression until a definition has been adopted, and until the conditions under which it may be exercised have been agreed to.

3.24 But in concluding that aggression had been committed, the ICC would not be exercising jurisdiction over aggression, as it would not be attempting to actually hold any person accountable for the crime. It would merely be reaching the view that the criminal enterprise of waging aggressive war had been committed as a preliminary circumstance to the prosecution of criminal acts over which it may exercise jurisdiction – namely crimes against humanity and war crimes. This would appear to be what is foreseen in Article 25(3)(d) ICC Statute, which imposes liability upon a person who:

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

3.25 Aggression is ‘a crime within the jurisdiction of the Court’ pursuant to subparagraph (i), even if the ICC is not yet entitled to *exercise* jurisdiction over the crime, in accordance with Article 5(2). Therefore, to the extent that crimes against humanity and war crimes prohibited by Articles 7 and 8 ICC Statute were committed by US troops, and to the extent these were ‘necessary and foreseeable’ consequences of the aggressive war, then military and civilian

leaders of the UK may be prosecuted before the ICC for those violations of Articles 7 and 8.

- 3.26 These legal provisions, applicable under the ICC Statute but familiar to most if not all criminal justice systems, including those currently in force within the UK, are designed to promote deterrence. Those who participate in criminal activity with others whose values are perhaps not set at quite as high a threshold as their own, may be held liable for the acts of their ‘partners in crime’. Accomplices should not be able to resist liability for crimes committed as part of a collective venture by merely claiming that the most evil of the acts were the responsibility of their associates.
- 3.27 The Panel concludes therefore, that the ICC Prosecutor should investigate fully the issue of responsibility of UK nationals with respect to all those matters referred to in section 2 above regarding violations of Article 8 ICC Statute, notwithstanding that such violations may have been committed by US forces.

4. Military Objectives and the Proportionate Use of Force

- 4.1 In its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*⁴¹, the International Court of Justice recalled that, ‘the conduct of military operations is governed by a body of legal prescriptions. This is so because “the right of belligerents to adopt means of injuring the enemy is not unlimited”’.⁴² The Court then proceeded to identify two ‘cardinal principles... constituting the fabric of humanitarian law’:

‘The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use... [H]umanitarian law, at a very early stage, prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives’.⁴³

- 4.2 The strictness of the principle of distinction (States must *never* make civilians the object of attack and *never* use weapons incapable of distinguishing between civilian and military targets) was further reiterated in paragraph 95: ‘methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited.’

⁴¹ See note 22.

⁴² *Ibid* para. 77.

⁴³ *Ibid* para. 78.

- 4.3 These general principles establish the necessary framework within which to consider the practical application of the more detailed rules set out in 1977 Additional Protocol I and the ICC Statute. They remain relevant, so far as the limiting concepts (military objective, military advantage, proportionality) possess a fluid or dynamic aspect, requiring application to particular sets of facts. Nevertheless, the rules also indicate the requirements of *process* in their application; they thereby impose other practical limitations on the lawful use of force, and on the investigation of uses of force post-conflict that are pertinent to consideration by the ICC prosecutor of those matters referred to in section 2 above. They are examined further below.

1977 Additional Protocol I and the ICC Statute

- 4.4 For present purposes, Articles 50, 51, 52, 55 and 57 1977 Additional Protocol I and Articles 8(2)(a)(iii) and (iv) and 8(2)(b)(i)(ii)(iii)(iv)(v)(ix)(xiii) and (xx) ICC Statute, bear directly on the questions of military objective, military advantage, and proportionality.⁴⁴ They reaffirm the principle of distinction, the protection of civilians and civilian objects, the prohibition of attacks which cause civilian casualties clearly excessive in relation to military advantage, and the illegality of use of weapons which cause superfluous injury, unnecessary suffering, or are inherently indiscriminate.

Military objectives

- 4.5 Military objectives are defined by reference also to the principle of distinction; thus, they do not include civilians or civilian objects.⁴⁵ So far as ‘objects’ are concerned, military objectives are limited, according to Article 52(2) 1977 Additional Protocol I, ‘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* [emphasis added].’⁴⁶
- 4.6 The two elements – ‘effective contribution’ and ‘military advantage’ – offer scope for subjective assessment and the exercise of discretion. Even the armed forces and their installations may not be attacked if it would result, *inter alia*, in excessive loss of civilian life. Moreover, even where a civilian object loses its civilian and protected character (for example, where civilian housing becomes subject to house by house fighting), international humanitarian law

⁴⁴ The relevant provisions have been repeatedly cited in Inquiry documentation and for the most part are not set out here.

⁴⁵ Article 48 lays down the ‘basic rule’: ‘In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.’

⁴⁶ Obviously military objectives include armed forces, their members, installations, equipment and transports.

entails that it should not be presumed so to have changed.⁴⁷ One overriding consideration in the identification of military objectives, it is suggested, is that they should be of ‘fundamental military importance.’⁴⁸

4.7 As a practical matter, this requires good faith assessments made in light of the peremptory character of the principles of protection and distinction.⁴⁹ As the ICRC Commentary to 1977 Additional Protocol I makes clear,

‘In order to comply with the conditions, the attack must be directed against a military objective with means which are not disproportionate in relation to the objective, but are suited to destroying only that objective, and the effects of the attacks must be limited in the way required by the Protocol; moreover, even after those conditions are fulfilled, the incidental civilian losses [p.626] and damages must not be excessive. Of course, the disproportion between losses and damages caused and the military advantages anticipated raises a delicate problem; in some situations there will be no room for doubt, while in other situations there may be reason for hesitation. In such situations the interests of the civilian population should prevail...’ (paragraph 1979)

Military advantage

4.8 As Article 52 1977 Additional Protocol I makes clear, there must be a definite military advantage for every military objective that is attacked. Article 57 (‘precautions in attack’) adds a further condition, namely, that the military advantage, which should also be concrete and direct, be weighed against the civilian losses and damage which could result from an attack. The ICRC Commentary notes that ‘a military advantage can only consist in ground gained and in annihilating or weakening the enemy armed forces’ (paragraph 2218).

4.9 Thus, the concept of ‘military advantage’ is not in itself capable of justifying high civilian casualties, for this would not be compatible with the basic rule set out in Article 48.⁵⁰ The assessment of ‘definite military advantage’ requires an assessment of the circumstances at the time. Thus, it is not permissible to engage in an attack which only offers potential or indeterminate advantages;⁵¹

⁴⁷ See Article 52(3) 1977 Additional Protocol I: ‘In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.’

⁴⁸ See ICRC, ‘Draft Rules for the Limitation of Dangers incurred by the Civilian Population in Time of War’, 1956, Article 7: ‘In order to limit the dangers incurred by the civilian population, attacks may only be directed against military objectives. Only objectives belonging to the categories of objective which, in view of their essential characteristics, are generally acknowledged to be of military importance, may be considered as military objectives. Those categories are listed in an annex to the present rules. However, even if they belong to one of those categories, they cannot be considered as a military objective where their total or partial destruction, in the circumstances ruling at the time, offers no military advantage.’ ‘Interlinked’ infrastructures raise particular problems; among others, see the ‘NATO Report’, paragraph 47.

⁴⁹ Cf. Article 24(2), 1923 Hague Draft Rules of Aerial Warfare, requiring that bombardment be *exclusively* directed at certain listed objectives. See also the conclusion of the ‘NATO Report’ in relation to attacks on the media (paragraph 47).

⁵⁰ See note 45 above.

⁵¹ Note, however, the British interpretative declaration on signature of 1977 Additional Protocol I: ‘In relation to para. 5(b) and para. 2(a)(iii) of Article 57, ‘... the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated particular parts of the attack.’

this means that those responsible for ordering an attack must be sufficiently informed, and that, in case of doubt, the safety of the civilian population must be taken into account.

- 4.10 In the context of an attack such as that on Iraq, it would be necessary to consider the concept of ‘military advantage’ in terms also of the *political objectives* alleged to justify the use of force in circumstances otherwise constituting a breach of Article 2(4) of the United Nations Charter. Thus, in a conflict waged to destroy or neutralise ‘weapons of mass destruction’, it would seem appropriate to condition the use of force on the defeat of those elements of the enemy armed forces possessing, or reasonably believed to possess, such weapons. The use of force for humanitarian purposes would likewise imply limitations on the conduct of hostilities, requiring context-specific interpretations of both military objective and military advantage.

Proportionality

- 4.11 The rule of proportionality is laid down in Article 57 (‘precautions in attack’). Article 57(2)(a) 1977 Additional Protocol I requires that those who plan or decide upon an attack shall ‘do everything feasible’ to verify that the objectives to be attacked are neither civilians nor civilian objects, but that they are military objectives not otherwise prohibited from attack. They are also required to ‘take all feasible precautions’ in the choice of means and methods of attack with a view to avoiding and in any event minimizing civilian casualties, and to *refrain* from attack which ‘may be expected’ to cause excessive civilian losses in relation to ‘the concrete and direct military advantage anticipated.’⁵²
- 4.12 That which is ‘feasible’ is that which is capable of being done and, by definition, whatever is under the jurisdiction and control of a party is *prima facie* capable of being done. It will always be ‘feasible’, for example, for fighting forces to have a policy of non-use of cluster munitions in or near civilian areas. However, it may not always be feasible to ensure implementation in every battlefield situation, unless relevant intelligence information is gathered and distributed, legal and tactical advice is available at an appropriate level, and commanders and troops are adequately and sufficiently trained.
- 4.13 ‘Lessons learned’ from past conflicts are necessarily a part of training for the future. No lessons will be learned, unless campaigns and incidents within campaigns are reviewed and assessed against the relevant international standards.
- 4.14 The question is: who decides? The Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia proposed the notion of the ‘reasonable military commander’ (paragraph 50). However, this has been criticised as

⁵² See also Article 57(2)(b) on the cancellation or suspension of attacks; and Article 57(3) on the obligation, where a choice is possible, to select a military objective an attack on which may be expected to cause the least danger to civilians.

potentially distancing the military from society at large, particularly given the self-evident fact that military commanders and civilian ‘observers’ are likely to attribute different weight to military advantage, on the one hand, and the life and well-being of non-combatants, on the other hand.

- 4.15 While admitting that the concept allows for subjective assessment (and that its application may be subject to battlefield conditions), the fact that international humanitarian law has set *standards* implies the existence or initiation of a process of impartial review, wherever the evidence suggests or raises a doubt about compliance, both in general and in particular instances.
- 4.16 For example, while there may be no formal prohibition on the use of cluster munitions, the proportionality rule necessarily means that they cannot lawfully be used in certain circumstances. Thus, the weapons themselves are ‘indiscriminate’;⁵³ they may not be used where this would result in the incidental loss of life or injury to civilians which is clearly excessive in relation to the overall military advantage anticipated. In other circumstances, their use may be determined by place and time, such as the presence or absence of civilians during particular periods of the day.
- 4.17 Given the unguided nature of the sub-munitions (bomblets) and their known failure rate, it is also reasonable to infer that, in principle, cluster munitions should not be used against targets in or near to civilian objects.⁵⁴
- 4.18 Similar limitations will apply to the use of other munitions. For example, it is doubtful whether the use of so-called ‘bunker buster’ bombs on a restaurant in a civilian residential area could be justified on the ground that an enemy military commander was believed to be dining there. It is also questionable whether such a ‘fact’ in itself is sufficient to allow the location thereupon to be classified as a ‘military objective.’⁵⁵

Process

- 4.19 Article 1 of each of the four 1949 Geneva Conventions requires States Parties to respect and ensure respect for the Conventions. This obligation is supplemented by Articles 85-91 of 1977 Additional Protocol I which deal with the repression of grave breaches of the Geneva Conventions and of the

⁵³ Their indiscriminate nature, in fact, is one of their military values, allowing effective assaults on widely dispersed soldiery.

⁵⁴ The ICRC Commentary to Article 57 1977 Additional Protocol I notes: ‘Proportionality is concerned with incidental effects which attacks may have on persons and objects, as appears from the reference to “incidental loss”. The danger incurred by the civilian population and civilian objects depends on various factors: their location (possibly within or in the vicinity of a military objective), the terrain (landslides, floods etc.), accuracy of the weapons used (greater or lesser dispersion, depending on the trajectory, the range, the ammunition used etc.), weather conditions (visibility, wind etc.), the specific nature of the military objectives concerned (ammunition depots, fuel reservoirs, main roads of military importance at or in the vicinity of inhabited areas etc.), technical skill of the combatants (random dropping of bombs when unable to hit the intended target).’ (Paragraph 2212).

⁵⁵ cf. Article 51(4) 1977 Additional Protocol I: ‘Indiscriminate attacks are ... (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.’

Protocol itself, which are to be regarded as war crimes. Under Article 86 of the latter, ‘The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.’ This requires that commanders and members of the armed forces be ‘aware of their obligations’, and that ‘any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, ... initiate such steps as are necessary to prevent such violations..., and, where appropriate, to initiate disciplinary or penal action against violators...’ (Article 87(3)).

- 4.20 As indicated above, the determination whether a particular attack is lawful in relation to its objective (military objective), the means and methods employed, and the injury and loss caused to civilians, is a mixed question of law and fact. The criteria are clearly set out in the relevant international instruments; however, they are not self-applying. Their good faith application therefore requires the initiation of a formal inquiry, wherever the evidence raises a credible inference that the applicable international standards may have been breached.
- 4.21 The nature of cluster munitions, for example, suggests that a formal inquiry is required, wherever they are employed in or near civilian objects such as indicated by section 2 above in relation to the military operations in Iraq. Similarly, inquiry is called for in other instances involving apparent attacks on civilian locations, such as market places or restaurants, or on civilian means of transport, such as buses. The International Court of Justice has characterised as a ‘cardinal principle’, the rule that States must never make civilians the object of attack and consequently never use weapons that are incapable of distinguishing between civilian and military targets. Unless controversial military operations are open to inquiry, there can be no effective guarantee that these international obligations will be implemented.

5. Supplementary Concerns Regarding Occupation

- 5.1 A number of further issues were presented for the Panel’s consideration regarding the conduct of the Coalition’s occupation of Iraq. First, did the approach revealed by the Coalition indicate ignorance of or disregard for responsibilities under Article 43 Hague Regulations? Secondly, did the conduct of the military occupation generally breach Articles 55, 56 and 64 of the Fourth Geneva Convention of 1949? Thirdly, did the occupying power breach any duty to preserve heritage assets? Fourthly, was the conduct of the occupying power strictly in accordance with the law of the State under occupation?
- 5.2 The ICC Statute under Article 8 includes as war crimes ‘grave breaches’ of the 1949 Geneva Conventions (Article 8(1)) and ‘other serious violations of the laws and customs applicable in an international armed conflict’ (Article 8(2)).

There is no doubt that the term ‘international armed conflict’ includes ‘military occupation’.⁵⁶

- 5.3 However, not all the norms under the Hague Rules and four Geneva Conventions, and other customary norms relative to the law of military occupation, may be said to attract fully the ICC’s jurisdiction. The ‘grave’ and ‘other serious violations’ of laws and customs of military occupation should be such that they meet the definitional specificity of war crimes under both the above cited clauses of Article 8, as further elaborated by the equally authoritative Elements of Crimes enunciation. In this context, we also need to recall that the Article 8 definitions remain exhaustive.
- 5.4 Article 43 Hague Regulations imposes an overarching regime of obligation upon the occupying power in the circumstance where ‘the authority of the legitimate power’ may be lawfully described as ‘having in fact passed into the hands of the occupant.’ The obligations thus arising require that the conduct of military occupation ‘shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country. The obligations here are specific, though subject to the general caveats arising from the twin expressions: ‘as far as possible’⁵⁷ and ‘unless absolutely prevented.’⁵⁸ While there is considerable *prima facie* evidence that these specific obligations stand violated in the conduct of military occupation in Iraq 2003,⁵⁹ such violation does not find a safe textual home under Article 8 ICC Statute.
- 5.5 Much the same may be said concerning the possible violation of Articles 55, 56 and 64 of the 1949 Geneva Convention IV provisions in the conduct of military occupation.⁶⁰
- 5.6 Accordingly, in the Panel’s considered opinion, while the four distinct but related issues pose pertinent issues concerning the conduct of the military occupation, on the basis of the evidence presented to the Panel these do not furnish a sufficient basis for investigation by the ICC Prosecutor.

⁵⁶ See, PNICC/2000/L.1/Add.2 at 16, N. 40.

⁵⁷ See, Documents 30-36, Evidence Bundle 1.

⁵⁸ The conduct of occupying power under this caveat stands implicated here by the time dimension, given the originary condition of armed attack and destruction of military targets. Any judgement concerning violation of the Article therefore invites attention to the issue of reasonable time within which restoration of public order and safety ought to be possible.

⁵⁹ The obligation is subject to respecting the laws in force in the country, unless absolutely prevented. This is an onerous requirement especially when the attacking and occupying forces remain relatively ignorant of such laws in force. However, such ignorance is not an aspect of ‘absolute prevention’. That refers rather to the variegated post-conflict contexts, conditions, and circumstances, including the scale of armed resistance by those subject to the conduct of military occupation.

In particular, the disinvestment of precious natural resource assets by the occupying powers, even when ‘legitimated’ by the device of occupant power regime convenient ‘interim’ government in the occupied territory, does not divest the conduct of military occupation of possible indictment, under existing standards and norms, of violation of international law.

⁶⁰ The issue concerning preservation of heritage assets in the conduct of military occupation, while poignantly important in context of Iraq, 2003, need not be visited in any complex detail here, beyond the acknowledgement that specific obligations on this register entail a somewhat innovated hermeneutic of the existing norms and standards of the international legal regime of the conduct of military occupation.

6. Rationale for an Investigation by the ICC Prosecutor

6.1 The Office of the Prosecutor is one of the four organs of the International Criminal Court. Before taking office on 16 June 2003, the Chief Prosecutor, Mr Luis Moreno-Ocampo, made the following solemn undertaking in open court in the Great Hall of Justice of the Peace Palace, The Hague, in accordance with Article 45 of the Court's Statute:

'I solemnly undertake that I will perform my duties and exercise my powers as Prosecutor of the International Criminal Court honourably, faithfully, impartially and conscientiously, and that I will respect the confidentiality of investigations and prosecutions.'

6.2 The independence and impartiality of the Prosecutor are also underlined in Article 42 of the Statute, and it is important to keep these qualities in mind when considering why an investigation should be initiated.

6.3 Article 53(1) of the Statute provides, *inter alia*:

'The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

- (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
- (b) The case is or would be admissible under Article 17; and
- (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice...'

6.4 The information in this report provides a reasonable basis for believing that crimes within the jurisdiction of the Court have been committed.

6.5 As regards the issues of admissibility under Article 17, especially the complementarity of the ICC's jurisdiction, there is no evidence that the case is currently being or is likely to be investigated by the United Kingdom or by any other State having jurisdiction, or that there has been an investigation and a decision not to prosecute.

6.6 In the light of the information provided, the case is certainly of sufficient gravity to justify further action by the Court. Furthermore, there are no substantial reasons for believing that an investigation would not serve the interests of justice.

6.7 On the contrary, the gravity of the alleged crimes and the interests of the victims demand that there should be an investigation. It is essential to establish the truth, fearlessly and without favour. The victims of the conflict in Iraq are owed this much at least, especially as the military operations were not justified by the right of self-defence and were undertaken without the express approval of the UN Security Council.

- 6.8 Some people will argue that compared with the crimes allegedly committed in the Democratic Republic of Congo, especially in the north-eastern province of Ituri, those allegedly committed by coalition forces in Iraq are insufficiently serious to warrant investigation by the Prosecutor, especially in view of the resource implications for his Office. It will also be contended that, in order to enable the new Court to establish itself firmly as a global institution, controversial allegations involving permanent members of the Security Council should be avoided so soon after the Rome Statute's entry into force.
- 6.9 However, such objections should be dismissed. The United Nations is based on the principle of the sovereign equality of all its Members (Article 2(1) of the UN Charter). Furthermore, all persons are equal before the law and are entitled without any discrimination to the equal protection of the law (Article 26 of the International Covenant on Civil and Political Rights 1966). All States should be reminded of their accountability under the rule of law and of the constraints which international law generally and the Statute in particular impose upon them as regards the conduct of military operations - especially as the fundamental rules of humanitarian law applicable in armed conflict embody 'elementary considerations of humanity' and "constitute intransgressible principles of humanitarian law".⁶¹
- 6.10 By promoting respect for the rule of law and helping to deter violations of international humanitarian law, an investigation by the Prosecutor would serve to achieve the International Criminal Court's objective of contributing to the prevention of the most serious crimes of concern to the international community as a whole.

⁶¹ See note 22, para. 79.

CONCLUSION

1. Resolution adopted by Peacerights accepting the report.

On 31st March 2004 the Executive Committee of Peacerights was presented with this report. It was unanimously accepted and a formal resolution to this effect was noted in the minutes.

2. Presentation of report to the ICC Prosecutor and the Attorney-General

2.1 This Report will be submitted to the ICC Prosecutor with a request to consider a full investigation into the matters raised.

2.2 In addition, the Report will be delivered to the Attorney-General. This reflects the fact that the International Criminal Court Act 2001 makes provision to enable the UK to meet its obligations under the ICC Statute and to incorporate the offences of genocide, crimes against humanity and war crimes into domestic law. Provision was thus made for the UK authorities to 'be in a position to investigate and prosecute any ICC crimes' under domestic law.⁶²

⁶² Explanatory Notes to the International Criminal Court Bill prepared by the Foreign and Commonwealth Office 2001.