



INTERNATIONAL PROGRESS ORGANIZATION

**Memorandum
on the Prosecution of Persons Responsible for International Crimes, Including
the Crime of Aggression, in the Territory of Iraq**

Vienna, 28 March 2003

The war prepared and waged by the United States, the United Kingdom and other members of the so-called "coalition of the willing" under the leadership of the United States against the Republic of Iraq has not been authorized by the United Nations Security Council. Resolution 1441 (2002) constitutes no authorization whatsoever for the unilateral use of force by the United States and its allies against Iraq. A draft resolution for the authorization of the use of force prepared by the United Kingdom was not put to a vote because of lack of support for such a resolution in the Security Council. In view of these undeniable facts, the present all-out war against Iraq constitutes a blatant breach of Art. 2 (4) of the United Nations Charter banning the unilateral threat or use of force against the territorial integrity or political independence of any state. The armed action against Iraq is a war of aggression according to the definition of aggression adopted by General Assembly resolution 3314 (XXIX) of 14 December 1974 and according to the Draft Code of Crimes against the Peace and Security of Mankind, adopted by the International Law Commission of the United Nations and submitted to the General Assembly of the United Nations (UN Doc. A/51/10 [1996]). The questions of personal criminal responsibility in connection with the initiation and conduct of this war have to be dealt within the framework of the existing rules of international criminal law based on the concept of universal jurisdiction. The fundamental considerations can be summarized as follows:

1. The investigation and prosecution of international crimes related to the war against Iraq cannot be undertaken by any of the warring parties. The plans announced by US officials for war crimes tribunals in Iraq have no basis in international law. A party to an international armed conflict cannot act as judge in its own cause.
2. Contrary to reports in the international media, the International Criminal Court (ICC) in The Hague has no jurisdiction as far as officials and personnel of the United States and Iraq are concerned. Neither the United States nor the Republic of Iraq has ratified the Rome Statute of the International Criminal Court which is in force since 1 July 2002. Because of the non-ratification of the treaty by Iraq, there exists no basis for the territorial jurisdiction of the ICC according to Art. 12 (2) (a) of the Rome Statute. However, on the basis of Art. 12 (2) (b) of the Statute, the ICC has jurisdiction over officials and personnel of the United Kingdom because of that country having ratified the Statute on 4 October 2001.
3. Furthermore, following from the absence of a definition of the crime of aggression in the Rome Statute, the ICC cannot, for the time being, exercise jurisdiction over this crime. This situation will only change if and when a definition will have been incorporated into the Statute by decision of the States Parties in the course of the First Review Conference to be held after the expiry of seven years from the entry into force of the Rome Statute (i.e. in 2009) (Art. 123 of the Statute).

4. So far, the United Nations Security Council has set up two ad hoc war crimes tribunals (on former Yugoslavia and Rwanda) on the basis of Chapter VII of the Charter. Apart from the lack of authority of the Council in judicial matters – the resolutions on the above mentioned tribunals having been *ultra vires* –, no ad hoc tribunal dealing with the war in Iraq will ever be established by that body because two of the warring parties are permanent members of the Security Council possessing the power of veto over any decision under Chapter VII.
5. In principle, universal jurisdiction over international crimes can be exercised by the national judiciary of any state on the basis of the respective provisions of the Geneva Conventions of August 12, 1949 and of other international legal instruments. The war crimes cases brought before Belgian courts by virtue of the provisions of that country's war crimes law of 1993, amended in 1999 (*Loi relative à la répression des infractions graves aux conventions internationales de Genève du 12 août 1949 et aux protocoles I et II du 8 juin 1977, additionnels à ces conventions*) are a case in point. As the handling of those cases has documented, domestic and foreign policy considerations of the country exercising universal jurisdiction may adversely affect the proceedings or may lead to the prosecution of cases on a selective basis – which undermines the very idea of universal jurisdiction. Furthermore, the Judgment of the International Court of Justice in the case *Democratic Republic of the Congo v. Belgium* (14 February 2002) has excluded the possibility of criminal proceedings against foreign heads of state or members of government by domestic courts for acts committed in their official capacity. The recent move by Belgian legislators to further amend the 1993 law – so that the Federal Prosecutor of Belgium will decide on the admissibility of cases (similar to the provisions of the German war crimes law of 26 June 2002) – documents the virtual impossibility of war crimes cases being handled *sine ira et studio* by courts of foreign countries.
6. In view of these legal facts, ideally, a permanent and impartial international tribunal such as the ICC should be entrusted with the investigation and prosecution of cases of international crimes related to the war in Iraq. Because the ICC has only jurisdiction over officials and personnel of the United Kingdom and other members of the "coalition of the willing" insofar as they have ratified the Rome Statute (such as Spain and Australia), but not over those of the United States and Iraq, the Court in The Hague will not be able to function as universal forum for war crimes proceedings related to the war in Iraq. Due to the ratification status of the Rome Statute at the present date, the Court would be forced to conduct proceedings on a basis that is *de facto*, though not *de jure*, selective. Furthermore, the ICC operates according to the principle of complementarity to national criminal jurisdictions.
7. Because of the lack of jurisdiction of the ICC over people from states that are major parties to the present conflict, the international community, represented by the General Assembly of the United Nations, may consider setting up a *United Nations War Crimes Commission on the War in Iraq* on the basis of Art. 22 of the UN Charter. Historic precedents such as the *Commission on the Responsibility of the Authors of War and on Enforcement of Penalties* established after World War I or the *United Nations War Crimes Commission* established in the course of World War II exist. Those earlier commissions, however, were established by coalitions of states representing only one party to the conflict and, thus, were not in conformity with the requirement of impartiality. Because of the provisions of Art. 10 of the UN Charter, the findings of a war crimes commission, if established as subsidiary organ under Art. 22, would only have the nature of recommendations. Irrespective of these statutory limitations, such a commission could play a useful role in connection with the initiation of eventual criminal proceedings by competent judicial institutions on the national and international level. It could substantially contribute to a comprehensive and impartial investigation of the facts. In view of the defiance of the will of the overwhelming majority of the United Nations member states by the states conducting the war against Iraq, the establishment of such a commission by the United Nations General Assembly would have special political significance.

8. The crimes to be investigated are those listed under Art. 5 of the Rome Statute of the International Criminal Court, namely the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. In the absence of a definition of the crime of aggression in the Rome Statute, the definition of aggression contained in General Assembly resolution 3314 (XXIX) will have to be applied. Apart from Art. 8 of the Rome Statute of the ICC, war crimes are defined in the Geneva Conventions of August 12, 1949.
9. In the case of the war waged against Iraq, not only the question of the commission of the crime of aggression by the leaders of the United States and the United Kingdom will have to be addressed, but also the responsibility for serious violations of international humanitarian law such as the bombing of civilians and of civilian installations in Iraq, the deliberate destruction of civilian infrastructure, the use of forbidden weapons (such as cluster bombs, depleted uranium missiles, etc.). According to the rules of international criminal law, there exists no statute of limitations of criminal responsibility. Heads of state or government as well as members of government do not enjoy immunity in regard to the commission of international crimes. The leaders of states aiding and abetting the war against Iraq (by providing the territory of their countries to the forces of the warring countries for the purpose of organizing attacks, flying bombing missions into Iraq, operating military command centers, organizing logistical support, etc.) are also liable of prosecution on the basis of universal jurisdiction.
10. Because of the legal facts explained above, the International Criminal Court can only exercise jurisdiction over one major country that is part of the anti-Iraq alliance. No ad hoc tribunals can be set up – within the existing legal and political framework of the United Nations Organization – to deal with the criminal responsibility of officials and personnel from other warring countries. Irrespective of whether the United Nations General Assembly will consider establishing a United War Crimes Commission for Iraq or not, individual states may take up investigations and/or prosecutions on an ad hoc basis where domestic jurisdiction allows the exercise of universal jurisdiction by national courts. However, because of the imperfect nature of the practice of international criminal justice by domestic courts, this avenue may not be feasible in most cases.
11. Absent the ratification by Iraq of the Rome Statute of the International Criminal Court, international crimes committed in the course of the war against Iraq can only be prosecuted on a selective basis by the ICC as permanent judicial institution. The United Nations Security Council is neither competent nor politically able to establish an ad hoc tribunal. The UN General Assembly does not possess enforcement powers and may only set up an investigative body. Domestic courts investigating and prosecuting international crimes by foreign nationals are prone to political interference according to the foreign policy interests of the respective country. In order to enjoy legitimacy, an *International Tribunal for the Prosecution of Persons Responsible for International Crimes in the Territory of Iraq since 2003* (War Crimes Tribunal for Iraq) would have to be established on the basis of an intergovernmental treaty to be concluded between the majority of United Nations member states. As this may not be feasible under the actual circumstances, it is to be hoped that legal action will be undertaken by concerned citizens particularly of those countries not party to the Rome Statute so that the respective domestic courts will eventually investigate and prosecute officials and personnel of those countries on the basis of universal jurisdiction (which excludes sovereign immunity of heads of state). Impeachment proceedings eventually initiated according to the provisions of the respective country's constitution will also be an important legal measure documenting that waging a war of aggression is under no circumstances whatsoever part of the exercise of sovereign immunity.