

# The International Criminal Court - A role in the Iraq conflict?

By Stephen Freeland\*

The International Criminal Court (ICC) was established in July 2002 with jurisdiction over grave international crimes committed after that time. Its judges were appointed in March and the Prosecutor, highly respected Argentinian Lluís Moreno Ocampo, took office last week. It is expected to begin hearing its first case by early 2004 with the Prosecutor's office already dealing with over 300 referrals. The Court's jurisdiction is 'complimentary' to that of States.

The Court has jurisdiction over acts committed by nationals of Parties or in the territory of a Party. Australia is a Party to the Rome Statute (which established the ICC), having ratified it in June 2002, but only after a last-minute fractured debate within government ranks. The Court is strongly opposed by the USA, which fears 'politically motivated' prosecutions. To date 90 countries have ratified the Statute, but notable omissions, apart from the USA, include China, Russia, India and most Asian and Middle East countries.

The USA had originally sought complete immunity for its nationals in the negotiations leading up to the conclusion of the Rome Statute. When this failed, it withdrew its support and has since instigated a series of actions which have the effect of undermining the Court. It has signed almost 40 bilateral immunity (non-surrender) agreements and last week pressured the Security Council to renew immunity from investigation/prosecution by the Court for non-party nationals engaged in United Nations authorised missions. It has even introduced domestic legislation (sometimes referred to as the 'Hague Invasion Act') enabling the President

to order the forcible 'rescue' of a USA national held by the Court.

The Court potentially may have jurisdiction in relation to the actions of Australian (and United Kingdom as it is also a Party) personnel who served in the Iraq conflict, subject to complementarity. It is less likely that it would have jurisdiction over USA forces unless the Security Council refers a particular matter involving USA personnel to the Prosecutor (obviously unlikely) or a subsequent Iraqi Government retroactively accepts the Court's jurisdiction in relation to the period of the Iraqi conflict (possible though unlikely).

The Court may also have a potential role in relation to crimes committed by the Saddam regime after July 2002. Again, this would in all likelihood require a referral from the Security Council, which will not happen given the USA's opposition to the Court. This does, however, raise the pertinent question as to how senior Saddam regime figures will (should) be brought to account for their actions. The USA appears to favour trials before domestic courts (Iraqi or American) or specially constituted military tribunals, such as were proposed following the September 11 attacks.

An alternate (and more appropriate) route may be the establishment by the Security Council of an *ad hoc* international tribunal, similar to those for former Yugoslavia and Rwanda, dealing specifically with the actions of former Saddam regime senior officials.

This issue continues to be debated among the occupying powers and the broader international community,

particularly as more evidence of past atrocities by the regime is uncovered.

In any event, the first few cases before the ICC will be significant in order to establish its credibility among critics. This is crucial since universal support for the Court is an important first step to end the previous era of impunity.<sup>①</sup>

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