

## **The Battles of Fallujah in Iraq: Criminalization by the International Criminal Court**

Rohaida Nordin  
*rohaidnordin@ukm.my*  
Faculty of Law  
Universiti Kebangsaan Malaysia

Tareq Hamid  
*tareqhamid@hotmail.com*  
Faculty of Law  
Universiti Kebangsaan Malaysia

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### **Abstract**

The Fallujah Battles were one of the world's worst humanitarian disasters, involving the murder and displacement of hundreds of thousands of people in the area of Fallujah City, Iraq. This article discusses the jurisdiction of the International Criminal Court (ICC) over war criminals of the Fallujah Battles. It first provides background discussion on the ICC, including the means and purposes of its establishment. It then discusses the jurisdiction of the ICC, including issues relating to temporal jurisdiction, personal jurisdiction and territorial jurisdiction, as well as the jurisdiction of the ICC over crimes committed by nationals of a non-State Party, specifically the United States which was one of the Coalition Forces involved in the Fallujah Battles, to the International Criminal Court Statute (Rome Statute). Finally, it analyses the possibility of nationals of a non-State Party being referred to the ICC by the Security Council (SC) and whether this is permissible under Article 13(b) of the Rome Statute. It will demonstrate that although the SC has the right to draw the attention of the ICC's prosecutor towards the non-State Party, the referral would require a Security Council Resolution to be passed. If such attempt is made by the SC, the article contends that it will not succeed because the non-State Party (United States) which is a permanent member of the SC with veto power will vote against such resolution.

**Keywords:** *Fallujah Battle, War Crime, Rome Statute, International Criminal Court, Geneva Conventions*

### **Abstrak**

Pertempuran di Fallujah adalah satu dari malapetaka kemanusiaan yang dahsyat di dunia yang melibatkan pembunuhan dan perpindahan ratusan ribu orang awam di Fallujah di Iraq. Sehubungan dengan itu, artikel ini membincangkan bidang-kuasa Mahkamah Jenayah Antarabangsa (MJA) untuk mendakwa penjenayah yang terlibat dalam pertempuran di Fallujah. Pertamanya, artikel ini menyediakan perbincangan awal mengenai MJA khususnya

mengenai bentuk dan tujuan penubuhannya. Ini diikuti dengan perbincangan mengenai bidang-kuasa MJA yang terdiri dari bidang-kuasa *temporal*, *personal* dan *territorial*. Seterusnya, artikel ini akan menentukan sama ada MJA mempunyai bidang-kuasa untuk mendakwa penjenayah di kalangan rakyat bukan negara anggota kepada Statut Mahkamah Jenayah Antarabangsa (*Rome Statute*) khususnya Amerika Syarikat (AS) yang merupakan salah sebuah negara anggota Tentera Bersekutu yang bertempur di Fallujah. Dalam erti kata lain, artikel ini akan membincangkan sama ada rakyat bukan negara anggota boleh dirujuk kepada MJA oleh Majlis Keselamatan dan sam ada ini dibenarkan di bawah Perkara 13(b) *Rome Statute*. Artikel ini menghujahkan bahawa meskipun Majlis Keselamatan mempunyai hak untuk membawa perhatian Pendakwa di MJA mengenai jenayah yang dilakukan oleh rakyat bukan negara anggota (US), rujukan tersebut hanya boleh dibuat jika satu resolusi diluluskan oleh Majlis Keselamatan. Perkara ini tidak akan tercapai kerana US sebagai ahli tetap Majlis Keselamatan dengan kuasa veto akan pasti menggunakan vetonya bagi menentang resolusi yang berkenaan.

***Kata Kunci: Pertempuran Fallujah, Jenayah Perang, Rome Statute, Mahkamah Jenayah Antarabangsa, Konvensyen Geneva***

## **1. Introduction**

Following the defeat of the Iraqi military, after the UK and US forces (Coalition Forces “CF”) had occupied and effectively controlled Iraq; two major assaults were launched on Fallujah city resulting to civilian casualties (Fallujah Battles). On 5 April 2004, the US Marines engaged in a military operation in Fallujah, allegedly to arrest those responsible for the killing of four US security guards on 31 March. Fallujah was under siege by US forces, during which time daily airstrikes and other means were employed while the military operation continued, although more occurred than what were actually known by the US. However, sporadic fightings continued until US forces handed over control of the city to Iraqi forces. According to reports from the health authorities and the media, the number of those killed in the first Fallujah Battle in April 2004 was at least 600 people, with half of the casualties being civilians, including women and children. In the second Fallujah Battle, in November 2004, at least 3000 civilians were reported to have been killed.

The Fallujah Battles have caused murders and displacement of hundreds of thousands of civilians by the members of the US, UK and Iraqi forces. Thus, it is important to analyse if any of the member has committed any violation of the international humanitarian law and that can be prosecuted before the ICC. Thus, the issue of the International Criminal Court (ICC) jurisdiction against the perpetrators is among the important issues because the US and Iraqi forces are non-State Parties, but the UK is a State Party to the Statute of ICC (Rome Statute).

Discussions in this article are divided into four main parts. The first part will provide the background of the ICC, including the means and purposes of its establishment. The second part deals with the jurisdiction of the ICC and its relationship with the Security Council (SC). The third part considers matters that can be referred to the ICC and questions pertaining to the jurisdiction of the ICC over acts committed during the Fallujah Battles. Additionally, the role of State Parties, the SC and the Prosecutor of the ICC will be examined in relation to the potential prosecution of individuals that allegedly committed international crimes during the Fallujah Battles. The fourth part considers the jurisdiction of the ICC in relation to nationals of both, State Parties and non-State Parties to the Rome Statute.

## **2. The Establishment of the ICC**

Prior to World War I, the international legal system had not evolved to the point where international courts for the prosecution of violations of international law had been established (McCoubrey, 1998, p.9-26). The International Military Tribunal for the Far East (also known as the Tokyo War Trials) and the Nuremburg Tribunal, were established after World War II (Fujita, 2009, p.23) by the Allied Powers (Simmons & Danner, 2009, p.240). In 1947, the United Nations (UN) General Assembly (UNGA) instructed the UN Committee on Codification of International Law (UNCCIL) to prepare a draft code for an ICC. The absence of such a court had been considered a defect in international humanitarian law (IHL) by international scholars for almost 100 years (Simmons & Danner, 2009, p.240). This is because there was no international institution to prosecute individuals for violating IHL and the international community had to rely on domestic courts to enforce IHL (Aksar, 2004, p.43).

The directive of the UNGA to the UNCCIL included a request to utilise the Nuremburg Principles as a general codification of offences or the “blueprint” for a statute establishing an ICC. As such, the UNCCIL has examined the international precedents such as the Statute of Nuremburg Tribunal and the Statute of Tokyo International Tribunal, the 1951 and 1953 draft statutes, the ICTY and the ICTR Statutes. After the examination, a draft statute for an ICC has been prepared and submitted to the UNGA. An ad hoc Committee on the Establishment of an ICC has also been established to review the major substantive and administrative issues arising out of the draft statute (UNGA Resolution No: 49/53 on 17 February 1995).

In 1994, UNGA decided to pursue work to establish the ICC (Schabas, 2007, p.15). Pursuant to UNGA Resolutions adopted in 1996 and 1997, the Diplomatic Conference of Plenipotentiaries on the Establishment of the ICC convened on 15 June 1998 in Rome (Schabas, 2007, p.18). On 17 July 1998, representatives of 160 States gathered to vote on the adoption of the Rome Statute and the establishment of the ICC (Francine, 2008, p.1). The ICC was established to prosecute the gravest international crimes and end a long tradition of impunity that had emboldened international criminals throughout the world (Francine, 2008, p.1). Although the ICC was established to address serious international crimes of an egregious nature perpetrated as part of a plan or policy or as part of a large scale commission and only such offences will appear on its docket, the degree of violence is not itself a separate jurisdictional requirement (Bantekas, 2007, p.387).

### **3. ICC Jurisdiction and the Relationship with Security Council**

The Rome Statute has also adopted the relationship between the SC and ICC. Thus, there was an overlapping competence between the SC and ICC. The Council’s understanding of its jurisdiction under Chapter VII of the UN Charter after the end of the Cold War led to an expansion of the concept of “threat to the peace” where, include not the international conflicts only but also internal matters and it had considered that violations of humanitarian law could, in themselves, constitute threats to the peace. The SC-ICC relationship will be discussed in detail in the following paragraphs. Before that, it is crucial to access the nature of ICC jurisdiction.

#### **3.1 Nature of ICC Jurisdiction**

According to Rome Statute the ICC have four categories of jurisdictions. The jurisdiction of the ICC over the State Party or non-State Party must be considered in relation to temporal jurisdiction, personal jurisdiction and territorial jurisdiction which will be discussed here while the subject matter jurisdiction of the ICC in the specific context of the Fallujah Battles will be discussed in part 7 of this article.

##### **3.1.1 Temporal Jurisdiction**

According to Article 126(1) of the Rome Statute, the Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the UN according to Article 126 of Rome Statute. The 60th State to ratify the Rome Statute was the

Democratic Republic of Congo on 11 April 2002. In accordance with the aforementioned provision, the Rome Statute entered into force on 1 July 2002, 60th days after its sixtieth ratification (Schabas, 2007, p.66).

Article 11(1) of the Rome Statute grants the ICC temporal jurisdiction over crimes committed after the Rome Statute entered into force on 1 July 2002. The Statute seems to return to the issue in Article 24(1), which declares that no person shall be criminally responsible for conduct prior to the entry into force of the Statute. The ICC does not have jurisdiction over offences prior to the date the Rome Statute entered into force. According to Article 11(2), the ICC exercises jurisdiction over future State parties to the Rome Statute from the date the Rome Statute enters into force for that State, unless the State has previously accepted the jurisdiction of the ICC over international criminal offences by means of a declaration in accordance with Article 12(3). The SC confirmed the temporal jurisdiction of the ICC when referring the matter of Darfur to the Prosecutor, as the investigation of international crimes was to consider events from 1 July 2002 onwards (SC Resolution 1593).

The fact that the ICC cannot exercise jurisdiction over crimes committed before the Rome Statute became enforceable to the State in question distinguishes it from its predecessors. Previous international tribunals such as: ICTY and ICTR were established to deal with crimes committed prior to their respective establishments. Despite this fact, the actions of the CF during the Battles of Fallujah fall under the temporal jurisdiction of the ICC, as they occurred two years following the entry into force of the Rome Statute.

### **3.1.2 Personal Jurisdiction**

The personal jurisdiction of the ICC is covered under Article 25 of the Rome Statute. The ICC maintains jurisdiction over natural persons who commit crimes within the territorial jurisdiction of the ICC. According to Article 25(3) the person has liability for punishment in accordance with the Rome Statute. The jurisdiction applies irrespective of the official capacity of the person being prosecuted, as the ICC does not recognise immunities, such as head of State immunity, under national or international laws, according to Article 25(4). While the ICC exercises jurisdiction over such persons, Article 25(4) emphasises that States continue to have responsibility for the prosecution of persons guilty of international crimes.

The ICC could exercise its jurisdiction over nationals of a State Party who committed a crime according to Article 12(2)(b), regardless of where the acts were perpetrated. If a State that is non party to the Rome Statute accepts the exercise of jurisdiction of the ICC, the person alleged to have committed the crime could be prosecuted under jurisdiction based on the nationality of the offender (Schabas, 2007, p.72). Furthermore, Article 13 allows the ICC to exercise jurisdiction in matters regarding crimes enumerated in Article 5 of the Statute in situations: (i) any crimes being referred to the ICC Prosecutor by a State Party in accordance with Article 14; (ii) any crimes being referred to the ICC Prosecutor by SC acting under Chapter VII of UN Charter; and (iii) the Prosecutor initiating an investigation or prosecution in accordance with Article 15 of Rome Statute. If the ICC Prosecutor considers there is a reasonable basis to proceed with an investigation, the Prosecutor must submit a request for authorization of an investigation to a Pre-Trial Chamber of the Court. That Chamber may then

authorize the commencement of an investigation if the case appears to fall within the jurisdiction of the ICC (Brian D. Lepard, 2010, p.554).

Detailed discussion on ICC personal jurisdiction with regard to Fallujah Battles is made in part 5 of this article.

### **3.1.3 Territorial Jurisdiction**

According to Article 12(2)(a), the territorial jurisdiction of the ICC extends to crimes committed on the territories of State Parties to the Rome Statute after the entry into force of the Statute. The jurisdiction also extends to any territory where the person alleged to have committed the crime was a national of a State Party to the Rome Statute, according to Article 12(2) (b) of the Rome Statute.

In the case of Fallujah Battles, the State members of the CF are the US, UK and Iraq. US is a non-State Party to the Rome Statute. Thus, prosecution of US nationals falls under Article 13(b) of Rome Statute upon reference of the crimes by the SC under Chapter VII of the UN Charter. This is important because this article argues that the US forces have committed crimes during Fallujah Battles including crimes against humanity, war crimes and crimes of aggression. The UK is a State Party to the Rome Statute (UK signed Rome Statute on 30 November 1998) and allegedly they committed crimes with the US forces during the second Battle of Fallujah. As a result, the ICC has jurisdiction over the crimes which were committed by the UK forces in the second Fallujah Battle in November 2004. The Prosecutor of the ICC may also investigate the acts which were committed in Fallujah according to Article 15 of the Rome Statute. As a consequence, these crimes fall within the territorial jurisdiction of ICC according to Article 5 of the Rome Statute and shall not be subjected to any statute of limitations, according to Article 29.

## **3.2 The Relationship of the ICC with the SC**

When the Rome Statute was adopted in 1998, there was an expectation that the competencies of the ICC and the SC would overlap. The jurisdiction of the SC under Chapter VII of the UN Charter extends to any “threat to the peace” including international conflicts as well as internal matters of “extreme violence” (Fujita, 2009, p.455). Since IHL violations constitute “threats to the peace,” such violations fall under Chapter VII empowerments (Fujita, 2009, p.455). Since matters relating to IHL violations fall within the purview of the SC, it has a legitimate reason to query matters and refer them to the ICC. The referral of an alleged commission of an international crime by the SC allows the ICC to exercise jurisdiction over the matter.

Unlike the case of State Party referral under Article 14, there is no detailed provision in Rome Statute concerning SC referral (Schabas, 2007, p.151). However according to Schabas (2007, p.151), when the SC is referring a crime to ICC under Article 13(b) the following points should be taken into consideration:

1. If the case referred by the SC does not comply with the pre-conditions for the exercise of the jurisdiction of the Court.
2. The Prosecutor of the ICC cannot initiate investigation if it is determined that the referral is based on erroneous or insufficient information and evidence; or the referral is made of political reasons or unrealistic assumptions.
3. The subject of the referral should be one or more of the crimes in Article 5 of the Rome Statute. However, there is nothing to preclude the SC to establish a temporary international criminal tribunals similar to those established for the former Yugoslavia and Rwanda to look into the incident.
4. When referring the case to the Prosecutor, the SC must ensure the incident threatened or threatens international peace and security.
5. The Prosecutor has the right to refuse to investigate a referral if the situation of the referral does not meet the abovementioned criteria.

#### **4. Individual Criminal Responsibility under ICC**

Individual criminal responsibility applies to persons who commit serious international criminal acts. If such individuals are brought before national and international criminal courts and found guilty of the commission of such crimes, they are liable for punishment (Bonafe, 2009, p.13). According to Article 25(3) the Rome Statute attributes criminal responsibility to natural persons that commit crimes within the jurisdiction of the Court if that person individually or jointly commit, attempt to commit, order, solicit, induce, facilitate aid, abet or intentionally contribute to the commission of a crime within the jurisdiction of the ICC. Article 25 enumerating modes of participation leading to criminal responsibility which also include paragraphs (e) and (f) that deal with incitement to genocide and with attempt and abandonment. The inclusion of subparagraphs (e) and (f) may seem inappropriate from a structural point of view, because incitement to commit genocide and attempted genocide could be more readily viewed as inchoate crimes.

Therefore, the military commanders and heads of member States of the CF are responsible for crimes committed by their subordinates in Fallujah Battles. This is consistent with Article 27(1) which provides that the Rome Statute applies to all persons without distinction, including on the basis of official capacity such as head of state, member of government or elected representative. Further, according to Article 28, military commanders and other superior authorities are responsible for crimes committed by subordinates under their control. At the same time, Article 33(1) of the Statute states that superior's order shall not relieve a person of criminal responsibility unless the subordinate was under a legal obligation to obey the order and did not know that the order was unlawful, and the order was not manifestly unlawful. Orders to commit genocide or crimes against humanity are considered to be manifestly unlawful in accordance with Article 33(2).

## **5. Referral of a Crime to the ICC: Parties and Respective Roles**

Article 13 of the Rome Statute provides the ICC with jurisdiction in relation to crimes referred to the Prosecutor by a State Party in accordance with Article 14; crimes referred to the Prosecutor by the SC acting under Chapter VII of the UN Charter; and crimes that the Prosecutor has investigated in accordance with Article 15. As such, it is important to examine the role of the relevant party in any ICC proceedings.

### **5.1 The Role of the State Party**

Article 14 of the Rome Statute enables any State Party to refer crimes to the Prosecutor on the condition that:

1. The alleged crimes were committed within the jurisdiction of the ICC and the request to the Prosecutor is to investigate these crimes and determine which person(s) should be charged with the commission of such crimes.
2. The referral to the Prosecutor must contain relevant circumstances and the supporting documentation as is available to the State Party referring the matter.

As such, according to, Article 14, any State Parties are entitled to refer the crimes committed in Fallujah to the Prosecutor of the ICC because the crimes committed by members of the CF in Fallujah are within the ambit of Article 5 of the Rome Statute. In this case, UK as a State Party to the Rome Statute was a member of the CF when attacks was made in November 2004. This would mean most of the crimes, which were committed in Fallujah Battles by UK Forces are under the jurisdiction of the ICC according to Article 14.

### **5.2 The Role of the SC**

Providing for the referral of cases to the Prosecutor by the SC was a contentious issue among delegates of States participating in the Rome Conference in 1998 (Fujita, 2009, p.456). Some delegates opposed the provision on the basis that it could serve to protect permanent members of the SC due to the veto power allocated to China, France, Russia, the UK and the US (Schabas, 2007, p.152). Nine votes are required to adopt a SC Resolution, but any permanent member may exercise a veto (Fujita, 2009, p.456).

The SC is empowered to refer matters to the Prosecutor of the ICC under Article 13(b) of the Rome Statute. The commission of criminal acts falling under Chapter VII of the UN Charter and Article 5 of the Rome Statute can be referred to the Prosecutor for investigation by the SC (Daniel and Ronen, 2010, p.123). However, it is unlikely that the ICC could exercise its jurisdiction over acts committed by US forces in the battles of Fallujah because the US is a permanent member of the SC and if a resolution were brought forward, the US would most likely veto the resolution to preventing the referral of the matter.



### 5.3 The Role of the Prosecutor

In the event that State Parties and the SC are unwilling or unable to refer a criminal matter to the Prosecutor for investigation and prosecution, the Prosecutor has the right to initiate an investigation based solely upon the merits. Article 15 of the Rome Statute provides:

1. The Prosecutor may initiate investigation *proprio motu* on crimes within the jurisdiction of the ICC.
2. The Prosecutor shall analyze the seriousness of the information which were received and seek additional information from State Parties, organs of the UN, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.
3. The Prosecutor must submit a request to the Pre-Trial of ICC Chamber for authorization to proceed with an investigation or prosecution, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.
4. If the Pre-Trial Chamber of ICC concludes there is a basis for the Prosecutor to proceed as the acts fall within the jurisdiction of the ICC, it shall authorize the investigation.
5. The refusal of the Pre-Trial Chamber of ICC to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor of ICC or evidence regarding the same situation.
6. If the Prosecutor concludes after examining the information received that there is insufficient basis for investigation, the State Parties that provided the information shall be informed. The matter can be further examined in the future if new facts and evidence become available.

The empowerment of the Prosecutor was a contentious issue as well, as many States were worried that the Prosecutor held significant power over the States themselves in relation to the investigation of criminal acts and the operations of the ICC. The powers of the Prosecutor to initiate investigations were restricted in Article 15(3), which provides that the Prosecutor could not initiate an investigation without the consent of the Pre-Trial Chamber of the ICC in accordance with the Rules of Procedure and Evidence. Article 18 further constrains the Prosecutor by requiring the notification of State Parties and those States that would normally exercise jurisdiction over the crimes concerned based upon the information available to the Prosecutor. However, this is mere notification and is not to get approval or authorisation.

Arguably, the criminal acts committed by members of the CF in the Battles of Fallujah are worthy of investigation and prosecution under Article 15. This is not only because the criminal acts are within the jurisdiction of ICC but also because we have a precedent in the case of the State of Sudan, a non-State Party to the Rome Statute. In Sudan's case, the Prosecutor exercised his authority on the Sudanese President Omar Hassan al-Bashir by

issuing an arrest warrant for crimes of genocide that he committed in Darfur and his facilitation of the Janjaweed militia. As such, using Sudan's case the Prosecutor is able to initiate investigations on criminal acts committed by the CF in the Fallujah Battles, including those by the member of US Force although US is a non-State Party.

## **6. The Limitations on ICC over Nationals of non-State Party**

The ICC has jurisdiction over the nationals of non-States Party of the Rome Statute if the nationals committed crimes within the territory of a State Party.

Despite of its jurisdiction, the ICC limits the exercise of its jurisdiction in specific circumstances namely, complementarily, SC requests for deferral, Article 98(2) agreements and immunity of state officials. All such limitations will be discussed in detail in the following paragraphs.

### **6.1 Immunity of State Officials**

Generally, according to Rome Statute, the official capacity of an individual does not exempt the person from criminal responsibility for acts that are prohibited by international law (Daniel and Ronen, 2010, p.123). Article 27(1) of the Rome Statute recognises no forms of immunity for Head of State or otherwise, as preventing the ICC from exercising jurisdiction over a person alleged to have committed serious violations of international law. The issue of immunity is raised again in Article 98(1) which prohibits the ICC from requesting a State Party to engage in activities that would require the State Party to violate international law relating to consular, diplomatic or Head of State immunity of a person or property within their jurisdiction without the consent of the Third Party State affected. Therefore, it is possible for ICC to request the arrest and surrender of serving State officials that are not entitled to immunity *ratione personae*, and former officials, where the crime they have allegedly committed is one of universal jurisdiction i.e. over grave breach which mentioned in Article 146 in Fourth Geneva Convention and defined it in Article 147 of Fourth Geneva Convention.

### **6.2 Article 98(2) Agreements**

While some persons acting in official capacity maintain immunity under international law, international treaties have been entered into by States that prevent the exercise of jurisdiction by judicial bodies over their nationals. In an effort to account for such instruments, Article 98(2) of the Rome Statute prohibits the ICC from requesting a receiving State to assist in the extradition of a non-national in contravention of international legal obligations arising from treaties or conventions with another State without having first obtained a waiver of immunity from the sending State. The provisions provide a safeguard for State Parties to the Rome Statute in the event of conflicting obligations between the ICC and international law or treaties.

While the interpretation of Article 98(2) conclude that the international agreements forbidding the transfer of nationals of non-State Parties to the ICC would be inconsistent with the purpose of the ICC and inconsistent with the wording of Article 98(2), the US has pursued

such activities in recent years. The US has embarked on a programme of concluding agreements with other States prohibiting the transfer of US nationals to the ICC without the expressed consent of the US (Akande, 2003, p.642) such as agreement between the government of the Hashemite Kingdom of Jordan and the government of US on 16<sup>th</sup> December 2004. The existence of such agreement prevents the ICC from requesting the surrender of US nationals from State Parties and it is likely that other States that are not party to the Rome Statute will begin negotiating similar agreements (Akande, 2003, p.642).

### **6.3 SC Requests for Deferral**

Article 16 of the Rome Statute provides that the SC may request the ICC to defer an investigation or prosecution for 12 months after the adoption of a resolution to that effect. The SC may act in such manner pursuant to its obligations to protect international peace and security under Chapter VII of the UN Charter if it deems the continued investigation or prosecution of a person threatens international stability. Furthermore, although the SC can only make the request for a period up to 12 months, the request can be renewed by adopting further resolution (Fujita, 2009, p.464). However, a procedural safeguard exists that prevents the abuse of the provision by the SC. According to Schabas (2007, p.169), the power of SC under Chapter VII of the UN Charter that allows it to refer persons to the ICC can be used by the ICC to assess whether or not the SC was acting legitimately under the UN Charter before granting the request made by SC under Article 16.

### **6.4 Complementarity**

It is important to note that according to the principle of complementarity the national courts of State Parties to the Rome Statute continue to hold the primary responsibility of prosecuting their nationals for the commission of serious international crimes, and the ICC serves only as a court of last resort (Fujita, 2009, p.xx). The ICC can only proceed with investigations and prosecutions if the national jurisdictions are unable or unwilling to do so and depending upon international cooperation between States and international organizations for the investigations and prosecutions to proceed (Fujita, 2009, p.xx). The complementarity principle also allows the ICC to intervene in the States which are refuses to prosecute those who commit the most serious crimes (Erica, 2009, p.2).

Therefore, with regards to the UK participation in the Fallujah Battle, it is assumed that the national jurisdictions are unable or unwilling to prosecute member of UK Force who attacked Fallujah city. Accordingly, the ICC will be the court of last resort to prosecute the perpetrators.

### **6.5 Competing Requests for Extradition and Surrender**

In some cases, competing requests for extradition and surrender are made by States and the ICC respectively. When the extradition request comes from a non-State Party to the Rome Statute, the State Party is obliged to give priority to the request of the ICC (Article 90(4) of Rome statute). In the event of an extradition agreement exists between a State Party and a non-State Party to the Rome Statute; the State Party with custody has the right to choose whether to surrender the person to the ICC or the non-State Party (Article 90(6) of Rome

Statute). In making its decision, the State Party should consider the following factors: (i) the date of the requests; (ii) the interests of the requesting State in extraditing the person, including whether the alleged crime was committed in the requesting State's territory and the nationality of the victims and the person sought; and (iii) the possibility of the surrender of the person to the ICC. Therefore, if any of the members of the CF been charged before the ICC, this rule on competing requests will be applicable.

## **7. The ICC Jurisdiction in the Fallujah Battles**

Although the inclusion of other crimes, such as drug trafficking, terrorism, and offences against UN and associated personnel was contemplated before the Rome Statute was adopted, (Schabas, 2007, p.64) such criminal acts were excluded from the final text. Thus, the ICC has jurisdiction only over the most serious international crimes, which are enumerated in Article 5 of the Rome Statute. The four categories of crimes that fall under the jurisdiction of the ICC are genocide, crimes against humanity, war crimes and aggression (Schabas, 2007, p.64). In the following paragraphs, the crimes enumerated within the text of the Rome Statute will be discussed in the context of the Battles of Fallujah.

### **7.1 The Crimes of Genocide**

The UNGA decided to proceed with the drafting of a separate convention on genocide because it was important to define genocide as a crime distinct from crimes against humanity and establish 'genocide' as a singular criminal offence under international law (Schabas, 2007, p.37). As the result, the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) which was adopted by the UNGA in 1948 (Aksar, 2004, p.201). Article 1 of the Genocide Convention provides that genocide is universally recognised as violation of customary international law irrespective of whether committed during peacetime or wartime. The Rome Statute also considered the crime of genocide in distinct terms and the ICC is empowered to prosecute such offences that occur within its jurisdiction (Aksar, 2004, p.201).

Both Article 6 of the Rome Statute and Article 2 of the Genocide Convention define 'genocide' (Schabas, 2007, p.37) as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group:

1. Killing members of the group.
2. Causing serious bodily or mental harm to members of the group.
3. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.
4. Imposing measures intended to prevent births within the group.
5. Forcibly transferring children of the group to another group.

Arguably, the acts of CF during the Battles of Fallujah constitute crimes of genocide because the CF used chemical weapons during the battles, such as white phosphorus

(Popham, 2010). The usage of such weapons evenly has caused an alarming rise in cancer rates, particularly in children; birth defects; and high infant mortality rates because of the toxic effects of the exposure of residents to this chemical residue, as well as radiation and other pollutants, leftover from the Battles of Fallujah. For this reason, arguably the CF are responsible for violations of Article 6(b) of the Rome Statute because the acts committed caused serious bodily harm to the residents of Fallujah.

## **7.2 Crimes against Humanity**

Crimes against humanity are universally prohibited according to the customary rules of IHL and regarded as international crimes (Aksar, 2004, p.240). The concept of “crimes against humanity” emerged as the result of the Allied Powers desire to prosecute Nazi war criminals for war crimes following World War II (De Guzman, 2000, p.343). The concept was one of the most important outcomes of World War II as it introduced individual criminal responsibility in international legal proceedings and was enforced for the first time in the International Military Tribunals at Nuremburg and Tokyo (Aksar, 2004, p.240). However, the prosecution of war criminals for such acts did little to clarify the definition of “crimes against humanity.”

The establishment of ICTY and ICTR addressed the indeterminacy associated with the definition of the concept by defining the term “crimes against humanity” in the statutes governing the two tribunals. Both statutory instruments provide lists of inhumane acts that constitute crimes against humanity (Robinson, 1999, p.45) but a slight variance exists between their respective definitions. Article 5 of the ICTY Statute (ICTY was established in May 1993) defines such crimes as acts committed in armed conflict, whether international or internal in character, and directed against any civilian population such as murder, extermination, enslavement, deportation, imprisonment, torture, rape and persecutions on political, racial and religious grounds. While the ICTY suggests a nexus to armed conflict is required, the ICTR Statute suggests a discriminatory motive is required (ICTR was established in November 1994). Despite the differences, the two statutory provisions provided jurisprudence and a foundation to guide delegates during the Rome Conference in 1998 when the draft of Rome Statute was discussed.

Article 7 of the Rome Statute defines crimes against humanity as:

1. The crimes related with the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack such as: murder, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, considered crimes against humanity.
2. The torture or persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious or gender as defined in Article 7(3), or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in Article 7(3) or any crime within the jurisdiction of the court and other inhumane acts of a similar

character intentionally causing great suffering, or serious injury to body or to mental or physical health.

In our case, the CF attacked the city of Fallujah between April and November of 2004 and killed a large number of civilians. Although there are no exact number of civilian casualties on record, but it is believed that thousands of civilians lost their lives during these two attacks. Since most of the persons killed during these attacks were civilians, the attacks can be described as systematic attacks directed against Fallujah civilians. The acts of CF are considered crimes against humanity because they killed a large number of Fallujah population most of them were civilians and caused destruction of Fallujah city. Thus, arguably, CF has committed crimes against humanity under Article 7 of the Rome Statute.

### **7.3 War Crimes**

IHL contains two categories of war crimes: grave breaches and violations of the laws or customs (Aksar, 2004, p.74 ; Article 8 of Rome Statute) and further can be divided into four distinct types of war crimes: grave breaches; violations of Common Article 3 of Geneva Conventions 1949; war crimes under Additional protocol I (API); and breaches under Additional Protocol II (APII). The ICC has jurisdiction over war crimes, particularly those crimes committed as part of a plan or policy, or as part of a large scale commission of such crimes. Article 8(2)(a) of the Rome Statute is concerned with grave breaches of the Geneva Conventions, particularly acts against persons or property relating to:

1. Willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering, or serious injury to body or health;
2. Extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly; and
3. Compelling a prisoner of war or other protected person to serve in the forces of a hostile power, willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial, unlawful deportation or transfer or unlawful confinement and taking of hostages.

CF actions in the battles of Fallujah between April and November 2004 amount to grave breaches of the Geneva Conventions of 1949. The CF killed nearly 600 civilians by April 12<sup>th</sup> 2004 during the first Battle of Fallujah, some of them in their homes with their families (Consumers for Peace War Crimes Committed by the United States in Iraq and Mechanisms for Accountability, 2006). Furthermore, CF killed thousands of civilians during the second Battle of Fallujah. Such acts are considered contrary to Common Article 3(1)(a) of the Geneva Conventions; Article 147 of the Fourth Geneva Convention; and Article 50(3) of API because the protections accorded to civilians during hostilities, particularly women and children, was not respected during these two battles. Furthermore, the nature of these battles deprived residents of Fallujah of their civilian character. The acts of the CF constitute serious violations of IHL concerning civilians and should be dealt with accordingly under Article 8(2)(a) of the Rome Statute. The massive amount of damage to, and destruction of, property

that was incurred by the population of Fallujah as a result of the actions of CF during the Battles of Fallujah should be regarded a grave breaches because all these acts were committed against protected property and cannot be justified by military necessity.

#### **7.4 Crimes of Aggression**

The term ‘aggression’ is defined as “an unprovoked attack, the first attack in a quarrel, an assault, an inroad” (May, 2008, p.209). The Nuremberg and Tokyo Tribunals, which had jurisdiction over the crime of aggression, called these crimes “the crime against peace” (Kim, 2000, p.83). During the Rome Conference, German and Japanese delegations insisted that aggression be listed under the ICC jurisdiction (Schabas, 2007, p.134). Although they were listed in the Rome Statute, the crime of aggression, however was not defined or otherwise elaborated upon. Article 5(2) of the Rome Statute merely provides that the ICC will exercise jurisdiction over such crimes once a provision is adopted in accordance with Articles 121 and 123 of the Rome Statute (Fujita, 2009, p.661). Until the crime of aggression is appropriately defined in a manner consistent with the UN Charter, the ICC will be unable to exercise jurisdiction of such crimes.

#### **8. Conclusion**

This article, firstly considered the ICC in relation to the ability of the ICC to prosecute war criminals and the background of the ICC, including the means and purposes of its establishment. The second part discussed the jurisdiction of ICC such as the temporal jurisdiction, personal jurisdiction, territorial jurisdiction, and subject matter jurisdiction. The third part discussed the relationship of ICC with the SC. The fourth part of this article considered the potential criminal acts that occurred during the battles of Fallujah and the criminal responsibility of CF in relation to genocide, crimes against humanity, war crimes and aggression under Article 5 of the Rome Statute and questions pertaining to the jurisdiction of the ICC over acts committed during the Battles of Fallujah.

The conclusion reached concerning the possibility of a non-State Party to the Rome Statute being referred to the ICC by the SC was that it was permissible under Article 13(b) of the Rome Statute. However, even though the SC has the right to draw the attention of the Prosecutor of the ICC towards non-State Party to the Rome Statute, it is unlikely to ever do so because the referral would require a SC Resolution and the US has veto power over resolutions due it status as a permanent member of the SC.

The SC must reform its system and reform the right to veto possessed by the permanent members of the SC. The right of veto is an obstacle to international justice because it prohibits the adoption of resolutions referring the matter of criminal acts that occurred during the Battles of Fallujah to the Prosecutor of the ICC.

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### **Brief Note of Authors**

Dr. Rohaida Nordin (PhD) is a senior lecturer at the Faculty of Law, Universiti Kebangsaan Malaysia. She teaches criminal procedure and international law and indigenous peoples. While her expertise is on human rights of the vulnerable groups including indigenous peoples, minorities, child and women, she is interested in researching on human rights education and comparative studies between international human rights law and Islamic human rights. Her email address is rohaidnordin@ukm.my and Telephone: +603-89216365 (Office).

Tareq Hamid is a post-graduate student doing his LLM at the Faculty of Law, Universiti Kebangsaan Malaysia. Mr Tareq Hamid is an Iraqi. His research interest is on any international law and humanitarian laws issues with regards to any conflicts especially those in the Middle East countries. His email address is tareqhamid@hotmail.com