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How the U.S. Should Respond to ICC Investigation into Alleged Crimes in Afghanistan

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The prosecutor for the International Criminal Court (ICC), Fatou Bensouda, announced on November 3 that she had formally requested authorization from the Court's Pre-Trial Chamber to open an investigation into war crimes and crimes against humanity allegedly committed in Afghanistan since May 2003.¹

Although the prosecutor has not released the details of the request, she has previously indicated the investigation could include allegations of torture and ill-treatment by U.S. military forces occurring largely from 2003–2004 in Afghanistan as well as at CIA facilities in Lithuania, Poland, and Romania, which are ICC state parties.² Since Afghanistan is a party to the Rome Statute of the International Criminal Court, the ICC claims authority to investigate all parties to the conflict, including the U.S. This despite the U.S. not being a party to the Rome Statute, rejecting ICC jurisdiction over U.S. persons, and taking steps to insulate itself from ICC jurisdiction.

In response to these claims by the ICC, the U.S. should take several steps.

1. Make clear that the U.S. rejects ICC claims of jurisdiction.

2. State that the U.S. itself investigates all allegations of war crimes and crimes against humanity made against its military and officials, and has done so for alleged crimes in Afghanistan and elsewhere. Thus any allegations should be dismissed by the prosecutor under the Court's own complementarity standard in the Rome Statute.
3. Reassess the more cooperative relationship it has taken to the ICC in light of a possible Court investigation of U.S. military personnel and officials. If the Court chooses to investigate U.S. persons, the U.S. should end that cooperation.

The U.S. and ICC Relationship

The U.S. was deeply involved in the negotiations in the effort to create an International Criminal Court in the 1990s. However, once negotiations began on the final version of the Rome Statute, its support waned because key concerns were ignored or opposed at the 1998 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. The final document was approved over U.S. opposition.³

In December 2000, President Bill Clinton authorized the U.S. delegation to sign the Rome Statute to facilitate U.S. efforts to address U.S. concerns, but emphasized that the U.S. still had “concerns about significant flaws in the treaty.”⁴ President Clinton did not submit the treaty to the Senate for advice and consent necessary for ratification and recommended that his successor also refrain from doing so.

The Bush Administration, after failing to secure the changes necessary for addressing U.S. concerns, “un-signed” the Rome Statute,⁵ and took additional

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steps to protect U.S. nationals, officials, and service members from the ICC. These included:

- Signing the American Service-Members' Protection Act (ASPA), which restricts U.S. interaction with and support of the ICC.
- Entering into over 100 Article 98 agreements to preclude other nations from surrendering, extraditing, or transferring U.S. persons to the ICC or third countries for that purpose without U.S. consent.⁶

The Obama Administration was more supportive of the ICC in its rhetoric and actions, including active participation in ICC meetings, voting for a Security Council referral of the situation in Libya to the ICC, and turning two individuals sought by the ICC for alleged crimes in Uganda and the Democratic Republic of the Congo over to the Court.⁷ However, the Obama Administration did not re-sign the Rome Statute or seek ratification, and maintained U.S. Article 98 agreements with other nations.

Infringement on U.S. Sovereignty

A fundamental principle of international law is that a state's legal obligations are based on its

expressed consent to be bound through ratification/acceptance of the obligation or long-standing practice and observance among sovereign nations sufficient to create an international legal norm. Some legal scholars find this principle problematic, but it remains foundational.⁸ If a government freely chooses to subject its citizens to ICC jurisdiction, that is its choice.

To date, more than 120 countries have decided to become ICC state parties, but the U.S. is not one of them. ICC claims of jurisdiction over U.S. persons are based neither on U.S. consent nor observance. In fact, the U.S. has more than declined to ratify the Rome Statute. It consistently rejected ICC claims of jurisdiction over U.S. persons even before the Rome Statute entered into force. It "un-signed" that statute when it entered into force and notified the treaty depositor that it did not intend to become an ICC party to remove any legal obligations arising from its signature.

Moreover, the U.S. has untaken specific actions designed to protect its citizens from ICC jurisdiction. Even in the narrow territorial jurisdiction of Afghanistan, the U.S. secured exclusive jurisdiction over U.S. military and supporting personnel by the Afghan government prior to that country's accession to the Rome Statute and has a bilateral agreement

1. International Criminal Court, "Statement of ICC Prosecutor, Fatou Bensouda, Regarding Her Decision to Request Judicial Authorisation to Commence an Investigation into the Situation in the Islamic Republic of Afghanistan," November 3, 2017, https://www.icc-cpi.int/Pages/item.aspx?name=171103_OTP_Statement (accessed November 14, 2017).
2. International Criminal Court, Office of the Prosecutor, "Report on Preliminary Examination Activities," 2016, pp. 43-50, https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf (accessed November 14, 2017).
3. The final text of the Rome Statute was adopted by a vote of 120 to 7, with 21 abstentions. The U.S. voted against adoption. For the U.S. perspective at the conference, see David J. Scheffer, "America's Stake in Peace, Security, and Justice," U.S. Department of State, August 31, 1998, <https://www.mtholyoke.edu/acad/intrel/scheffer.htm> (accessed November 14, 2017).
4. President Bill Clinton, "Statement Authorizing the US Signing of the Rome Statute of the International Criminal Court," December 31, 2000, <http://www.iccnw.org/documents/USClintonSigning31Dec00.pdf> (accessed November 14, 2017).
5. The text of the letter, signed by U.S. Undersecretary of State for Arms Control John Bolton, stated: "This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty." John R. Bolton, letter to U.N. Secretary General Kofi Annan regarding the Rome Statute of the International Criminal Court, May 6, 2002, <https://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm> (accessed November 14, 2017).
6. Brett D. Schaefer and Steven Groves, "The U.S. Should Not Join the International Criminal Court," Heritage Foundation *Backgrounder* No. 2307, August 17, 2009, <http://www.heritage.org/report/the-us-should-not-join-the-international-criminal-court>, and Brett D. Schaefer, Charles D. Stimson, and Steven Groves, "U.S. Should Reject ICC Attempt to Prosecute American Servicemembers and Officials," Heritage Foundation *Issue Brief* No. 4623, November 9, 2016, <http://thf-reports.s3.amazonaws.com/2016/IB4623.pdf>.
7. For a list of these statements and actions, see American NGO Coalition for the International Criminal Court, "Obama Administration," <https://www.amicc.org/obama-administration> (accessed November 14, 2017).
8. See, for example, Andrew Guzman, "The Consent Problem in International Law," Berkeley Program in Law and Economics, Working Paper Series, March 10, 2011, <http://escholarship.org/content/qt04x8x174/qt04x8x174.pdf> (accessed November 14, 2017).

with the Afghan government not to surrender U.S. persons to the ICC.⁹ Thus, U.S. practice is to shield itself from ICC jurisdiction.

The prosecutor argues that U.S. consent is unnecessary because the alleged crimes occurred on the territory of an ICC state party. But the Afghan government had a preexisting legal agreement granting the U.S. and other international forces exclusive jurisdiction over their military and associated personnel. In effect, ICC claims of jurisdiction over U.S. persons conflict with preexisting, countervailing legal obligations. As argued by Professor Michael Newton:

Treaty negotiators expressly rejected efforts to confer jurisdiction to the ICC based on its aspiration to advance universal values or a self-justifying teleological impulse to bring perpetrators to justice. Rather, its jurisdiction derives solely from the delegation by States Parties of their own sovereign prerogatives.... The ICC is not empowered to sweep aside binding bilateral agreements between sovereign states. By asserting that it has power to abrogate underlying bilateral treaties, the Court undermines ancient precepts of international law and harms the principles of treaty law. The ICC is not constructed as an omnipotent super-court with self-proclaimed universal jurisdiction based upon the presumption that the Rome Statute operates in isolation from other treaty-based constraints on sovereign prerogatives.... [T]he Court cannot unilaterally override the validity of existing jurisdictional treaties. The assertion of such powers would violate the

Vienna Convention on the Law of Treaties and muddy the existing debates related to resolving conflicts between equally binding treaty norms.¹⁰

In short, if the U.S. does not stand firm, the principle of state consent could be harmed and efforts to assert legal obligations upon the U.S. absent its consent could arise in the future.

Complementarity

The Rome Statute specifies that the Court shall act in a complimentary manner with national jurisdictions, meaning that cases are inadmissible unless the national jurisdiction is unwilling or unable to genuinely prosecute.¹¹ Indeed, the prosecutor's statement noted,

In undertaking this work, if authorised by the Pre-Trial Chamber, my Office will continue to fully respect the principle of complementarity, taking into account any relevant genuine national proceedings, including those that may be undertaken even after an investigation is authorised, within the Rome Statute framework.¹²

Some observers have urged the U.S. to respond to the prosecutor's announcement by conducting investigations into allegations of torture and mistreatment by U.S. nationals.¹³ In fact, the United States has investigated allegations of detainee abuse and has conducted hundreds of criminal investigations into allegations from Afghanistan and elsewhere. For example, the United States presented its initial report on U.S. implementation of the Conven-

9. Letter dated January 14, 2002, from the Permanent Representative of the United Kingdom and Northern Ireland to the United Nations, addressed to the President of the Security Council, annex to the letter, "Military and Technical Agreement between the Afghan Interim Administration and the International Security Assistance Force," United Nations S/2002/117, January 25, 2002, <https://reliefweb.int/sites/reliefweb.int/files/resources/9B11C79DE13BB700C1256B5300381E4F-UNSC-AFG-25JAN.PDF> (accessed November 14, 2017), and U.S. Department of State, "Agreement between the Government of the Transitional Islamic State of Afghanistan and the Government of the United States of America Regarding the Surrender of Persons to the International Criminal Court," signed September 20, 2002, entered into force August 23, 2003, <https://www.state.gov/documents/organization/183325.pdf> (accessed November 14, 2017).

10. Michael A. Newton, "How the International Criminal Court Threatens Treaty Norms," *Vanderbilt Journal of Transnational Law*, Vol. 49, No. 2 (August 25, 2016), pp. 371-431, <https://www.vanderbilt.edu/jotl/wp-content/uploads/sites/78/3.-Newton-copy.pdf> (accessed November 14, 2017).

11. Rome Statute of the International Criminal Court, Articles 1 and 17, https://www.icc-cpi.int/nr/rdonlyres/ea9aef77-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf (accessed November 14, 2017).

12. International Criminal Court, "Statement of ICC Prosecutor, Fatou Bensouda, Regarding Her Decision to Request Judicial Authorisation."

13. Jennifer Trahan, "It's High Time for the US to Conduct Complementarity As To Crimes in Afghanistan," *Opinio Juris*, November 5, 2017, http://opiniojuris.org/2017/11/05/its-high-time-for-the-us-to-conduct-complementarity-as-to-crimes-in-afghanistan/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+opiniojurisfeed+%28Opinio+Juris%29 (accessed November 14, 2017).

tion Against Torture to the U.N. Committee Against Torture in May 2006 and informed the committee that the U.S. had

carried out more than 600 criminal investigations into allegations of mistreatment, and more than 250 individuals have been held accountable for detainee abuse. Their punishments have included courts-martial, prison terms for as long as ten years, formal reprimands and separation from our military services.¹⁴

The Obama Administration presented its report on U.S. compliance with the Convention Against Torture in August 2013, which detailed ongoing investigative activities related to alleged detainee mistreatment, the conclusions of those investigations, and examples of prosecutions.¹⁵ Unlike the 2006 report, which did not cover activities related to detainees held by the Central Intelligence Agency, the Obama Administration's report detailed the investigative steps taken with respect to alleged abuse of a few detainees held by the CIA.

The record shows that the U.S. has taken allegations of detainee abuse, whether the abuse actually happened or not, extremely seriously and it has complied with its obligations under domestic law and the Convention Against Torture.

By contrast, the U.S. is under no treaty or legal obligation to satisfy the ICC prosecutor. In fact, ASPA prohibits the use of any funding to assist "the investigation, arrest, detention, extradition, or prosecution of any United States citizen or permanent resident alien by the International Criminal Court."¹⁶ To avoid the inference that the U.S. acknowledges ICC claims of jurisdiction over U.S. persons, the Trump Administration should not waive any ASPA restrictions on U.S.

cooperation with the ICC and reject any ICC request pertaining to the Afghanistan investigation.

Next Steps

Since no ICC state party has requested this investigation, the prosecutor has proceeded on her own authority, which requires the Court's Pre-Trial Chamber to approve the prosecutor's request. Close observers of the ICC regard this as likely.¹⁷ Thus, the prospect that the ICC could issue warrants for U.S. military personnel and government officials is far more real today than was the case over the past decade when the situation in Afghanistan remained in preliminary examination purgatory.

However, even if the Pre-Trial Chamber approves the investigation, it is not guaranteed that the Court will issue warrants for American persons. It is possible that the prosecutor and the Court will focus on Afghan and Taliban allegations and deem that prior U.S. investigations meet the willing and able complementarity threshold in the Rome Statute.

However, while the prosecutor acknowledges these U.S. investigations in her 2016 Report on Preliminary Examination Activities, the report language indicates that she regards them as insufficient. This should be of concern to both Congress and the Trump Administration, who should take appropriate action by:

- **Reiterating that the U.S. will not ratify the Rome Statute and rejects ICC claims of jurisdiction over U.S. persons.** The Trump Administration should publicly affirm that the U.S. will not seek ratification of the Rome Statute, supports the Bush Administration's "un-signing" of the Rome Statute, and does not recognize ICC claims of jurisdiction over U.S. persons.

14. Barry F. Lowenkron, Assistant Secretary for Bureau of Democracy, Human Rights and Labor, "Opening Statement for U.S. Hearing at Committee Against Torture," May 5, 2006, <https://www.state.gov/j/drl/rls/68558.htm> (accessed November 14, 2017), and U.S. Department of State, "Second Periodic Report of the United States to the Committee Against Torture (CAT)," various dates, <https://www.state.gov/j/drl/rls/c14907.htm> (accessed November 14, 2017).

15. U.S. Department of State, "Periodic Report of the United States of America to the United Nations Committee Against Torture (Third, Fourth, and Fifth Reports)," August 12, 2013, <https://www.state.gov/j/drl/rls/213055.htm> (accessed November 14, 2017).

16. U.S. Department of State, Bureau of Political-Military Affairs, "American Service-Members' Protection Act," July 30, 2003, <https://2001-2009.state.gov/t/pm/rls/othr/misc/23425.htm> (accessed November 14, 2017).

17. Kevin Jon Heller, "Initial Thoughts on the ICC's Decision to Investigate Afghanistan," *Opinio Juris*, November 3, 2017, http://opiniojuris.org/2017/11/03/otp-decides-to-investigate-the-situation-in-afghanistan/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+opiniojurisfeed+%28Opinio+Juris%29 (accessed November 14, 2017), and Alex Whiting, "An ICC Investigation of the U.S. in Afghanistan: What Does it Mean?" *Just Security*, November 3, 2017, <https://www.justsecurity.org/46687/icc-investigation-u-s-afghanistan-mean/> (accessed November 14, 2017).

- **Refusing to cooperate with the investigation.** Cooperating with the ICC investigation could give the impression that the U.S. actually recognizes and consents to the Court's jurisdiction, which could have negative consequences for both increasing legal vulnerability of U.S. persons in the future and undermining the principle of state consent in international law. As a preemptive step, the U.S. should: (1) remind all governments with which it has Article 98 agreements that they are obligated not to surrender U.S. persons to the court or to any third party that has intent to surrender U.S. persons to the court; (2) insist that this provision be included and utilized in any future U.S. status of forces agreement; and (3) ensure that similar language is included in all United Nations peacekeeping mandates in which U.S. persons will or could participate. In addition, the U.S. should make clear to the Court that efforts to prosecute Americans will negatively impact U.S. policy toward and cooperation with the ICC. Finally, the U.S. should notify other governments that the U.S. will not abide the arrests of U.S. persons on the basis of an ICC warrant.
- **Reassessing U.S. support for the ICC.** ASPA restricts U.S. cooperation with and support of the ICC. Nonetheless, the U.S. has supported the Court in a number of ways, including voting for Security Council referrals of situations in Sudan and Libya to the ICC and by amending the law to allow the State Department's "Rewards for Justice Program" to be used for information leading to the arrest of individuals sought by the ICC. These efforts are well-intentioned and consistent with America's desire to assist ICC efforts

"to bring to justice...foreign nationals accused of genocide, war crimes and crimes against humanity."¹⁸ However, if the ICC proceeds to investigate and seek the arrest of U.S. persons, the U.S. should not cooperate with or support the ICC in any regard. Such accommodation would be a tacit endorsement of ICC legitimacy in its effort to arrest and try U.S. persons absent U.S. consent.

Conclusion

The decision of the ICC prosecutor to seek a formal investigation into alleged crimes committed in Afghanistan since 2003 creates the sobering possibility that U.S. military personnel and government officials could be investigated and subjected to ICC arrest warrants. This despite the fact that the U.S. never ratified the Rome Statute, rejects its claims of jurisdiction, and has investigated these matters.

The prosecutor should recognize the earnest and extensive efforts of the U.S. to investigate allegations and hold accountable those responsible for proven crimes, and deem the ICC's investigation as unnecessary due to the complementarity provisions in the Rome Statute. Regardless, the prospect of an ICC investigation of U.S. persons should lead Congress and the Trump Administration to clarify U.S. policy to protect U.S. persons from claims of ICC jurisdiction that the U.S. does not recognize.

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18. U.S. Department of State Bureau of Political-Military Affairs, "American Service-Members' Protection Act."