

December 2, 2017

**INTERNATIONAL CRIMINAL COURT COMMITTEE
AMERICAN BRANCH OF THE
INTERNATIONAL LAW ASSOCIATION[♦]**

* * *

**THE INTERNATIONAL CRIMINAL COURT'S
INQUIRY AS TO CRIMES IN AFGHANISTAN
QUESTIONS & ANSWERS**

**DOES THE INTERNATIONAL CRIMINAL COURT HAVE A PENDING
PRELIMINARY EXAMINATION AS TO CRIMES COMMITTED IN AFGHANISTAN?**

Yes. In 2007, the International Criminal Court's ("ICC") Office of the Prosecutor ("OTP") made public that the Prosecutor, who had received a large number of communications related to Afghanistan, had opened a Preliminary Examination into the situation. A November 20, 2017 request by the Prosecutor for authorization to move to the Investigation stage states that the Preliminary Examination was opened in 2006.¹ During a Preliminary Examination, the office examines the "communications and situations that come to its attention based on the statutory criteria and the information available."²

**HOW DOES THE INTERNATIONAL CRIMINAL COURT HAVE JURISDICTION
OVER THE SITUATION IN AFGHANISTAN?**

Because Afghanistan acceded to the ICC's Rome Statute³ on February 10, 2003, the ICC has jurisdiction over crimes committed in Afghanistan as of May 1, 2003. This could potentially include jurisdiction over crimes committed on the territory of Afghanistan by the nationals of a non-State Party to the ICC's Rome Statute, such as the United States.

WHAT IS THE GOAL OF A PRELIMINARY EXAMINATION?

During the Preliminary Examination phase of the Court's proceedings, the OTP determines whether there is enough information on crimes of sufficient gravity to provide a reasonable basis to open an Investigation. During the Preliminary Examination, the OTP analyzes: (1) whether or not the ICC has jurisdiction (i.e., whether a Rome Statute crime appears to have been

[♦] This document is primarily the work of the Drafting Subcommittee, consisting of Jennifer Trahan, Linda Carter, Megan Fairlie, Alexandra Harrington, Ved Nanda, and Leila Sadat. John Washburn provided additional advice. Taylor Ackerman and Erin Lovall provided research assistance. This document represents the views of the members of the American Branch of the International Law Association (ABILA) International Criminal Court Committee and not the views of the International Law Association (ILA) or ABILA as a whole.

¹ Publicly Redacted Version of Request for Authorisation of an Investigation Pursuant to Article 15, para. 22, ICC-02/17-7-Conf-Exp (Nov. 20, 2017), at https://www.icc-cpi.int/CourtRecords/CR2017_06891.PDF [viewed 11/25/17].

² ICC-OTP, *Report on Preliminary Examination Activities 2016*, para 1, at https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf [viewed 11/4/17].

³ "Rome Statute" refers to the Rome Statute of the International Criminal Court, *entered into force* July 1, 2002, UN Doc. A/CONF.183/9, 2187 UNTS 90, *reprinted in* 37 ILM 999 (July 17, 1998) [hereinafter Rome Statute].

committed within the Court’s jurisdiction), (2) whether the potential crime(s) would be admissible (a crime would be inadmissible if a national court is already addressing it, or if the crime is of insufficient gravity), and (3) whether or not an Investigation would be in the interests of justice and the victims.⁴ Article 53(1)(a)–(c) of the Rome Statute provides these criteria.⁵

HAS THE ICC PROSECUTOR NOW MOVED FOR PERMISSION TO OPEN AN INVESTIGATION REGARDING CRIMES IN AFGHANISTAN?

Yes. On November 3, 2017, the ICC Prosecutor announced that she would file a request with the ICC Pre-Trial Chamber that the Preliminary Examination regarding Afghanistan move to the Investigation stage.⁶ On November 20, 2017, the Prosecutor filed the motion.⁷ The Prosecutor is taking this action on her own initiative (*proprio motu*), pursuant to Article 13(c) of the Rome Statute, as she did not receive a referral from a State Party or the Security Council.

WHAT DOES OPENING AN INVESTIGATION MEAN FOR THE AFGHANISTAN INQUIRY?

During an Investigation, “The Office of the Prosecutor [collects] the necessary evidence from a variety of . . . sources The investigation can take as long as needed to gather the required evidence. If sufficient evidence [is] collected to establish that specific individuals bear criminal responsibility, the Prosecutor would then request Judges of [the designated Pre-Trial Chamber] to issue either summonses to appear or warrants of arrest.”⁸

Thus, moving from the Preliminary Examination to the Investigation stage would take the ICC’s Afghanistan inquiry one step closer to actual cases being pursued and, potentially, after the conclusion of further investigation and further authorization by the Court, the issuance of summonses to appear and/or warrants of arrest if all further procedural steps are completed, and the facts and law are found to warrant it.

WHAT IS THE LEGAL STANDARD FOR MOVING FROM A PRELIMINARY EXAMINATION TO AN INVESTIGATION?

Under Rome Statute Article 15, the Pre-Trial Chamber decides whether to approve the Prosecutor’s *proprio motu* request to open an investigation.⁹ The Pre-Trial Chamber will assess whether there is a reasonable basis to believe crimes within the ICC’s jurisdiction have been

⁴ ICC, Preliminary Examinations, at <https://www.icc-cpi.int/Pages/Preliminary-Examinations.aspx> [viewed 11/4/17]. For further discussion of OTP procedures during the Preliminary Examination, see ICC-OTP, *Policy Paper on Preliminary Examinations* (Nov. 2013), at https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf [viewed 11/4/17].

⁵ See Rome Statute, *supra* note 3, Art. 53(1)(a)–(c).

⁶ 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 (Nov. 3, 2017), at https://www.icc-cpi.int/Pages/item.aspx?name=171103_OTP_Statement [viewed 11/4/17].

⁷ Publicly Redacted Version of Request for Authorisation of an Investigation Pursuant to Article 15, *supra* note 1.

⁸ ICC Press Release, *ICC Judges Authorise Opening of an Investigation Regarding Burundi Situation*, ICC-CPI-20171109-PR1342 (Nov. 9, 2017), at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1342> [viewed 11/16/17].

⁹ Rome Statute, *supra* note 3, Art. 15.

committed, whether there is a potential case that would be admissible, and whether there are no substantial reasons to believe the interests of justice would not be served by the investigation, taking into account the gravity of the crimes and the interests of the victims.¹⁰

DOES THE PRELIMINARY EXAMINATION COVER, AND WOULD THE INVESTIGATION COVER, ALLEGED CRIMES COMMITTED BY UNITED STATES NATIONALS?

Yes. Already in 2016, the OTP made clear in its “Report on Preliminary Examination Activities 2016” that it intended to examine alleged crimes including those committed by United States nationals in the armed forces and Central Intelligence Agency (CIA).¹¹

The OTP’s November 20, 2017 request states: “[T]he information available provides a reasonable basis to believe that members of United States of America (‘US’) armed forces and members of the Central Intelligence Agency (‘CIA’) committed acts of torture, cruel treatment, outrages upon personal dignity, rape and sexual violence against conflict-related detainees in Afghanistan and other locations, principally in the 2003–2004 period.”¹²

Specifically, the OTP has been examining whether, and now has a reasonable basis to believe that, conduct by United States nationals could amount to war crimes. The OTP’s November 20, 2017 request states:

- “The information available provides a reasonable basis to believe that in the period since 1 May 2003, members of the US armed forces have committed the war crimes of torture and cruel treatment (article 8(2)(c)(i)), outrages upon personal dignity (article 8(2)(c)(ii)) and rape and other forms of sexual violence (article 8(2)(e)(vi)). These crimes were committed in the context of a non-international armed conflict.”¹³
- “The information available provides a reasonable basis to believe that in the period since 1 July 2002, members of the CIA have committed the war crimes of torture and cruel treatment (article 8(2)(c)(i)); outrages upon personal dignity (article 8(2)(c)(ii)); and rape and other forms of sexual violence (article 8(2)(e)(vi)). These crimes were committed in the context of a non-international armed conflict, both on the territory of Afghanistan as well as on the territory of other States Parties to the Statute.”¹⁴

The “territory of other States Parties” appears to refer to Poland, Romania, and Lithuania, each of which is a State Party to the Rome Statute and is known to have housed CIA “black sites.”

¹⁰ See, e.g., ICC Press Release, *ICC Pre-Trial Chamber I Authorises the Prosecutor to Open an Investigation into the Situation in Georgia* (Jan. 27, 2016), at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1183> [viewed 11/18/17].

¹¹ ICC-OTP, *Report on Preliminary Examination Activities 2016*, *supra* note 2, para. 211.

¹² Publicly Redacted Version of Request for Authorisation of an Investigation Pursuant to Article 15, *supra* note 1, para. 4.

¹³ *Id.*, para. 187.

¹⁴ *Id.*

WHAT PARTICULAR TECHNIQUES ALEGEDLY UTILIZED BY UNITED STATES NATIONALS IS THE PROSECUTOR EXAMINING?

According to the OTP's latest filing, "[t]here is a reasonable basis to believe that the following techniques, among others, were used against detainees by members of the US armed forces and the CIA, in varying combinations:

- (i) incommunicado detention and prolonged and continuous solitary confinement;
- (ii) sensory deprivation, including by hooding, imposition of constant conditions of darkness or light, or removal of external stimuli using black-out goggles and sound-blocking earphones;
- (iii) sensory overstimulation, including by exposure to loud music, other forms of noise, and bright or flashing lights;
- (iv) other forms of manipulation of the environment, especially exposure to extreme heat or cold;
- (v) exploitation of phobias and cultural, religious and sexual taboos, including by use of dogs, enforced nudity, "diapering" (requiring detainees to urinate or to defecate on themselves or in their clothing), sexual humiliation or insults, offensive use of items of religious significance;
- (vi) imposition of "stress positions" designed to induce muscle fatigue, including by requiring detainees to stand against a wall with their body weight resting against their hands and feet, or to maintain uncomfortable positions for extended periods of time;
- (vii) suspension, such as from the ceiling in a vertical shackling position as to enforce sleep deprivation or otherwise inflict pain;
- (viii) sleep deprivation and/or manipulation, brought about through a variety of means including stress positions, loud noise or music, bright lights;
- (ix) food deprivation and/or manipulation, including by inducing or satisfying hunger or disrupting sleep;
- (x) varying degrees of physical assault, including grasping, slaps, blows or kicks, rough treatment including the "rough take down", and measures to simulate or threaten forms of assault which could cause graver physical injury (such as "walling", by which detainees would, by controlled means, be slammed against an artificial wall);
- (xi) cramped or close confinement to restrict the scope of physical movement, for example by placing detainees in boxes;

(xii) sexual violence, including by means of “rectal rehydration” or “rectal feeding” applied with excessive force; and

(xiii) suffocation by water, or the practice of so-called “waterboarding”, which simulated drowning (and, potentially, imminent death) by pouring water over a cloth covering the mouth and nose of a restrained person, as well as the placing of detainees in icy water baths, hosing them down or deluging them with water, including while restrained.”¹⁵

The November 20, 2017 request to the Pre-Trial Chamber further states that “the information available indicates that the above techniques were applied cumulatively and repeatedly to detainees over extended periods of time, causing severe physical or mental pain or suffering. Victims of such conduct exhibited behavioural and psychological symptoms, including ‘visions, paranoia, insomnia,’ and attempts at self-mutilation.”¹⁶

WHAT OTHER POTENTIAL ACCUSED MAY BE INVESTIGATED BY THE PROSECUTOR REGARDING THE SITUATION IN AFGHANISTAN?

The OTP has also been examining, and the Investigation, if leave is granted, would also cover war crimes and crimes against humanity allegedly committed by the Taliban and affiliated armed groups, as well as war crimes allegedly committed by Afghan authorities.

WHAT CRIMES OF THE TALIBAN AND AFFILIATED GROUPS IS THE PROSECUTOR EXAMINING?

Specifically, as to the Taliban and affiliated armed groups, the OTP states that “[t]he information available provides a reasonable basis to believe that members of the Taliban and affiliated armed groups are responsible for alleged crimes committed within the context of the situation, constituting crimes against humanity and war crimes, as part of a widespread and systematic campaign of intimidation, targeted killings and abductions of civilians perceived to support the Afghan Government and/or foreign entities or to oppose Taliban rule and ideology.”¹⁷

Additionally, the OTP states that it has a reasonable basis to believe the Taliban and affiliated groups have committed the following crimes against humanity: murder, imprisonment or other severe deprivation of physical liberty, and persecution against an identifiable group or collectivity on political grounds and on gender grounds.¹⁸

The request to open an investigation further states that there is a reasonable basis to believe the Taliban and affiliated groups have committed the following war crimes in the context of a non-international armed conflict: murder, intentionally directing attacks against the civilian population, intentionally directing attacks against humanitarian personnel, intentionally directing attacks against protected objects, conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities, and killing or wounding treacherously a combatant adversary.¹⁹

¹⁵ *Id.*, para. 193.

¹⁶ *Id.*, para. 196.

¹⁷ *Id.*, para. 4.

¹⁸ *Id.*, para. 72.

¹⁹ *Id.*, para. 123.

WHAT CRIMES OF THE AFGHAN AUTHORITIES IS THE PROSECUTOR EXAMINING?

As to crimes of the Afghan authorities, the OTP states: “The information available also provides a reasonable basis to believe that members of the Afghan National Security Forces (“ANSF”), in particular members of the National Directorate for Security (“NDS”) and the Afghan National Police (“ANP”), have engaged in systemic patterns of torture and cruel treatment of conflict-related detainees in Afghan detention facilities, including acts of sexual violence.”²⁰

Specifically, the OTP states there is a reasonable basis to believe that, in the period since May 1, 2003, members of the ANSF have committed the war crimes, in the context of a non-international armed conflict, of torture and cruel treatment, outrages upon personal dignity, and sexual violence.²¹

COULD THE UNITED STATES ENGAGE IN “COMPLEMENTARITY” SO AS TO AVOID ICC EXPOSURE FOR UNITED STATES NATIONALS?

Yes. The ICC is a court of last resort. For this reason, a state can avoid ICC prosecutions of its nationals by investigating and, where warranted, prosecuting the crimes of which they are suspected in accordance with the standards set forth in Article 17 of the Rome Statute.²² If the United States investigates and/or prosecutes genuinely, the ICC loses its authority to proceed on the cases. However, if the United States is deemed “unwilling” or “unable” to investigate and/or prosecute genuinely, then the cases remain admissible.

In this context, “unwilling” refers to whether national authorities act diligently and in good faith, while “unable” refers to their capacity to act.²³ As defined in Article 17 of the Rome Statute, a state is deemed “unwilling” to investigate or prosecute when the national courts or prosecutions are “shielding the person” from justice, when there is “unjustified delay” in prosecution, or when the proceedings lack independence or impartiality inconsistent with an intent to bring the person to justice.²⁴ A state is considered “unable” to investigate or prosecute when there is a “total or substantial collapse or unavailability” of national courts such that the state is unable to obtain the accused or necessary evidence or is otherwise unable to carry out the proceedings.²⁵

WHAT WOULD COMPLEMENTARITY ENTAIL IF THE UNITED STATES WERE TO UNDERTAKE IT?

If the United States investigates and/or prosecutes genuinely the crimes that the ICC is examining regarding United States nationals in Afghanistan, then that would render the cases inadmissible at the ICC.

²⁰ *Id.*, para. 4.

²¹ *Id.*, para. 161.

²² See Rome Statute, *supra* note 3, Art. 17.

²³ *Id.*

²⁴ *Id.* Art. 17(2).

²⁵ *Id.* Art. 17(3).

The United States would presumably need to investigate and/or prosecute the same or at least substantially the same persons for substantially the same conduct as the ICC is examining.²⁶ The United States would not necessarily need to prosecute the crimes under the same nomenclature that the ICC is using (war crimes and crimes against humanity). Violations of law for instance under the United States Uniform Code of Military Justice (“UCMJ”)—which governs violations by United States armed forces—are phrased in different terminology, but if the United States investigates substantially the same conduct as the ICC is investigating this should satisfy complementarity, as long as pursued with sufficient seriousness so that it does not constitute “unwillingness” (such as “shielding”). For example, the United States, which has no statute criminalizing “crimes against humanity,” could not pursue such charges through either its military or civilian court system.²⁷ But it could prosecute the underlying misconduct which the ICC is framing as crimes against humanity.

HAS THE UNITED STATES ENGAGED IN COMPLEMENTARITY REGARDING CRIMES IN AFGHANISTAN?

It appears that United States authorities have taken some minimal, but likely insufficient, measures. As to complementarity, the OTP’s recent filing notes:

In the US, a number of congressional inquiries have revealed previously unknown details of the interrogations conducted by armed forces and by the CIA, while other reviews have been undertaken internally or by the Department of Justice (“DOJ”). Despite this, to the Prosecution’s knowledge, other than a very limited number of cases where the alleged use of interrogation techniques resulted in death in custody, either no national investigations or prosecutions have been conducted or are ongoing in the US against the persons or groups of persons involved in the conduct alleged as set out in this Request and its confidential ex parte annexes, or the information available is insufficient to identify the contours of any relevant national proceedings.²⁸

Further details as to steps the United States has taken are set forth in the November 20, 2017 request by the Prosecutor to open an investigation.²⁹

To the extent that United States authorities have undertaken more complementarity efforts than the ICC is aware of, these should be made known to the Court, including information of enough specificity to demonstrate that such proceedings were undertaken as to the specific cases the ICC is examining.

²⁶ See Prosecutor v. Ruto, ICC-01/09-01/11-307, Judgment on Admissibility (Aug. 30, 2011) (“This case is only inadmissible before the Court if the same suspects are being investigate by Kenya for substantially the same conduct.”). It is unclear whether the United States would need to investigate or prosecute every national whom the OTP is examining in order to satisfy complementarity.

²⁷ Legislation that would enact crimes against humanity into U.S. law is pending in Washington.

²⁸ Publicly Redacted Version of Request for Authorisation of an Investigation Pursuant to Article 15, *supra* note 1, para. 5.

²⁹ See *id.*, paras. 299–334.

SHOULD THE UNITED STATES FULLY INVESTIGATE OR PROSECUTE REGARDLESS OF THE ICC INQUIRY?

Regardless of the ICC inquiry, the United States has an independent legal duty to investigate torture and ill-treatment, including rape, committed by United States nationals, whether in the military, CIA, or contractors of either, including when these offenses are committed abroad.³⁰

Under the four 1949 Geneva Conventions, to which the United States has been party since 1955, “torture or inhuman treatment” are “grave breaches” which parties in international armed conflict owe an obligation to prosecute.³¹ “Cruel treatment and torture” are also violations of Common Article 3 to the 1949 Geneva Conventions, which is applicable to situations of non-international armed conflict.³²

The United States is also a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the “Torture Convention”), and has been since 1994.³³ The Torture Convention mandates that a state extradite offenders or prosecute offenses when, *inter alia*, committed by a national of that state.³⁴

IS OBSTRUCTION OF THE ICC A POTENTIAL RESPONSE BY THE UNITED STATES?

History suggests the answer to this question is yes. Under the George W. Bush Administration, the United States undertook various aggressive measures regarding the ICC.

³⁰ See 18 U.S.C. §§ 2340, 2340A, 2340B (federal torture statute covering torture committed outside the U.S. if perpetrated by a U.S. national or a person present in the U.S.); Uniform Code of Military Justice, 10 U.S.C. Chapter 47 (military court jurisdiction over members of the armed forces), § 918 - Art. 118 (murder), § 920 - Art. 120 (rape and sexual assault), § 928 - Art. 128 (assault), § 893 - Art. 93 (cruelty and maltreatment); UCMJ Article 134, 10 U.S.C. § 934 (2006) (assimilation provision, empowering prosecutions of additional U.S. domestic crimes under the UCMJ); Military Extraterritorial Jurisdictions Act, 18 U.S.C. §§ 3261–3267 (providing criminal jurisdiction over offenses committed by members of the Armed Forces and persons employed by or accompanying them overseas). The latter law would cover contractors to the armed forces.

³¹ 1949 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Art. 49 (obligation to prosecute grave breaches), Art. 50 (grave breaches); 1949 Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Art. 50 (obligation to prosecute grave breaches), Art. 51 (grave breaches); 1949 Geneva Convention III Relative to the Treatment of Prisoners of War, Art. 192 (obligation to prosecute grave breaches), Art. 130 (grave breaches); 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, Art. 146 (obligation to prosecute grave breaches), Art. 147 (grave breaches).

³² Common Article 3 to the four 1949 Geneva Conventions, Art. 3(1)(a).

³³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 UNTS 85.

³⁴ *Id.*, Art. 5.

First, the United States, which had signed the Rome Statute under the Clinton Administration, by note dated May 6, 2002, stated that the United States would no longer be bound by the obligations of a signatory.³⁵

Second, Congress enacted legislation that prohibited U.S. cooperation with the ICC, or required waivers for such cooperation, including Section 705 of the Foreign Operations Authorization Act of 2000, the American Service-Members' Protection Act (2002) ("ASPA"),³⁶ and the "Nethercutt Amendment" (2005).³⁷

Third, the United States negotiated and entered into over 100 agreements varyingly referred to as "Article 98 agreements"³⁸ or Bilateral Immunity Agreements ("BIAs") with a broad variety of countries. These agreements, which are in some cases reciprocal, basically provide that the country entering the agreement will not surrender American nationals accused of war crimes, genocide, or crimes against humanity to the ICC, even if the individuals at issue committed the crimes in a country that has accepted ICC jurisdiction, and regardless of whether the individuals at issue would be prosecuted in the United States.

Fourth, the United States sponsored two U.N. Security Council resolutions (resolutions 1422 and 1487) that purportedly exempted U.N. peacekeepers hailing from countries not party to the Rome Statute from ICC jurisdiction for twelve months,³⁹ which exemption was subsequently renewed for an additional twelve months.⁴⁰ Both resolutions have since expired.

WOULD HOSTILE MEASURES AGAINST THE ICC BE AN EFFECTIVE OPTION FOR THE UNITED STATES TO PURSUE?

No. The hostility towards the ICC exhibited by the George W. Bush Administration did not ultimately serve the United States well. Indeed, recognizing this, a reversal of course began during the second term of that administration, when the United States abstained from vetoing the U.N. Security Council's referral of the situation in Darfur to the ICC.⁴¹

First, the letter purporting to "unsign" the Rome Statute was likely ineffective, since the Vienna Convention on the Law of Treaties does not provide for any such "unsigning" of a treaty.⁴²

³⁵ Letter from John R. Bolton, United States Under Secretary of State for Arms Control and International Security, to Kofi Annan, U.N. Secretary General (May 6, 2002).

³⁶ American Service-Members' Protection Act of 2002, P.L. 107-206, 16 Stat. 899 (2002), 22 U.S.C. §§ 7421 *et seq.* [hereinafter ASPA].

³⁷ Consolidated Appropriations Act, 2005, Pub. L. No. 108-447 § 574, 118 Stat. 2809, 3037-38 (2004).

³⁸ The name refers to Article 98 of the Rome Statute, which deals with the situation where a country may find itself caught in a conflict between its obligation to the ICC to execute its arrest warrants and its obligations under a Status of Forces Agreement ("SOFA") or Status of Mission Agreement ("SOMA"), or diplomatic or state immunity.

³⁹ S.C. Res. 1422 (2002). The resolution specifically covered "current or former officials or personnel from a contributing State not a Party to the Rome Statute" regarding "acts or omissions relating to a United Nations established or authorized operation . . ."

⁴⁰ S.C. Res. 1487 (2003).

⁴¹ S.C. Res. 1593 (2005).

⁴² Vienna Convention on the Law of Treaties, 1155 UNTS 331, 1969, 8 ILM (*entered into force* Jan. 27, 1980). *See also* Jennifer Trahan, *U.S. Affirms that It Adheres to Rome Statute Signatory Obligations: It*

Second, the ASPA, dubbed the “The Hague Invasion Act” because it authorized the President “to use all means necessary and appropriate” to free United States officials, service members, and government employees detained by the ICC,⁴³ proved an embarrassment and provoked strong negative reactions, particularly from European allies. The notion that the United States military would invade the Netherlands to attack the ICC prison in The Hague—or any other ICC facilities in The Netherlands—is an affront to Dutch sovereignty, and particularly problematic given The Netherlands’ close relationship to the United States as a NATO ally.

Third, the peacekeeper resolutions prompted strident criticism of the United States, and the U.N. Security Council ultimately refused to renew them. It is also unclear whether these resolutions were even legally effective, since the Rome Statute only addresses the U.N. Security Council referral of a “situation”⁴⁴ and not something less than a full situation.

Fourth, many of the countries pressed to enter into BIAs (and threatened with the loss of military assistance if they did not do so), instead received such assistance from China.⁴⁵ Thus, the United States’ BIA policy backfired by increasing China’s sphere of influence.⁴⁶

Accordingly, these kinds of harsh tactics against the ICC should most definitely *not* be repeated by the current administration. Not only were the past attempts to undermine the ICC ineffective (and often actually harmful to United States interests), given the existence of the Afghanistan inquiry, to undertake hostile measures against the ICC now would be seen as a repudiation of the rule of law (at least when accountability of nationals is at issue). Moreover, CIA abuses at “black sites,” including those in Afghanistan, Poland, Romania and Lithuania, were well-documented by the United States Senate Select Committee on Intelligence, as revealed by the

Should Put This In Writing, OPINIO JURIS (Feb. 27, 2013), at <http://opiniojuris.org/2013/02/27/u-s-affirms-that-it-adheres-to-rome-statute-signatory-obligations-it-should-put-this-in-writing> (Harold H. Koh stated the Bolton note was ineffective and merely a piece of “graffiti”).

⁴³ Human Rights Watch, *‘Hague Invasion Act’ Becomes Law* (Aug. 3, 2002), at <https://www.hrw.org/news/2002/08/03/us-hague-invasion-act-becomes-law> [viewed 11/4/17].

⁴⁴ Rome Statute, *supra* note 3, Art. 13(b).

⁴⁵ General Bantz J. Craddock, Head of U.S. Southern Command, testified that:

[ASPA] has the unintended consequence of restricting our access to and interaction with many important partner nations. . . . Extra-hemispheric actors are filling the void left by restricted US military engagement with partner nations. We now risk losing contact and interoperability with a generation of military classmates in many nations of the region, including several leading countries An increasing presence of the People’s Republic of China (PRC) in the region is an emerging dynamic that must not be ignored

Excerpts from Statement Before the House Armed Services Committee (Mar. 7, 2005), at <http://www.house.gov/hasc/testimony/109thcongress/FY06%20Budget%20Misc/Southcom3-9-05.pdf>.

⁴⁶ For a full compilation of comments about BIA repercussions, see Comments by U.S. Officials on the Negative Impact of Bilateral Immunity Agreements (Bias and the American Servicemembers’ Protection Act (ASPA)), at http://www.iccnw.org/documents/CICCFs-CommentsUSOfficials_BIA-ASPA_current.pdf [viewed 11/11/17]. See also Nicholas D. Kristof, *Schoolyard Bully Diplomacy*, N.Y. TIMES (Oct. 16, 2005), at <http://query.nytimes.com/gst/fullpage.html?res=9B04E4D9143FF935A25753C1A9639C8B63> [viewed 11/16/17].

525-page redacted summary of the full report,⁴⁷ so it would be disingenuous for the United States to act as if there is no basis for the ICC's inquiry, at least vis-à-vis CIA black sites.

Another significant reason for the United States to cooperate with, rather than obstruct, the ICC is to continue the foreign relations benefits from the now-established "principled engagement" policy⁴⁸ that was adopted during the Obama administration. Even without formal party status to the Rome Statute, the United States has worked with international partners in efforts related to ICC cases. For example, U.S. Special Operations Forces have assisted in the hunt for Joseph Kony, long wanted for the terror he and his Lord's Resistance Army have visited on people in northern Uganda and surrounding areas. Through this type of principled engagement, the credibility of the United States is enhanced internationally, and the United States is able to play an important role in ending impunity for international crimes.

DOES THE UNITED STATES HAVE ANY OBLIGATION TO COOPERATE WITH AN ICC INVESTIGATION?

The United States does not have an obligation to cooperate with the ICC, as it is not a party to the Rome Statute and therefore does not owe cooperation obligations that States Parties owe under Article 86. Furthermore, there are legislative obstacles to U.S. cooperation.

Under ASPA, the United States cannot allow an investigation or inquiry by the ICC on United States territory,⁴⁹ and the United States is precluded from responding to ICC requests for cooperation as to investigations of United States nationals.⁵⁰ Specifically, section 204(b) of ASPA states: "no United States Court, and no agency or entity of any State or local government, including any court, may cooperate with the International Criminal Court in response to a request for cooperation submitted by the International Criminal Court pursuant to the Rome Statute."⁵¹ This was modified by the Dodd Amendment, which allows cooperation in certain situations

⁴⁷ *Senate Report on CIA Torture*, CNN (Dec. 4, 2014), at <http://www.cnn.com/interactive/2014/12/politics/torture-report>. The full report has never been publicly released.

⁴⁸ *See, e.g.*, Stephen J. Rapp, U.S. Ambassador-at-Large for War Crimes Issues, Regarding Stocktaking at the Eighth Resumed Session of the Assembly of States Parties of the International Criminal Court (Mar. 23, 2010), at <http://usun.state.gov/briefing/statements/2010/138999.htm>; Harold H. Koh & Stephen J. Rapp, U.S. Engagement with the International Criminal Court and the Outcome of the Recently Concluded Review Conference, U.S. State Dep't Briefing (June, 15 2010), http://www.state.gov/s/wci/us_releases/remarks/143178.htm.

⁴⁹ ASPA, *supra* note 36, § 2004(h).

⁵⁰ *Id.*, § 2004(b).

⁵¹ *Id.*, § 2004(b).

involving foreign nationals, but not regarding nationals.⁵² ASPA is potentially subject to presidential waiver.⁵³

If the case were to proceed to the issuance by the ICC of arrest warrants covering United States nationals (which would require Court approval for “confirmation of charges”), ASPA prohibits the United States from extraditing nationals to the ICC.⁵⁴ The warrants would then, effectively, act as travel restrictions for the individuals covered, who likely would choose not to travel to ICC States Parties (which would have a statutory obligation to cooperate with the ICC and execute its arrest warrants).

If, as noted above, the un-signing is ineffective, under Article 18 of the Vienna Convention on the Law of Treaties, the United States may not take actions that defeat the “object and purpose” of the treaty,⁵⁵ which might include obstructing ICC investigations. However, ASPA was adopted subsequent to the signing, so U.S. officials could interpret it as being “superior” to any international obligations the United States might have under its signature. Under the “later in time” doctrine, U.S. courts (and executive branch officials) could thus take the position that the United States is entitled not to cooperate in any manner with the Court in terms of investigating or prosecuting individuals present in the United States, or even abroad to the extent they are governed by U.S. law.

DOES THE ICC REALLY HAVE JURISDICTION OVER THE UNITED STATES MILITARY IN AFGHANISTAN?

An interesting question as to jurisdiction has been raised by Michael Newton. Newton argues that, because the United States retained jurisdiction over United States forces deployed in Afghanistan under a Status of Forces Agreement (SOFA), Afghanistan had no jurisdiction over United States military and, consequently, it could not allow the ICC to exercise jurisdiction on its behalf.⁵⁶ Others, including the OTP, disagree with his jurisdictional arguments.⁵⁷

⁵² The Dodd Amendment states that “[n]othing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosevic, Osama bin Laden, other members of Al Qaeda, leaders of Islamic Jihad, *and other foreign nationals accused of genocide, war crimes, or crimes against humanity.*” S. Amdt. 3787 to S. Amdt. 3597 to H.R.4775 (2002), at <https://www.congress.gov/amendment/107th-congress/senate-amendment/3787?q=%7B%22search%22%3A%5B%22S.Amdt.3787%22%5D%7D&r=1> (emphasis added).

⁵³ ASPA Section 2011 states:

Sections 2004 and 2006 shall not apply to any action or actions with respect to a specific matter involving the International Criminal Court taken or directed by the President on a case-by-case basis in the exercise of the President’s authority as Commander in Chief of the Armed Forces of the United States under article II, section 2 of the United States Constitution or in the exercise of the executive power under article II, section 1 of the United States Constitution.

ASPA, *supra* note 36, § 2011.

⁵⁴ *Id.*, § 2004(d) (prohibition on extradition to the International Criminal Court).

⁵⁵ Vienna Convention on the Law of Treaties, *supra* note 42, Art. 18.

⁵⁶ Michael A. Newton, *How the International Criminal Court Threatens Treaty Norms*, 49 VAND. J. TRANSNAT’L L. 371 (2016), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2667220%20 [viewed 11/4/17].

The Committee views the better reading to be that the SOFA only obligated Afghanistan to refrain from exercising jurisdiction over United States military and accompanying civilian personnel, but did not otherwise affect its relationship to the International Criminal Court, as Afghanistan never surrendered its inherent prescriptive or territorial jurisdiction, which remained fundamental aspects of its sovereignty as a state.⁵⁸

Likewise, there is no Article 98 issue presented, as Article 98 only addresses inconsistent surrender obligations; it does not address jurisdiction. Under Article 98(2) of the Rome Statute, “[t]he Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligation under international agreements”⁵⁹ This presumably means that *if* Afghan officials detain a member of the U.S. armed forces, the ICC may not require the Afghan government to surrender that individual to the Court if such surrender would be precluded under the United States-Afghanistan SOFA.

Furthermore, the SOFA between the United States and Afghanistan provides that “U.S. Department of Defense military and civilian personnel are to be accorded status equivalent to that of U.S. Embassy administrative and technical staff under the Vienna Convention on Diplomatic Relations of 1961.”⁶⁰ Thus, it appears that the SOFA covers only members of the DOD and civilian personnel accompanying the military deployment, and not CIA personnel.

WOULD CONDUCT BY UNITED STATES NATIONALS SATISFY THE ICC’S GRAVITY THRESHOLD?

The OTP states that there is “a reasonable basis to believe that at least 54 detained persons . . . were subjected to torture, cruel treatment, outrages upon personal dignity, rape and/or sexual violence by members of the US armed forces on the territory of Afghanistan, primarily in the period 2003–2004.”⁶¹

The OTP further states that there is “a reasonable basis to believe that at least 24 detained persons . . . were subjected to torture, cruel treatment, outrages upon personal dignity, rape and/or sexual violence by members of the CIA on the territory of Afghanistan and other States

⁵⁷ Roger O’Keefe, *Response: ‘Quid,’ Not ‘Quantum’: A Comment on ‘How the International Criminal Court Threatens Treaty Norms,’* 49 VAND. J. TRANSNAT’L L. 433 (2016); Carsten Stahn, *Response: The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the Nemo Dat Quod Non Habet Doctrine—A Reply to Michael Newton,* 49 VAND. J. TRANSNAT’L L. 443 (2016) (“Article 98 is only relevant to identifying whether there is a surrender obligation to which that particular State [Afghanistan] can be held accountable,” not to issues of jurisdiction). *See also* Publicly Redacted Version of Request for Authorisation of an Investigation Pursuant to Article 15, *supra* note 1, para. 46.

⁵⁸ Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution,* 88 GEORGETOWN L.J. 381, 403-17 (2000) (explaining the prescriptive, adjudicative and enforcement jurisdiction of the ICC).

⁵⁹ Rome Statute, *supra* note 3, Art. 98(2).

⁶⁰ Congressional Research Service, Chuck Mason, Legislative Attorney, *Status of Forces Agreement (SOFA): What Is It, and How Has It Been Utilized?* (Mar. 15, 2012), at <https://fas.org/sgp/crs/natsec/RL34531.pdf> [viewed 11/4/17].

⁶¹ Publicly Redacted Version of Request for Authorisation of an Investigation Pursuant to Article 15, *supra* note 1, para. 161.

Parties to the Statute (namely Poland, Romania, and Lithuania), primarily in the period 2003–2004.”⁶²

Some have raised the possibility that the alleged conduct of United States nationals might not satisfy the ICC’s fairly high “gravity threshold.”⁶³ Yet, from the OTP’s most recent filings, the conduct of at least 78 United States nationals appears to be at issue if the OTP is able to join investigation of the situation in Afghanistan with conduct at “black sites” in Poland, Romania, and Lithuania.⁶⁴ An assessment of gravity would include “both quantitative and qualitative considerations.”⁶⁵ This would include consideration of factors such as the “scale of the crimes,” “the nature of the crimes,” “the manner of commission of the crimes,” and the “impact of the crimes.”⁶⁶

* * *

Because the United States has capable military and civilian court systems, it is the recommendation of this Committee that the United States Government utilize complementarity and fully—and genuinely—investigate, and, where warranted, prosecute any crimes the ICC is investigating against United States nationals, particularly, acts of torture and cruel treatment identified in the declassified summary of the United States Senate Report. This would both render ICC cases against U.S. nationals “inadmissible” before the ICC and ensure that justice is done for any crimes committed.

-- Jennifer Trahan
Chair, International Criminal Court Committee of the
American Branch, International Law Association
jennifer.trahan@att.net

⁶² *Id.*

⁶³ Alex Whiting, *An ICC Investigation of the U.S. in Afghanistan: What Does It Mean?*, JUST SECURITY (Nov. 3, 2017), at <https://www.justsecurity.org/46687/icc-investigation-u-s-afghanistan-mean/> [viewed 11/4/17].

⁶⁴ Publicly Redacted Version of Request for Authorisation of an Investigation Pursuant to Article 15, *supra* note 1, para. 161.

⁶⁵ ICC-OTP, *Policy Paper on Preliminary Examinations*, *supra* note 4, para. 61.

⁶⁶ *Id.*, paras. 62–65.