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U.S. Should Reject ICC Attempt to Prosecute American Servicemembers and Officials

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Foreign Policy recently reported that the International Criminal Court (ICC) is likely to initiate a formal investigation into alleged crimes against humanity and war crimes in Afghanistan.¹ Allegations have been made against Afghan, Taliban, and international military forces, including U.S. troops and intelligence personnel. Thus, the U.S. faces the prospect of having its soldiers and officials charged with crimes by the ICC.

The prospect of an ICC investigation into crimes that the U.S. has thoroughly investigated over two Administrations is extremely troubling. It ignores America's explicit desire not to be bound by ICC jurisdiction, raises questions about the court's commitment to its rules on complementarity, and underscores U.S. concerns about politicization of the court. If the ICC, as expected, does launch an investigation into crimes allegedly committed by U.S. persons, its action will justify—once again—America's decision not to join the ICC and should lead the U.S. to suspend its relations with the ICC, which has been more cooperative in recent years.

Rejecting ICC Jurisdiction

America has a long history of supporting international justice for war crimes and crimes against

humanity dating back to the Nuremburg trials and the Yugoslavia and Rwanda ad hoc tribunals. Unsurprisingly, the U.S. was an eager participant in negotiations to establish a permanent international criminal court in the 1990s.

As negotiations on the Rome Statute of the International Criminal Court were nearing completion, however, it was clear that a number of serious U.S. concerns would not be addressed. Although President Bill Clinton signed the statute, these concerns led him to urge President George W. Bush not to submit it to the Senate for the advice and consent necessary for ratification. Subsequent efforts to change the statute to address key U.S. concerns failed, and President Bush decided to “un-sign” it by formally notifying the U.N. Secretary-General that the U.S. did not intend to ratify the treaty and was no longer bound under international law to avoid actions that would run counter to the intent and purpose of the statute.

Thereafter, the U.S. took a number of steps to protect its military personnel, officials, and nationals from ICC claims of jurisdiction, including concluding a bilateral non-surrender agreement (known as an Article 98 agreement in reference to the Rome Statute article that permits such agreements) with Afghanistan and over 90 other nations wherein those governments agreed not to turn over U.S. persons to the ICC without American authorization.²

Even though the U.S. has not ratified the Rome Statute and has made clear its desire to be exempt from it, the ICC claims jurisdiction over the crimes allegedly committed by any person—even those whose governments have not joined the ICC—in the territory of any nation that is a party to the Rome Statute. The treaty entered into force for Afghanistan on May 1, 2003.

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Thorough U.S. Investigations and Accountability for Crimes Against Detainees

The United States has a long history of investigating allegations of detainee abuse and has reported on those investigations, prosecutions, and outcomes for years in an open and transparent manner.

For example, on May 5 and 8, 2006, in Geneva, Switzerland, the United States presented its initial report on U.S. implementation of the Convention Against Torture to the U.N. Committee Against Torture. Assistant Secretary of State Barry F. Lowenkron reiterated in his opening statement to the committee that the United States is “committed to upholding our national and international obligations to eradicate torture and to prevent cruel, inhuman or degrading treatment or punishment.”³

In response to questions about the number of investigations of allegations relating to detainee abuse, the U.S. delegation said:

Of the hundreds of thousands of services members who are or have been deployed in Afghanistan and Iraq, there have been approximately 800 investigations into allegations of mistreatment, including approximately 600 criminal investigations. After many of these investigations were completed, no misconduct was found. In many others, however, the Department of Defense did discover misconduct and took action.⁴

Specifically, the U.S. informed the committee that more than 270 actions were taken against more than 250 servicemembers. There were 103 criminal

courts-martial in which 89 servicemembers were convicted (an 86 percent conviction rate) and 19 received sentences of one year or more. In addition, more than 100 servicemembers received non-judicial punishment; more than 60 were reprimanded, and as of May 8, 2006 (the last day of the hearing), 28 were involuntarily separated from the military. The United States also noted that additional investigations were ongoing, accountability was ongoing, and supervisors had been investigated and held accountable for their actions as well.

The Obama Administration also presented its report on U.S. compliance with the Convention Against Torture in an official periodic report on August 12, 2013.⁵ Throughout the body of the U.S. report, the Administration details ongoing investigative activities related to alleged detainee mistreatment, the conclusions of those investigations, and examples of prosecutions. Unlike the 2006 report, which did not cover activities related to detainees held by the CIA, the Obama Administration’s report detailed the investigative steps taken with respect to alleged abuse of a few detainees held by the CIA.

Taken together, the U.S. periodic reports across two Administrations demonstrate that the United States has taken allegations of detainee abuse, whether the abuse actually happened or not, extremely seriously.

In its annual *Report on Preliminary Examination Activities*, the ICC’s Office of the Prosecutor concludes that “the information available provides a reasonable basis to believe that crimes under articles 7 [crimes against humanity] and 8 [war crimes] of the Statute have been committed.”⁶ This includes

1. David Bosco, “International Criminal Court Poised to Open Investigation into War Crimes in Afghanistan,” *Foreign Policy*, October 31, 2016, <http://foreignpolicy.com/2016/10/31/exclusive-international-criminal-court-poised-to-open-investigation-into-war-crimes-in-afghanistan/> (accessed November 7, 2016).
2. 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, September 20, 2002, <http://www.law.georgetown.edu/library/research/guides/upload/Afghanistan03-119.pdf> (accessed November 7, 2016).
3. Barry F. Lowenkron, Assistant Secretary for Bureau of Democracy, Human Rights and Labor, U.S. Department of State, “Opening Statement for U.S. Hearing at Committee Against Torture,” Geneva, Switzerland, May 5, 2006, <http://www.state.gov/j/drl/rls/68558.htm> (accessed November 7, 2016).
4. Charles Stimson, Deputy Assistant Secretary for Detainee Affairs, U.S. Department of Defense, remarks in transcript, “The United States’ Oral Response to the Questions Asked by the Committee Against Torture,” Geneva, Switzerland, May 8, 2006, <http://www.state.gov/j/drl/rls/68562.htm> (accessed November 7, 2016). Mr. Stimson is now a Senior Legal Fellow at The Heritage Foundation.
5. 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, <http://www.state.gov/j/drl/rls/213055.htm> (accessed November 7, 2016).
6. International Criminal Court, Office of the Prosecutor, *Report on Preliminary Examination Activities (2015)*, November 12, 2015, p. 27, <https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf> (accessed November 7, 2016).

crimes allegedly committed by U.S. servicemembers and civilians. The ICC acknowledges—as it must—that the U.S. has conducted investigations, including criminal investigations, of alleged crimes and has prosecuted and disciplined individuals for misconduct, yet it apparently remains unconvinced that the U.S. fully pursued these matters.⁷

This is a critical matter because under the principle of complementarity to national criminal jurisdictions outlined in Article 17 of the statute, a case should be inadmissible if a government is investigating or has investigated or prosecuted the case in which it has jurisdiction unless the court concludes that the government is unwilling or unable to genuinely carry out the investigation or prosecution.

That the ICC prosecutor is unsatisfied by U.S. actions surrounding the allegations demonstrates an unreasonableness on the part of the Prosecutor and raises questions about the court's commitment to the principle of complementarity.

Politicization

A key U.S. concern is that the Rome Statute creates an unaccountable legal institution that could exercise its power for political purposes.⁸ The primary politicization concern is that individuals, non-governmental organizations, or governments could allege crimes and threaten legal action to punish or deter military action in defense of national interests.

If the prosecutor moves the “preliminary examination” of the situation in Afghanistan that includes alleged crimes by U.S. persons to a formal “situation under investigation,” this will raise a question about the possible politicization of the court by its own staff.

The preliminary examination into alleged crimes in Afghanistan first became public in 2007. The U.S. has since pursued actions that have amply demonstrated its willingness and ability to investigate and

prosecute crimes under the jurisdiction of the ICC and should have led the prosecutor to exclude allegations involving U.S. persons from its investigation. But the ICC continues to include alleged crimes by U.S. persons in its report on preliminary examinations.

A likely reason for this is that it is politically advantageous to the ICC to continue its consideration of as many examinations outside Africa as possible, especially if they involve alleged crimes by powerful Western nations. This is even more important now that the court is facing unprecedented challenges after Burundi, Gambia, and South Africa announced their intention to withdraw from the Rome Statute.⁹ These governments made this decision based on their belief that the ICC focuses disproportionately on African crimes. Other African governments share this perception and could likewise withdraw, threatening the future of the ICC. Launching a non-African investigation in Afghanistan that could lead to charges against U.S. persons would help to counter this criticism.

What the U.S. Should Do

To protect U.S. interests and citizens, the next Administration should:

- **Reaffirm the U.S. intention not to ratify the Rome Statute.**
- **Reject ICC claims of jurisdiction over U.S. persons.** To protect its own interests, the U.S. should continue to insist that it is not bound by the Rome Statute and does not recognize the ICC's authority over U.S. persons. Moreover, because the U.S. has thoroughly investigated alleged crimes and punished those proven to have committed them, any ICC investigation into those alleged abuses is vitiated by the complementarity provisions of the Rome Statute.

7. Ibid., p. 30.

8. According to David J. Scheffer, chief U.S. negotiator at the 1998 Rome conference, “We sought a court that would be empowered by the UN Security Council to pursue those responsible for heinous crimes, whoever and wherever they are, but also a court whose ability to act without a Security Council mandate would be shaped in such a way as to protect against a misguided exercise of authority that might harm legitimate national and international interests... Unfortunately, a small group of countries, meeting behind closed doors in the final days of the Rome conference, produced a seriously flawed take-it-or-leave-it text, one that provides a recipe for politicization of the court and risks deterring responsible international action to promote peace and security.” David J. Sheffer, Ambassador-at-Large for War Crimes Issues, U.S. Department of State, “Statement on Creating an International Criminal Court,” August 31, 1998, <https://www.mtholyoke.edu/acad/intrel/scheffer.htm> (accessed November 7, 2016).

9. Abraham Joseph, “Why Did South Africa, Burundi and Gambia Decide to Leave the International Criminal Court?” *The Wire*, November 1, 2016, <http://thewire.in/76869/why-did-south-africa-burundi-and-gambia-decide-to-leave-the-international-criminal-court/> (accessed November 7, 2016).

- **Maintain and expand America's bilateral Article 98 agreements.** The U.S. has troops stationed and in transit around the globe and in all likelihood will be involved in anti-terrorism activities around the world for many years. Now is not the time to terminate the legal protections enjoyed by U.S. military personnel and officials deployed in foreign nations.
- **Exercise available options to protect U.S. persons from the ICC.** Should the ICC launch a formal investigation in Afghanistan or anywhere else, the U.S. should inform all governments with which it has Article 98 agreements that they are bound 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. The U.S. should also insist that this provision be included and utilized in any future U.S. status of forces agreement and ensure that similar language is included in all United Nations peacekeeping mandates in which U.S. persons will or could participate.
- **Suspend cooperation with the ICC.** The 2002 American Servicemembers' Protection Act, as amended in 2007 and 2008, restricts U.S. cooperation with and support of the ICC. Nonetheless, the U.S. has increasingly cooperated with the ICC, including turning over Bosco Ntaganda to the ICC after he surrendered to the U.S. embassy in Rwanda.¹⁰ If the ICC launches an investigation involving U.S. persons regarding alleged crimes that the U.S. has thoroughly investigated over two Administrations, it will illustrate that it is not the impartial legal institution that it purports to be and does not merit U.S. support and cooperation.

Conclusion

Although the ICC represents an understandable desire to hold criminals accountable for their terrible crimes, the court is flawed. These flaws pose serious challenges to America's sovereignty and national interests. The expected decision to launch a formal investigation into alleged crimes in Afghanistan underscores the need to maintain practices designed to protect U.S. servicemembers and other U.S. persons from the jurisdiction of a court that the U.S. has never joined.

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10. Reuters, "Rwanda Says War Crimes Suspect Surrenders at U.S. Embassy," March 18, 2013, <http://www.reuters.com/article/us-rwanda-warcrimes-usa-idUSBRE92H0PQ20130318> (accessed November 7, 2016), and press release, "Bosco Ntaganda in the ICC's custody," International Criminal Court, March 22, 2013, <https://www.icc-cpi.int/Pages/item.aspx?name=pr888> (accessed November 7, 2016).