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The ICC Investigation in Afghanistan Vindicates U.S. Policy Toward the ICC

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Last week, the prosecutor for the International Criminal Court (ICC) stated that investigations into alleged war crimes and crimes against humanity in Afghanistan may result in the prosecution of U.S. policymakers or servicemen. The potential prosecution of U.S. persons by the court over incidents that the U.S. deems lawful is one of the prime reasons why the Bush Administration did not seek U.S. ratification of the treaty creating the court, rejected ICC claims of authority over U.S. persons, and sought to negotiate agreements with countries to protect U.S. persons from being arrested and turned over to the ICC.¹

The investigation is not complete, the prosecutor has not determined if he will seek warrants against U.S. officials or servicemen, and Afghanistan is constrained from turning over U.S. persons to the ICC under existing agreements. However, the potential legal confrontation justifies past U.S. policy, emphasizes the need to maintain and expand legal protections for U.S. persons against ICC claims of jurisdiction, and should lead the Obama Administration to endorse the Bush Administration's policies toward the ICC.

U.S. Policy Toward the ICC. The U.S. initially was an eager participant in the effort to create the ICC in the 1990s. However, America's support waned because many of its concerns about the proposed court were ignored or opposed. Among other concerns, the U.S. concluded that the ICC lacked prudent safeguards against political manipulation, possessed sweeping authority without accountabil-

ity to the U.N. Security Council, and violated national sovereignty by claiming jurisdiction over the nationals and military personnel of non-party states in some circumstances.

In the end, U.S. efforts to amend the Rome Statute were rejected. President Bill Clinton urged President George W. Bush not to submit the treaty to the Senate for advice and consent necessary for ratification. After additional efforts to address key U.S. concerns failed, President Bush felt it necessary to "un-sign" the Rome Statute and take additional steps to protect U.S. nationals, officials, and service members from the ICC, including passing the American Service-Members' Protection Act of 2002, which restricts U.S. interaction with the ICC and its state parties, and seeking Article 98 agreements to preclude nations from surrendering, extraditing, or transferring U.S. persons to the ICC or third countries for that purpose without U.S. consent.²

The Afghan Investigation. On September 10, the Prosecutor for the International Criminal Court, Argentinean Luis Moreno Ocampo, announced that ICC investigators had begun looking into allegations of war crimes and crimes against humanity, including torture, "massive attacks," and collateral

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damage resulting from military action in Afghanistan. The allegations were made by human-rights groups and the Afghan government. According to Béatrice Le Fraper du Hellen, a special adviser to Ocampo, the ICC has been “collecting data about allegations made against the various parties to the conflict” since 2007.³

Since Afghanistan acceded to the Rome Statute—the treaty establishing the ICC—on February 10, 2003, the prosecutor is empowered to receive and investigate crimes alleged to have occurred in Afghanistan after the establishment of the court in July 2002.⁴

Although the investigation will also look into crimes allegedly committed by the Taliban, Ocampo confirmed that North Atlantic Treaty Organization troops participating in the United Nations mandated International Security Assistance Force (ISAF) mission to bolster the Afghan government could become a target of ICC prosecution. A decision to prosecute ISAF forces for actions in Afghanistan would almost certainly involve American servicemen which, as of July 23, 2009, constituted nearly half of all foreign troops involved in the mission (29,950 out of 64,500⁵) and represent one of the few countries willing to fully engage in military action to confront Taliban forces.

The ICC investigation is at an early stage. According to du Hellen, “[I]t’s particularly complex. It’s taking time to gather information on crimes

allegedly committed on the government side, on the Taliban side and by foreign forces.”⁶ In the end, the ICC may find no evidence to proceed with a warrant against anyone—American or otherwise.

Status of Forces Agreement. The ICC can act only if a country is unwilling or unable to pursue the alleged crimes. However, in a situation like Afghanistan, it is very likely that the ICC would have to assert jurisdiction because the government of Afghanistan has extremely limited legal jurisdiction over U.S. officials and service members. Specifically, the U.S. and the Afghan government entered into a Status of Forces Agreement (SOFA) regarding military and civilian personnel in Afghanistan engaged in “cooperative efforts in response to terrorism, humanitarian and civic assistance, military training and exercises, and other activities.” Under the SOFA,

U.S. personnel are immune from criminal prosecution by Afghan authorities, and are immune from civil and administrative jurisdiction except with respect to acts performed outside the course of their duties. [The agreement] explicitly authorized the U.S. government to exercise criminal jurisdiction over U.S. personnel, and *the Government of Afghanistan is not permitted to surrender U.S. personnel to the custody of another State, international tribunal [including the ICC], or any other entity without consent of the U.S. government.*⁷

1. Joe Lauria, “Court Orders Probe of Afghan Attacks,” *The Wall Street Journal*, p. A10, at <http://online.wsj.com/article/SB125253962307797635.html#printMode> (September 11, 2009).
2. For an in-depth history of this process and U.S. policy toward the ICC, see Brett D. Schaefer and Steven Groves, “The U.S. Should Not Join the International Criminal Court,” Heritage Foundation *Backgrounder* No. 2307, August 18, 2009, at <http://www.heritage.org/Research/InternationalOrganizations/bg2307.cfm>.
3. Michael Peel, “ICC Examines Possible Afghan War Crimes,” *Financial Times*, September 10, 2009, at <http://www.ft.com/cms/s/0/43060b66-9dcc-11de-8de8-00144feabdc0.html> (September 11, 2009).
4. The International Criminal Court was formally established in 2002 after 60 countries ratified the Rome Statute of the International Criminal Court. The ICC was created to prosecute war crimes, crimes against humanity, genocide, and the as yet undefined crime of aggression.
5. NATO HQ Media Operations Centre—Afghanistan, “International Security Assistance Force and Afghan National Army Strength & Laydown,” July 23, 2009, at <http://www.nato.int/isaf/docu/epub/pdf/placemat.pdf> (September 11, 2009).
6. Michael Peel, “ICC Examines Possible Afghan War Crimes.”
7. Italics added. R. Chuck Mason, “Status of Forces Agreement (SOFA): What Is It, and How Has It Been Utilized?” Congressional Research Service, Report RL34531, June 18, 2009, p. 8, at <http://www.fas.org/sgp/crs/natsec/RL34531.pdf> (September 11, 2009).

Although the SOFA was signed by the interim government, it remains binding on the current government and the Afghan government could not try U.S. officials or service members for acts committed during the “course of their duties,” even if it wanted to.

Thus, the ICC would undoubtedly find the Afghan government unable to pursue the alleged crimes. Such a finding would raise another issue. Under the Article 98 agreement with Afghanistan, the government has agreed not to turn over U.S. persons to the ICC or to allow a third party to do so without U.S. permission—an unlikely development, given that a U.S. official has stated that the United States has no reason to believe that U.S. persons have committed crimes in the conduct of their official duties under ISAF that have not been properly investigated and adjudicated.⁸

These safeguards are not a guarantee of protection from the illegitimate claims of ICC jurisdiction, but U.S. officials and service members are much more protected than they would be without them. Most likely, an ICC warrant would be executed against a U.S. person in Afghanistan only if that person traveled to an ICC state party that does not have an Article 98 agreement with the U.S. The current

scenario, therefore, only underscores the urgency of negotiating more such agreements.

Reject the Rome Statute. The Obama Administration is reportedly close to announcing a change in U.S. policy toward the ICC, including affirming President Clinton’s 2000 signature on the Rome Statute and increasing U.S. cooperation with the court. Weakening protections against ICC prosecution of U.S. officials and service members would be a grave mistake, as illustrated by the ongoing investigation in Afghanistan.

The ICC’s Afghan investigation is a testament to the wisdom of the Bush Administration. To protect its officials and servicemen, 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, maintain and expand legal protections like Article 98 agreements, and exercise great care when deciding to support the court’s actions.

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8. Specifically, the U.S. official stated, “I can assure you that allied forces are...doing everything they can to avoid hurting civilians.... There are cases and incidents of misbehavior of troops, and every country is obligated to take steps against these folks. We take those types of things seriously. Our military courts would obviously investigate those things first, and where there needed to be prosecutions and sentencing, all of that would happen.” Joe Lauria, “Court Orders Probe of Afghan Attacks,” *The Wall Street Journal*, p. A10, at <http://online.wsj.com/article/SB125253962307797635.html#printMode> (September 11, 2009).