

ISSUE BRIEF

No. 4317 | DECEMBER 11, 2014

U.S. Refusal to Ratify Rome Statute Vindicated by ICC Afghanistan Report

Brett D. Schaefer and Steven Groves

The Office of the Prosecutor (OTP) for the International Criminal Court (ICC) recently released its annual *Report on Preliminary Examination Activities*, which updates the status of its examination of alleged crimes committed in Afghanistan and other situations to determine whether a full investigation is warranted. Unlike previous reports, which broadly identified “international forces” and “pro-government forces,” the 2014 report explicitly states that the OTP is assessing available information about alleged war crimes committed by U.S. armed forces in Afghanistan. The examination remains preliminary, but the 2014 report indicates more clearly than ever before that the ICC is contemplating opening a criminal investigation that could include charges against U.S. persons.

This possibility vindicates the decisions of the Bush Administration not to seek ratification of the Rome Statute, to enact limitations on U.S. engagement with the ICC, and to negotiate scores of bilateral agreements that obligate other nations not to surrender U.S. persons to the ICC without U.S. permission. 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. The U.S. should also expand the existing tools available to protect U.S. interests and individual Americans from a court that the U.S. has never joined.

This paper, in its entirety, can be found at <http://report.heritage.org/ib4317>

The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

The ICC and Afghanistan

Established under the 1998 Rome Statute of the International Criminal Court, the ICC is the first permanent international court established to try and punish individuals committing genocide, crimes against humanity, war crimes, and the crime of aggression. The Rome Statute entered into force in July 2002, and the ICC claims jurisdiction over the citizens of states that have ratified the Rome Statute and also over individuals from countries that are not party to the Rome Statute if the alleged crimes occur on the territory of an ICC state party, the non-party government invites ICC jurisdiction, or the U.N. Security Council refers the case to the ICC.¹ Although the U.S. is not party to the Rome Statute, Afghanistan ratified it on February 10, 2003, and the ICC thereby claims jurisdiction over the crimes specified in the Rome Statute that are allegedly committed by any person in Afghan territory after that date.

The Alleged Crimes

The OTP’s preliminary examination of alleged crimes in Afghanistan has been publicly disclosed since 2007. As stated in the 2014 report, the preliminary examination is based on 102 communications made to the OTP that provide “a reasonable basis to believe that crimes under articles 7 and 8 of the Statute [crimes against humanity and war crimes] have been committed in the situation in Afghanistan.”² The report attributes most of these crimes to the anti-government forces: e.g., the Taliban and the Haqqani Network.

The report exonerates pro-government forces, including U.S. forces, of charges that they intentionally attacked civilians, concluding: “[T]he Office

assesses that the information available does not provide a reasonable basis to believe that the war crime of intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities” was committed. The report, however, states in regard to U.S. forces:

[T]he information available suggests that between May 2003 and June 2004, members of the US military in Afghanistan used so-called “enhanced interrogation techniques” against conflict-related detainees in an effort to improve the level of actionable intelligence obtained from interrogations. The development and implementation of such techniques is documented inter alia in declassified US Government documents released to the public, including Department of Defense reports as well as the US Senate Armed Services Committee’s inquiry...

Certain of the enhanced interrogation techniques apparently approved by US senior commanders in Afghanistan in the period from February 2003 through June 2004, could, depending on the severity and duration of their use, amount to cruel treatment, torture or outrages upon personal dignity as defined under international jurisprudence. In addition, there is information available that interrogators allegedly committed abuses that were outside the scope of any approved techniques, such as severe beating, especially beating on the soles of the feet, suspension by the wrists, and threats to shoot or kill.³

In other words, the OTP is specifically examining evidence that U.S. forces tortured or ill-treated detainees on a scale that amounts to a war crime.

Status

It is important to note that the OTP is only at the preliminary examination stage. As explained in the report, the OTP is still assessing the evidence of potential cases to determine whether the evidence is sufficient to merit seeking authorization from the Pre-Trial Chamber to open a formal investigation. This process has been ongoing since at least 2007, and it is unclear when, if ever, the OTP will move toward a formal investigation. Nonetheless, the specific reference to U.S. forces in the 2014 report is a marked change and deserves attention.

The U.S. has monitored the status of the preliminary investigation since 2007 but assumed that the OTP was not seriously considering the matter. This changed when the OTP sent a letter to the U.S. government in 2013 describing evidence of U.S. abuse of detainees in Afghanistan and requesting information about those cases and broader detainee practices.

Reportedly, the U.S. sent a delegation to The Hague urging “the court not to publish the allegations, even in preliminary form. They warned that the world would see any ICC mention of possible American war crimes as evidence of guilt, even if the court never brought a formal case.”⁴ Their appeals were obviously unsuccessful and underscore the concerns of previous U.S. officials that the ICC could act in an irresponsible or politicized manner.

-
1. Rome Statute of the International Criminal Court, July 17, 1998, Articles 12 and 13, http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf (accessed December 9, 2014).
 2. The specific alleged crimes are “murder under article 7(1)(a), and imprisonment or other severe deprivation of physical liberty under article 7(1)(e); murder under article 8(2)(c)(i); cruel treatment under article 8(2)(c)(i); outrages upon personal dignity under article 8(2)(c)(ii); the passing of sentences and carrying out of executions without previous judgement pronounced by a regularly constituted court under article 8(2)(c)(iv); intentionally directing attacks against the civilian population or against individual civilians under article 8(2)(e)(i); intentionally directing attacks against personnel, material, units or vehicles involved in a humanitarian assistance under article 8(2)(e)(iii); intentionally directing attacks against buildings dedicated to education, cultural objects, places of worship and similar institutions under article 8(2)(e)(iv); and treacherously killing or wounding a combatant adversary under article 8(2)(e)(ix).” International Criminal Court, Office of the Prosecutor, *Report on Preliminary Examination Activities 2014*, December 2, 2014, pp. 18–19, <http://justsecurity.org/wp-content/uploads/2014/12/International-Criminal-Court-OTP-Report-Preliminary-Examination-Activities-2014.pdf> (accessed December 10, 2014).
 3. *Ibid.*, p. 22.
 4. David Bosco, “Is the ICC Investigating Crimes by U.S. Forces in Afghanistan?” *Foreign Policy*, May 15, 2014, http://foreignpolicy.com/2014/05/15/is-the-icc-investigating-crimes-by-u-s-forces-in-afghanistan/?wp_login_redirect=0 (accessed December 10, 2014).
-

Complementarity

Even in the event that the OTP determines that U.S. persons have committed war crimes in relation to torture or maltreatment of detainees, under the principle of complementarity, the ICC lacks jurisdiction if those crimes have been investigated or prosecuted by U.S. authorities.⁵ The U.S. has in fact conducted multiple investigations into alleged detainee abuse in Afghanistan that have resulted in prison sentences, courts-martial, non-judicial punishments, and reprimands.⁶ To date, more than 100 U.S. personnel have been court-martialed for mistreatment of detainees, with an 86 percent conviction rate.⁷ In addition, several studies have been conducted regarding U.S. interrogation policy, all of which found no government policy that directed, encouraged, or condoned detainee abuse.⁸

It is unclear from reading the OTP report whether it has given any credence or weight to the U.S. investigations or whether its analysis of complementarity has yet to be conducted. In either event, the U.S. has a strong argument that the ICC lacks jurisdiction over the alleged abuses detailed in its report.

What the U.S. Should Do

After the ICC came into existence, the U.S. took steps to protect U.S. persons from the court's jurisdiction. Despite a more conciliatory relationship with the ICC, the Obama Administration has resisted calls to seek ratification of the Rome Statute or to repudiate the more than 100 bilateral Article 98 agreements,⁹ including one with Afghanistan,¹⁰ that obligate countries not to surrender U.S. persons to the ICC without U.S. permission.

The 2014 report proves that the U.S. was correct to be cautious. To maximize U.S. protections, the U.S. should:

- **Reaffirm its intent 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 and punished those proven to have abused detainees, any ICC investigation into those alleged abuses is vitiated by the complementarity provisions of the Rome Statute.
- **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 OTP launch a formal investigation, 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. Likewise, the U.S. should insist that this provision

5. Rome Statute, Article 17.

6. U.N. Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Second Periodic Report of States Parties Due in 1999, Addendum, United States of America*, May 6, 2005, paragraph 88, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2f48%2fAdd.3%2fRev.1&Lang=en (accessed December 10, 2014).

7. U.N. Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Third to Fifth Periodic Reports of States Parties Due in 2011, United States of America*, August 12, 2013, paragraph 129, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fUSA%2f3-5&Lang=en (accessed December 10, 2014).

8. U.N. Committee Against Torture, *Second Periodic Report*, paragraph 89.

9. Georgetown Law Library, "International Criminal Court—Article 98 Agreements Research Guide," http://www.law.georgetown.edu/library/research/guides/article_98.cfm (accessed December 10, 2014).

10. 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>.

also be included and utilized in any future U.S. status of forces agreement and ensure that similar language is included in all United Nations peace-keeping mandates in which U.S. persons will or could participate.¹¹

Conclusion

Although the ICC represents an understandable desire to hold war criminals accountable for their terrible crimes, the court is flawed notionally and operationally. President Bill Clinton considered the ICC's flaws serious enough to recommend against U.S. ratification of the Rome Statute unless they were resolved, and President George W. Bush concurred.

These issues continue to pose serious challenges to America's sovereignty and national interests. The

latest report only underscores the wisdom of the U.S.'s arm's-length policy and the need to maintain practices designed to protect U.S. persons from the jurisdiction of a court that the U.S. has never joined.

—*Brett D. Schaefer is Jay Kingham Fellow in International Regulatory Affairs in the Margaret Thatcher Center for Freedom, of the Kathryn and Shelby Cullom Davis Institute for National Security and Foreign Policy, at The Heritage Foundation, and editor of ConUNdrum: The Limits of the United Nations and the Search for Alternatives (Rowman and Littlefield, 2009). Steven Groves is Bernard and Barbara Lomas Senior Research Fellow in the Thatcher Center.*

11. An example of such language that could be adapted for individual missions was included in Resolution 1497, in which the Security Council decided "that current or former officials or personnel from a contributing State, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing State." U.N. Security Council Resolution 1497, August 1, 2003, <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Chap%20VII%20SRES%201497.pdf> (accessed December 9, 2014).