**The ICC’s Situation in Afghanistan: Questions and Answers on Implications for the United States**

The Situation in Afghanistan is in preliminary examination at the International Criminal Court (ICC). In the ICC prosecutor’s 2016 annual report on preliminary examinations, she announced, that there was a “reasonable basis” to find “war crimes of torture and related ill-treatment, by US military forces deployed to Afghanistan and in secret detention facilities operated by the Central Intelligence Agency, principally in the 2003-2004 period, although allegedly continuing in some cases until 2014.”

**Are there charges against US Nationals?**

No, not yet. The situation in Afghanistan is only under preliminary examination; the Prosecutor has not yet requested an authorization for an investigation. If the situation switches from a preliminary examination to an investigation, the prosecutor could request arrest warrants or summonses to appear for senior US nationals suspected of committing Rome Statute crimes under ICC jurisdiction. After they appear in the pre-trial chambers, a separate confirmation of charges hearing could occur.

**What would the charges against US Nationals likely be?**

Paragraph 211 of the prosecutor’s 2016 annual report on preliminary examinations, the prosecutor found information that “members of the US armed forces and the US Central Intelligence Agency (“CIA”) resorted to techniques amounting to the commission of the war crimes of torture, cruel treatment, outrages upon personal dignity, and rape.” If the prosecutor decided to bring charges against US national in the Afghanistan situation it would likely be for these war crimes.

**How can the ICC exercise jurisdiction over US Nationals?**

Under Article 12(2)(a), the ICC may exercise jurisdiction over crimes committed on the territory of the state party from the entry of force of the Rome Statute for that state. Therefore, the ICC has had jurisdiction over Rome Statute crimes committed in Poland and Romania since July 1, 2002, Afghanistan since May 1, 2003, and Lithuania since August 1, 2003. So, although, the ICC does not possess jurisdiction over US nationals for Rome Statute Crimes through their nationality, the ICC may exercise jurisdiction over US nationals for Rome Statute Crimes committed on state party territory. Since, the crimes occurred in Afghanistan, Poland, Lithuania and Romania which
are state parties, the ICC has jurisdiction over Rome Statute crimes committed on these states’ territories.

**Who could face arrest warrants from the ICC?**
The ICC is a criminal court; so, it only prosecutes individuals—not groups or countries. The individuals whom the ICC prosecutes are not foot soldiers. The ICC only prosecutes those who are the most responsible for the Rome Statute crimes under its jurisdiction. These tend to be high-ranking military or public officials. These individuals may not have physically carried out the crimes, but through their orders or the principle of command responsibility, they can be held accountable for these crimes. In the case of US nationals, these individuals could be high-ranking CIA or military officers, like a general signing off on interrogation techniques or another officer in charge of a detention facility. They could also be top-level officials or a member of the executive branch who set the policies for or approved tactics that amounted to war crimes.

**Is the prosecutor only targeting US nationals in the Afghanistan Situation?**
No, the prosecutor has also found there to be a reasonable basis to believe that Rome Statute crimes were committed by the Afghan government, the Taliban and the Afghan national police. She is also examining other NATO personnel’s actions related to the detainees. Therefore, it is unlikely that the prosecutor would not only bring charges against US nationals.

**Can the US do anything to avoid arrest warrants for its nationals?**
Yes. According to Article 1 of the Rome Statute, the nature of the ICC is that it is “complementary to national criminal jurisdictions.” The ICC is a court of last resort. Practicing the principle of complementarity, it exercises its jurisdiction when a state’s judicial institutions are unable or unwilling to initiate fair proceedings for Rome Statute crimes. For a case to be considered inadmissible, the United States would need to request complementarity in the pre-trial chambers. The pre-trial judges must grant that request unless they conclude that the domestic courts are ‘unwilling’ and ‘unable’ to ‘genuinely’ investigate and prosecute individuals for these crimes before exercising jurisdiction. Otherwise, such a case would be inadmissible under Article 16 of the Rome Statute.

The United States has not prosecuted those most responsible for war crimes against detainees in Afghanistan. It must do so if it wants to avoid ICC prosecution of its nationals by making a request for complementarity.

**How can the US prosecute its nationals for these war crimes domestically?**
The Convention Against Torture was translated into US criminal code through 18 U. S. C. 2340-2340A, and US Counterinsurgency Field Manual states that those “who engage in cruel of inhuman treatment of prisoners betray the standards of the profession of arms and U.S. laws. They are subject to punishment under the Uniform Code of Military Justice.” The lengths of time since torture occurred in Afghanistan may have surpassed 5 years, which tends to be a statute of limitations in the United States. However, according to US jurisprudence, there is not a statute of limitations on torture.

President Barack Obama granted immunity to all personnel who had used the Enhanced Interrogation Techniques (EITs) approved under the Bush Administration. Yet, under the Convention against Torture, this immunity cannot be upheld. As a state party to the Convention against Torture, the US must comply with its obligations to prosecute.

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Updated 6/07/2017