

## **The International Criminal Court: A Case on President Obama**

Written for the American NGO Coalition for the ICC (AMICC) by Anne Zaftis, 2016

Certain actions of the United States armed forces in wartime could be in violation of laws and customs of war that have been in force since the signing of the 1899 and 1907 Hague Conventions. These violations could include mistreatment of prisoners during interrogation, torture and summary execution of captured enemy combatants, and the use of violence against civilian non-combatants.

This paper examines whether provisions within the Rome Statute could lead to prosecutions of President Obama and officials of his administration in the International Criminal Court (ICC). The Rome Statute of the International Criminal Court seeks to prosecute war crimes and crimes against humanity after they occur as well as to stop the policies that allow them to continue. We will now examine how these provisions might be applied to President Obama and his administration on the issues of war crimes and crimes against humanity.

Actions in the wars in Yemen and Afghanistan including the reported torture of detainees could well fall within the definition of war crimes in the Rome Statute. However, the United States has not ratified the Statute and is not a state party to the Court. As a result, the ICC has no jurisdiction on any actions committed by the United States unless they took place in a territory of a state party. Yemen is not a state party, which means that the United States' actions on that territory could not be under the jurisdiction of the ICC. However, Afghanistan is a state party to the Statute. Therefore

the ICC could have jurisdiction over actions by President Obama and his administration in Afghanistan.

### **America's Actions in Afghanistan**

Since 2001, Afghanistan has continually seen the deaths of civilians by American ground forces, warplanes, drone attacks and alleged torture in detention facilities. These actions might amount to war crimes and crimes against humanity under the Rome Statute. An important issue here has to do with knowledge, which is an important factor in establishing liability for these crimes under the Statute. Thus, concerning torture, the issue would be about the knowledge the United States had on what was going on in these detention facilities in Afghanistan. It is alleged that President Obama and his administration had knowledge of torture, yet continued to enter detainees into these facilities. Under Article 7 of the Rome Statute, which explains and defines crimes against humanity, President Obama and his administration could be in violation of subsection (f) torture and subsection (k) "other inhumane acts of similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."

These same actions are also covered in Article 8 on war crimes, which, however, require that they are part of a policy. If leaders of the U.S. issued orders under a policy that supported these actions then they would be in violation of Article 8 of the Rome Statute, which stipulates that the court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

There have been many similar incidents that have occurred during the Afghanistan war under both the Bush and Obama presidencies. There have been acts,

which may be covered under the Rome Statute provisions such as torture and inhuman treatment, extensive destruction through airstrikes, intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities. A state party of the Rome Statute, any ICC prosecutor, or the United Nations Security Council could refer these acts to the ICC. The ICC prosecutor could also receive information on these acts and proceed to a formal investigation if she considered them admissible as crimes to the court's jurisdiction.

### **America's Use of Drones**

The use of drones and Obama's drone strike program could be considered a war crime. It is said to have killed as many as 957 civilian Pakistanis, including more than 200 children. In Yemen, the number of innocent people killed is as high as 84. These acts could invoke general international law principles of distinction and proportionality that are used in provisions of Article 8(2)(b)(i). Following the principle of distinction, Article 8 requires that attacks distinguish between civilians and combatants, and when there is doubt, an individual must be presumed to be a civilian. Based on the principle of proportionality, the Article requires that even unintentional loss of innocent life not be excessive in relation to the anticipated military advantage gained from launching the attack.

There have been strikes and attacks on first responders and funeral attendees, in which it may have been impossible to know that civilians were not present. These assaults have been launched without certainty that those being targeted were combatants. In some cases, strikes apparently have been launched with full knowledge that civilians were present. The Obama administration claims that its use of lethal force is legal,

ethical, and wise. However, civil society organizations such as Amnesty International (AI) think otherwise and are gravely concerned with the number of civilian casualties. AI further alleges that the Obama administration's high numbers of civilian fatalities indicate that war crimes are likely to have occurred. Many organizations have urged the U.S. government to follow international law on the protection of civilians as included in the Rome Statute.

In summary, it appears that Article 7 and Article 8 of the Rome Statute could qualify actions of the United States as crimes against humanity and war crimes. Under the Statute, Article 7, which focuses on crimes against humanity, stipulates that torture, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, and any other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health could be cause for ICC prosecution.

In conclusion, President Obama could be prosecuted at the International Criminal Court for war crimes and crimes against humanity that were committed in Afghanistan because the latter is a state party to the Rome Statute. This means that the current ICC prosecutor could in fact bring U.S. action in Afghanistan to the court. However, for any crimes committed in any country that is not party to the Statute and to the ICC, President Obama and his administration would not be under the Court's jurisdiction because the U.S. is not party to the Rome Statute. The only way to prosecute Obama and his administration for these specific crimes would be in a U.S. court.