



COMMUNICATIONS TO THE ICC REGARDING THE SITUATION IN AFGHANISTAN

On September 9, 2009, International Criminal Court Chief Prosecutor Luis Moreno-Ocampo confirmed that his office is looking into allegations of crimes committed in Afghanistan, which could include alleged crimes by NATO forces in which the United States participates as well as crimes committed by the Taliban. This follows several press releases in May, July and October, 2008 stating that the Office of the Prosecutor is monitoring such allegations. To open a formal investigation in the absence of a State Party or UN Security Council referral, the Prosecutor would be required to present evidence to and seek the permission of the ICC's Pre-Trial Chamber.

According to press reports, on September 9, 2009 the ICC Prosecutor stated in a press conference at an international justice conference at United Nations Headquarters in New York that NATO's legal advisor had visited the Court in The Hague the previous week to discuss whether NATO soldiers could be tried before the Court if they commit atrocity crimes. The Prosecutor also stated that NATO's training of its colonels includes information about how crimes they commit could be brought before the ICC.¹ In response to this latest statement, a US official responded, "We have not seen [Mr. Ocampo's] comments, but I can assure you that allied forces are operating under very difficult circumstances and are doing everything they can to avoid hurting civilians."² Further, US officials have stated that if US servicemembers commit any criminal acts they will be investigated by US military courts.

The ICC has jurisdiction over alleged crimes committed on the territory of an ICC State Party and by State Party nationals from the date that country becomes a State Party to the Rome Statute. Afghanistan became a State Party on May 1, 2003; therefore, the Prosecutor may investigate crimes allegedly committed on Afghanistan's territory after that date. The Prosecutor could investigate as far back as July 1, 2002 only if Afghanistan were to lodge a declaration with the Court accepting the Court's jurisdiction for a specified period prior to the date that it became a State Party. The United States has not joined the ICC and thus the Court does not have jurisdiction over crimes on US territory or by US nationals unless committed on the territory of a State Party.

The Bush Administration has been accused of covering up war crimes committed by US officials in Afghanistan by various news sources, including CNN and The New York Times.³ At this time, the Obama administration has made clear its intention to allow and encourage investigations into alleged abuses committed in Afghanistan and elsewhere. Under the principle of complementarity, the Court will not interfere if a state which has jurisdiction is willing and able to investigate and prosecute those responsible for committing crimes within its jurisdiction.

¹ Associated Press, Prosecutor Looking into War Crimes in Afghanistan, National Public Radio, September 11, 2009, available at <http://www.npr.org/templates/story/story.php?storyId=112694112>.

² Joe Lauria, Court Orders Probe on Afghan Attacks, Wall Street Journal, September 10, 2009, available at <http://online.wsj.com/article/SB125253962307797635.html>.

³ James Risen, U.S. Inaction Seen After Taliban P.O.W.'s Died, N.Y. Times, July 10, 2009, available at <http://www.nytimes.com/2009/07/11/world/asia/11afghan.html>.





Background on the Situation in Afghanistan

Following the September 11 attacks, in late 2001, the US sent troops to Afghanistan as US Operation Enduring Freedom (OEF) at the invitation of its internationally-recognized government, the Northern Alliance, and aided anti-Taliban forces throughout the country. The goal of OEF was to destroy the Al-Qaeda terrorist training camps inside Afghanistan. The US-led military operation culminated in the seizure of Kabul by the Northern Alliance and the overthrow of the Taliban government. An interim government was put in place following the removal of the Taliban. The interim government has since been replaced by an elected government.

The UN Security Council recognized that the use of force was an appropriate response to the September 11 attacks.⁴ In subsequent resolutions, the UN Security Council authorized the deployment of an International Security Assistance Force (ISAF) to Afghanistan.⁵ UN troops in Afghanistan are covered by a UN mandate and are separate from the US-led OEF.

Bilateral Agreements Between the US and Afghanistan

On September 20, 2002 the US and Afghanistan entered into a bilateral executive agreement that requires the other party to extradite all US nationals back to the US and not to the ICC if a request is made.⁶ This agreement, purported to be made under Article 98 of the Rome Statute, is also referred to as a Bilateral Immunity Agreement (BIA). The agreement between the US and Afghanistan is not public and it is unclear if it is reciprocal. It is also unclear if the Obama administration would enforce the BIA agreements entered into by the Bush administration, including the Afghanistan agreement.

The US has not yet concluded a formal Status of Forces Agreement (SOFA) with Afghanistan, though there have been a series of interim agreements, at least one of which is still in effect, which have the effect of a SOFA and the US could use to require Afghanistan to return any US nationals to the US for investigation and prosecution. For example, the US and the interim Afghan government completed an agreement in 2003 granting US military personnel immunity from prosecution in Afghan courts unless they commit crimes outside the scope of their duties.⁷ However, this immunity does not appear to extend to contractors performing official business in Afghanistan. It is unclear if this agreement would affect any ICC investigation. At this time, the interim government has been replaced by an elected government which has assumed responsibility for the interim government's legal obligations and the agreement remains in force.

⁴ UN Security Council, Res. 1368, September 12, 2001, available at <http://www.un.org/News/Press/docs/2001/SC7143.doc.htm> (“Recognizing the inherent right of individual or collective self-defense in accordance with the [UN] Charter” and expressing its “readiness to take all necessary steps to respond to the terrorist attacks”).

⁵ *Id.*

⁶ Agreement regarding the surrender of persons to the International Criminal Court, signed at Washington September 20, 2002, (entered into force August 23, 2003). See U.S. Department of State, 2003 Treaty Actions (updated March 2004), available at <http://www.state.gov/s/l/treaty/34278.htm>.

⁷ Agreement regarding the status of United States military and civilian personnel of the U.S. Department of Defense present in Afghanistan in connection with cooperative efforts in response to terrorism, humanitarian and civic assistance, military training and exercises and other activities, exchange of notes September 26 and December 12, 2002 and May 28, 2003 (entered into force May 28, 2003). See U.S. Department of State, 2003 Treaty Actions (updated March 2004), available at <http://www.state.gov/s/l/treaty/34278.htm>.





Conclusion

At this time, the Obama administration has encouraged an investigation of US conduct in Afghanistan. The ICC Prosecutor has not released any detailed statements regarding his preliminary investigation in Afghanistan and if his evaluation includes the conduct of US nationals as well as members of the Taliban. However, if the investigation leads to possible NATO crimes which could lead to charges against American citizens, under the principle of complementarity the US would have the right to investigate and try those individuals.

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Updated September 14, 2009*

