Can the Int’l Criminal Court Try US Officials?—The Theory of “Delegated Jurisdiction” and Its Discontents (Part I)

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Just Security is pleased to launch this online symposium—spearheaded by Professor Laura Dickinson—which is focused on the International Criminal Court’s (ICC) probe in Afghanistan and its implications for the United States. This is Part I of a two part post; Part II is available here.

As has been discussed here on Just Security, the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) has sought permission to open an investigation into international crimes committed in connection with the war in Afghanistan. The OTP’s filing (dated November 20, 2017) indicates that the proposed investigation would cover crimes committed by members of the Taliban, U.S. personnel (representing the Department of Defense and the Central Intelligence Agency), and Afghan National Security Forces and affiliated armed groups. The investigation would involve alleged crimes committed on Afghan soil but also on the territories of certain ICC member countries that provided stopover points used during the “extraordinary renditions” of presumed terrorists from their place of capture to various detention centers and “black sites” around the world. It appears that crimes committed by the then-Northern Alliance, such as the alleged Death Convoys in which captured Taliban fighters suffocated to death in droves, will fall outside the ICC’s temporal jurisdiction.

For crimes committed in Afghanistan, the ICC’s temporal jurisdiction starts on May 1, 2003. The OTP has argued that the ICC can prosecute alleged crimes committed prior to that date on the territories of other European ICC member states so long as such crimes were committed “in the context of and associated with the armed conflict in Afghanistan” such that “they are sufficiently linked to
and fall within the parameters of” the Afghanistan situation. This expansive approach implicates Poland, Lithuania, and Romania, which—as found by the European Court of Human Rights—all played host to secret detention facilities where individuals were mistreated. Most of the crimes involving U.S. personnel are likely to trace back to the early days of Operation Enduring Freedom (OEF) and the George W. Bush Administration, although serious allegations against U.S. personnel deployed to Afghanistan have emerged in later years.

If it comes to this, the United States may decide to argue that a series of Status of Forces Agreements (SOFAs) executed by Afghanistan divest the ICC of jurisdiction over DOD personnel, including members of the U.S. armed forces. (Any SOFA, it should be noted, would not apply to non-DOD personnel, as revealed by the differential treatment of DOD and CIA personnel in Italy allegedly involved in the rendition and torture of “Abu Omar”). The theory is that the ICC’s jurisdiction is premised on ICC member states delegating their sovereign right to exercise territorial jurisdiction to the Court. By granting the United States exclusive penal jurisdiction over its armed forces, Afghanistan cannot delegate to the ICC a power it has relinquished.

As discussed in this essay, while compelling, this argument provokes a number of counterarguments with which the U.S. government may need to contend if it ever has occasion to pursue this line of defense. These counterarguments relate to the timeline of relevant events, the scope and nature of the delegation in question, and alternative theories of ICC jurisdiction premised on international law rather than a delegation of a discrete domestic law competency.

With this contribution, I do not purport to assess the relative strengths of any of these various counterarguments; my hope is to simply traverse the terrain of competing theories that the U.S. government should anticipate in the event that the OTP focuses its sights on a U.S. suspect. Of course, as Alex Whiting has noted, it is unlikely that the Court will ever confront these arguments given the many structural barriers to a prosecution going forward involving a member of the U.S. armed forces or other U.S. official.
This is a two-part series. Part I discusses the operative status-of-forces agreements. Part II, which will be posted next week, address the various arguments around the impact of these agreements on the ICC’s jurisdiction.

The Military Operations in Afghanistan

By way of background, U.S. Forces have operated in Afghanistan under multiple, overlapping arrangements:

- As part of Operation Enduring Freedom (OEF) launched by the United States on October 7, 2001, after the attacks of September 11th. The operation started with air strikes but troops were on the ground by the end of October 2001. U.S. allies later pledged their own military personnel to the effort, which was aimed at dismantling training camps, routing the Taliban and Al Qaida, and preventing Afghanistan from providing a base for further terrorist activities. OEF-Afghanistan concluded at the end of 2014. (Other OEF missions (e.g., in the Philippines) endured for longer).

- As members of the International Security Assistance Force (ISAF) authorized by the U.N. Security Council in December 2001 (Resolution 1386) to assist the Afghan Interim Authority with security in and around Kabul following a diplomatic conference in Bonn, Germany, which resulted in the appointment of a unity government under Hamid Karzai. Many European states resisted a direct combat role for ISAF troops, preferring instead to focus on governance issues and enhancing Afghan security capacity. The Security Council authorized ISAF to operate outside of Kabul in 2003 in cooperation with the OEF Coalition (Resolution 1510). More than half of ISAF troops were drawn from the U.S. armed forces.

- As part of North Atlantic Treaty Organization (NATO) forces, which assumed command over ISAF in August 2003 and fully replaced it in 2014 (NATO’s first mission outside of the European-Atlantic region). The follow-on mission, called Resolute Support, was launched on January 1, 2015 upon the expiration of ISAF. Many contributing states placed caveats on the
geographical deployment and/or functional roles of their troops in connection with the mission.

- ISAF and OEF remained functionally distinct for years. The simultaneous operation of multiple missions made for a complicated organogram, and observers urged the merger of OEF and ISAF/NATO.

Each of these operations is subject to a status-of-forces agreement (SOFA) with Afghanistan. SOFAs are regularly used to define the operative legal rights and responsibilities when one state deploys its armed forces onto the territory of another state. The allocation of criminal jurisdiction and ensuring that U.S. forces receive the due process protections that they deserve are always central concerns and sensitive negotiating issues because they implicate core sovereign imperatives of host governments. At the same time, SOFAs also deal with more quotidian issues around travel, taxation, hiring local employees, customs, licensing, carrying arms, wearing uniforms, access to the electromagnetic spectrum, etc.

**The Applicable Status of Forces Agreements**

A web of SOFAs apply to DOD personnel deployed to Afghanistan. These agreements seek to allocate jurisdiction between Afghanistan and various “sending states” (states sending troops in country), including the United States.

1. **International Security Assistance Force SOFA**

First, ISAF had its own SOFA with Afghanistan, which was contained in an annex to a Military Technical Agreement (MTA) entitled “Arrangements Regarding the Status of the International Security Assistance Force.” According to Article 1(3) of the SOFA, all ISAF personnel,
will under all circumstances and at all times be subject to the exclusive jurisdiction of their respective national elements in respect of any criminal or disciplinary offences which may be committed by them on the territory of Afghanistan.

ISAF forces are also immune from personal arrest or detention. As discussed further here, the ISAF agreement at Article 1(4) provides in addition that ISAF and supporting personnel ... may not be surrendered to, or otherwise transferred to the custody of, an international tribunal or any other entity or State without the express consent of the contributing nation.

The ISAF Agreement entered into force on January 4, 2002, such that it predates the ICC’s jurisdiction in Afghanistan.

2. Bilateral SOFA #1

Next is the rather cursory bilateral SOFA between the United States and Afghanistan: 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. This is an executive agreement, as opposed to a treaty, that was concluded by an exchange of diplomatic notes between the United States and Afghanistan. It entered into force on May 28, 2003, about a month after latent ICC jurisdiction commenced.

The SOFA indicated that U.S. personnel were to be accorded a status equivalent to that of U.S. Embassy administrative and technical staff under the 1961 Vienna Convention on Diplomatic Relations (VCDR) when it comes to privileges and immunities (so-called “A & T Status”). This A & T equivalency would provide covered persons with absolute immunity from criminal proceedings before
Afghan courts for crimes committed within Afghanistan. By contrast, there is no immunity in the host state for civil claims arising out of acts performed outside the course of an individual’s official functions (per Article 31 of the VCDR incorporated into the SOFA by reference). The SOFA also authorizes the United States to exercise criminal jurisdiction over U.S. personnel in Afghanistan and indicates that U.S. personnel may not be transferred to the custody of an international tribunal or any other entity or state without the United States’ express consent.

Covered U.S. personnel include military and civilian personnel. Contractors and contract personnel enjoy certain tax benefits and relief from regulatory law, but are likely excluded from the criminal jurisdiction provisions since those provisions mention only “United States personnel”. This would apply to contractors hired by other U.S. agencies, such as the Department of State, which held the Blackwater contract. (Many SOFAs do not apply to contractors performing services for DOD who are not DOD employees). By way of comparison, other SOFAs into which the United States has entered permit host state jurisdiction over certain criminal conduct, such as grave premeditated crimes committed off-base (as found in Article 12 of the SOFA with Iraq), but this is not the case with respect to the SOFA with Afghanistan.

3. Bilateral Security Arrangement, SOFA #2

Similar provisions appear in a superseding Bilateral Security Arrangement (BSA) and associated SOFA finally negotiated and concluded in 2014. This agreement enabled U.S. troops to remain in Afghanistan after ISAF concluded. The BSA, which entered into force on January 1, 2015, was under negotiation for years. Sticking points included objections to U.S. forces’ conducting home raids as part of counter-terrorism operations, detention operations and particularly the Bagram detention facility, and the expansive exclusive jurisdiction terms demanded by Washington. In the end, Article 13 of the BSA grants exclusive civil and criminal jurisdiction to the United States over U.S. forces and their civilian component (i.e., persons employed by the DOD who are not members of the
armed forces), but Afghanistan retains jurisdiction over private contractors and their employees. The BSA contains a clause similar to the clause quoted above preventing the surrender of U.S. forces to any international tribunal without the sending state’s consent.

4. **NATO SOFAs**

Next, NATO has a SOFA with Afghanistan that governs coalition forces. It was negotiated and executed in 2014 at the same time as the BSA. It became effective when the ISAF mission concluded and Resolute Support was launched. It provides at Article 11(1) that the sending state shall have the exclusive right to exercise civil or criminal jurisdiction over its nationals for offenses committed within Afghanistan. Afghanistan authorizes sending states to hold trials in the territory of Afghanistan.

Finally, it should be noted that NATO members also have a SOFA that operates as between NATO members and a Partnership for Peace (PFP) Agreement that incorporates the terms of the NATO SOFA and applies to PFP states (generally states of the former Soviet Union). Unlike the other SOFAs, which grant exclusive jurisdiction to the United States vis-à-vis Afghan courts, the NATO/PFP SOFA is premised on a regime of concurrent or shared jurisdiction. This involves a rather complex formula allocating jurisdiction between the sending and receiving states based upon the status of the offense under U.S. and local law that is found in about half of all U.S. SOFAs. Notwithstanding this appearance of shared jurisdiction, in practice, the United State will normally ask the receiving state to waive jurisdiction and allow the United States to handle any criminal prosecution. The NATO SOFA indicates that the host state is to give “sympathetic consideration” to such a request. The NATO SOFA is a treaty that was subject to Congressional ratification; during this process, Congress expressed some concerns about these concurrent jurisdiction provisions.
These two arrangements might apply to the European states implicated in extraordinary renditions allegedly initiated by, or committed on behalf of, the United States.

5. **Article 98 Agreement**

In addition to these status-of-forces agreements, Afghanistan has executed another bilateral Agreement with the United States that may provide supplemental protection to U.S. personnel who might be under investigation by the ICC’s Office of the Prosecution.

In this agreement, which entered into force on August 23, 2003, both parties pledged not to surrender or transfer the nationals of the other to the International Criminal Court or to a third party for the purpose of onward transfer to the ICC. The agreement applies to all nationals of the two parties, regardless of governmental status. But, it will only be relevant in the event that a person wanted by the ICC is “present in the territory” of either the U.S. or Afghanistan. The United States has, however, 100 or so such agreements with other states, which would be operative in the event that an ICC suspect was found on the territory of one of these other signatories.

These agreement were inspired by Article 98(2) of the ICC Statute, which reads:

> The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.
Article 98 thus binds the Court, as opposed to the states party, and prevents the Court from asking a state to surrender a suspect if doing so would run afoul of another international agreement the state has with a “sending State.” It does not, however, prevent the OTP or Court from moving forward with an investigation or prosecution of someone subject to such an agreement.

Taken together, these various agreements reflect the unsurprising fact that it is DOD policy “to protect, to the maximum extent possible, the rights of U.S. personnel who may be subject to criminal trial by foreign courts and imprisonment in foreign prisons.” Implicit in this statement is the desire to protect U.S. persons’ due process rights, which might be infringed if they are subject to trial in an unfair judicial system. In addition, this policy reflects the goal of retaining the right to enforce the military’s own disciplinary standards as part of the chain of command. All told, and in principle, DOD will not send military personnel abroad without sufficient status protections such as those found in the SOFAs above.

[Editor’s note: Stay tuned for Part II of Professor Van Schaack’s analysis in which she discusses the potential legal impact of these agreements on the ICC’s jurisdiction.]

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