Treaty Based Limitations on the Article 12 Jurisdiction of the Int’l Criminal Court

by Mike Newton
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This piece is the latest in our online symposium—spearheaded by Professor Laura Dickinson—focusing on the International Criminal Court’s (ICC) probe in Afghanistan and its implications for the United States.

The International Criminal Court’s (ICC) Office of the Prosecutor (OTP) asserts jurisdiction over American forces in Afghanistan. The argument offered in support is flawed. It is contradicted by the basic tenets of treaty law and runs counter to the design of the Rome Statute. As most readers will know, negotiators explicitly rejected proposals to institute universal jurisdiction for the ICC. Instead, the defined scope of ICC jurisdiction embodied in Article 12 derives exclusively from the consent of states at the time of ratification of the Rome Statute. In the OTP view, the very nature of ICC allegations compels the conclusion that the Rome Statute supersedes any competing claim to jurisdiction negotiated by sovereign states. One treaty to rule them all. Not.

There is nothing whatever in the text or travaux of the Rome Statute to indicate that its supremacy supersedes treaty based jurisdictional allocations made by sovereign states that are not parties to the Rome Statute. The Prosecutor’s November 2017 application to open a formal investigation in the Afghanistan situation raises a host of policy and procedural issues with important and interconnected ramifications. Although a wonderful series of postings (see here, here, here, here, here, and here), have addressed various aspects of the OTP request, the jurisdictional dilemmas have often been either overlooked or oversimplified in the public debate.
The U.S. SOFA Agreement Merely Memorialized the Status Quo Ante

American forces were subject to the exclusive jurisdiction of American authorities from the moment that combat operations began in Afghanistan in October 2001. Prevailing law of armed conflict accords hostile forces complete immunity from laws of the territorial state when they enter an adversary’s sovereign territory during an international armed conflict. Valid jurisdictional claims by the domestic courts of other nations might theoretically support adjudicative jurisdiction based on passive personality or national laws implementing a form of universal jurisdiction if third states can lawfully establish personal jurisdiction. American forces were protected from all aspects of Afghan criminal authority by virtue of their combatant status. Phrased another way, Afghanistan lacked personal and adjudicative jurisdiction over any American combatant absent prisoner-of-war status following lawful detention. Detailed analysis of the myriad issues potentially raised by the OTP inclusion of CIA activities is beyond the scope of this posting.

Beth Van Schaack’s summary of the subsequent jurisdictional agreements between Afghanistan and other nations is accurate, but incomplete. As early as January 4, 2002, the British force commander of the Interim Security Assistance Force (ISAF) negotiated and signed a comprehensive agreement with the interim government in Afghanistan. The Annex provided, inter alia, that “ISAF and supporting personnel, including associated liaison 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.” In an unacknowledged quirk, this Agreement predates the temporal jurisdiction of the ICC itself as the Rome Statute entered into force on July 1, 2002. Nationals of States Parties became subject to the Article 12 jurisdiction of the Court irrespective of the ISAF agreement by virtue of sovereign choices to ratify the Rome Statute, but the United States is not a State Party.
The permanent agreement reached between Afghanistan and NATO on September 20, 2014, revalidated exclusive jurisdiction to all NATO nations and reiterated that the permanent agreement does not “limit or prejudice the implementation” of any “bilateral Agreement or Arrangement” then in force for Afghanistan. The treaty that applied to American personnel deployed as part of Operation Enduring Freedom took the form of an exchange of diplomatic notes. Article 2(1)(a) of the VCLT dispels any inference that the exchange of diplomatic notes did not constitute a binding treaty. Afghanistan relinquished any claim to criminal jurisdiction over the nationals of the United States by accepting that they are accorded status equivalent to that accorded to administrative and technical staff under the Vienna Convention on Diplomatic Relations.

Responding to the initial diplomatic note from the U.S. dated September 26, 2002, the Afghan Foreign Ministry declared “its concurrence” with the curtailed scope of sovereign criminal jurisdiction over American forces on December 12, 2002. In a second demarche dated May 28, 2003, Afghanistan reiterated its concurrence and noted that the agreement entered into force on that date pursuant to the Foreign Minister’s signature. The Afghan government accepted the legal premise that there was never a window within which the criminal jurisdiction of Afghanistan encompassed personal and adjudicative authority over American forces. Some have assumed that the gap from the Rome Statute entry into force for Afghanistan (May 1, 2003) until the date that the Status of Forces provisions officially entered into force (May 28, 2003) created a jurisdictional window for the ICC. The assumption that this sliver of opportunity for ICC jurisdiction represented the intentions of Afghanistan is unsupported by any hint of evidence from the Afghan government itself.

Implications of the binding treaties

The OTP dismisses the complex relationship raised by multiple treaties that allocate jurisdiction in footnote 47 of its filing, which simply declares that the “prescriptive and adjudicative” jurisdiction of Afghanistan remained intact irrespective of any prior agreements or the effects of interconnected treaties. Michael Vagias is surely correct that the ICC does not have a “completely free
hand” in interpreting its jurisdictional scope because it cannot “acquire a law-
making capacity through its compétence de la compétence.” Moreover, ICC case-
law holds that Article 12(2)(a) should be interpreted in the manner that best
preserves a healthy synergy between domestic criminal jurisdiction and the
territorial scope of ICC power.

Other ICC precedent indicates that the “interpretation of treaties, and the Rome
Statute is no exception, is governed by the VCLT, specifically the provisions of
Articles 31 and 32.” Rules of treaty interpretation prescribed by VCLT Article 31
mean that the phrase “on the territory of which the conduct in question
occurred” found in Article 12(2)(a) of the Rome Statute must be interpreted by
the Court in light of the “object and purpose” of the Rome Statute. The object
and purpose of the Rome Statute models shared rights and responsibilities
by which the Court synergizes with domestic systems in multiple manners
and stages of proceedings. Decisions by the OTP that invalidate jurisdictional
allocations between sovereign states and operate to deprive states of their
criminal jurisdiction undermine the very raison d’être of the institution.

The ILC Study Group on the Fragmentation of International Law concluded that
international law “is a legal system. Its rules and principles (i.e. its norms) act in
relation to and should be interpreted against the background of other rules and
principles.” As such, ICC decisions complying with the principle of effective
interpretation should seek to divine “the original consent and agreement of
States Parties effectively and not as unreal and illusory.” ICC judges should
interpret Article 12(2)(a) in a manner that accords with the actual agreement of
Afghan authorities. The Rome Statute itself combined with fundamental
principles of treaty interpretation make it clear that the Pre-Trial Chamber
should not conclude that it has jurisdiction over American forces. Given that the
Rome Statute lacks any sort of supremacy clause, interpreting Article 12(2)(a) to
override otherwise binding treaties would obligate ICC judges to craft a sui
generis theory describing the relationship of the Rome Statute vis-à-vis other
applicable treaty regimes.
The assumption that Afghan authorities were simply unaware of the implications of their sequenced international agreements is unwarranted. It strains credulity to believe, as the OTP seems to accept, that Afghan authorities were careless in their approach to ratifying the Rome Statute, thereby leaving an unanticipated jurisdictional scope for the Court. Recall that the nation faced an existential threat throughout the relevant period. The far more sustainable proposition is that the Afghan government moved cautiously to enter into the formal treaty relationship with the ICC only AFTER it ensured that American forces were immune from domestic personal and adjudicative jurisdiction derived from their presence on Afghan territory. It is a well-established tenet that parties entering into treaty arrangements do not intend to act inconsistently with generally recognized principles of international law. The ICJ has repeatedly emphasized that “[i]t is a rule of interpretation that a text emanating from a government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it.”

Because of its prior treaties with the United States, Afghanistan ratified the Rome Statute with the expectation that the treaty did not convey territorial jurisdiction over American forces to the ICC under Article 12(2)(a). No State can give away jurisdictional authorities that it does not possess and Afghanistan lacked jurisdiction over American nationals covered by the relevant treaties. Arguments that Afghanistan retained theoretical prescriptive jurisdiction over the Rome Statute core crimes are not only incorrect but also irrelevant, because the sovereign state possessed no personal or adjudicative authority over American forces. Afghanistan could not delegate territorial jurisdiction over American forces because there was no residual criminal jurisdiction to delegate.

**Effects of the OTP position**

ICC officials who are on the territory of States Party that have ratified the Relationship Agreement with the Court enjoy precisely the same status under the Vienna Convention as American forces on Afghan soil. Imagine the paroxysms of protest that would emanate from the Court if a State Party followed the logic of the November 20, 2017 OTP filing. In the interests of intellectual consistency,
the OTP should admit a priori that its assertion of jurisdiction over American personnel would also warrant the transfer of adjudicative jurisdiction over ICC officials delegated by States Party in violation of the Relationship Agreements.

The OTP is rescued from this inconvenient result of its position by the fact that there is nothing in the Rome Statute, established principles of treaty interpretation, or relevant state practice that warrants a unitary view of ICC adjudicative authority. A jurisdictional interpretation of Article 12(2)(a) that restates the premise of overarching ICC authority to negate domestic jurisdictional agreements would undermine the actual object and purpose of the Rome Statute.

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