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The War Over U.S. War Crimes in Afghanistan Is Heating Up

The Hague's International Criminal Court has long avoided pointing the finger at U.S. misdeeds in Afghanistan. That truce is about to end.

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The International Criminal Court in The Hague is tiptoeing closer to a confrontation with the United States. The key issue is U.S. detention practices, and the alleged use of torture, in

Afghanistan. A report just released by the office of the court's prosecutor, Fatou Bensouda, for the first time explicitly names U.S. forces as potential culprits.

The back story of the International Criminal Court's (ICC's) inquiry into possible crimes in Afghanistan extends more than a decade. Afghanistan joined the ICC in early 2003, less than a year after the court opened its doors. That move gave the international prosecutor potentially broad jurisdiction over crimes committed by all combatants on Afghan soil. Shortly thereafter, the ICC opened what it calls a "preliminary examination" of possible crimes in the country. In this phase of the court's work, the prosecutor's office reviews mainly outside sources of information about situations and considers whether to launch a full investigation of its own.

Year after year, the court's inquiry on Afghanistan has remained in limbo, even as reports of abuses in Afghanistan accumulate. The United Nations estimates that about 8,000 civilians have been killed in the country since 2009 alone.

To many observers, the ICC's sluggishness in responding to one of the world's bloodier conflicts appeared odd, particularly as it opened multiple formal investigations in Africa. It was hard to avoid the conclusion that the ICC might be avoiding Afghanistan precisely because an investigation there would involve scrutiny of U.S. actions and otherwise complicate major-power diplomacy related to the conflict. No NATO state involved in Afghanistan has expressed support for an ICC role.

While the court's inner workings are not easy to divine, it appears that a more assertive approach to Afghanistan developed sometime after Bensouda took over from the court's first prosecutor, Luis Moreno-Ocampo, in mid-2012. As prosecution officials prepared an update on the Afghan situation, they gathered NGO reports of abuses by U.S. forces and material from U.S. internal inquirers to go along with much more voluminous material on Taliban crimes and alleged Afghan government abuses.

In a Foreign Policy article published in May, I detailed the heartburn that the court's more energized inquiry was causing in Washington. In 2013, three senior State Department officials dashed to The Hague for a meeting with the deputy prosecutor, veteran Canadian lawyer James Stewart. At that meeting, the U.S. officials discouraged the prosecutor from specifically discussing alleged U.S. misconduct. It appears that Washington's alarm had an impact; the ICC's 2013 update on Afghanistan contained no direct references to U.S. forces. Allegations of U.S. misconduct were instead lumped into the category of "pro-government forces" and elided by the passive voice. "It has been alleged," 2013's report noted, "that, between 2002 and 2006, some of the detainees captured in Afghanistan were subjected to interrogation techniques which may constitute torture or inhumane treatment."

That tactful ambiguity vanished in the report released this year on Dec. 2. The prosecutor's office concluded that "the information available suggests that between May 2003 and June 2004, members of the US military in Afghanistan used so-called 'enhanced interrogation techniques' against conflict-related detainees in an effort to improve the level of actionable intelligence obtained from interrogations." (The report also considered whether certain raids and airstrikes by international forces constituted war crimes but concluded that there was no evidence of

intentional harm to civilians.) Still, the prosecutor's statements on U.S. detainee abuse mark the first time that the ICC, which the United States has not joined, has explicitly identified possible criminal behavior by U.S. nationals.

At a public event on Dec. 2, I asked the U.S. point person on global justice, Ambassador Stephen Rapp, about the new report. He expressed disappointment that the ICC was even considering U.S. conduct and reaffirmed long-standing U.S. policy -- articulated soon after the court was negotiated in 1998 -- that the ICC cannot exercise jurisdiction over a nonmember state. "The position of the U.S. in 1998 was that the ICC should not have jurisdiction over non-parties, and that remains, as a policy matter, something that we believe," Rapp said. He also maintained that even if the court somehow had jurisdiction, the U.S. military justice system has examined the relevant allegations and has taken appropriate action, including some prosecutions.

The court remains a very long way from indictments of U.S. soldiers or civilian officials. The prosecutor still hasn't decided to open a full investigation. Even if she does, indictments of U.S. personnel are highly uncertain. What appears to be happening behind the scenes is a quiet push and pull between The Hague and Washington over whether the United States has adequately investigated abuses by its own forces. If the United States can demonstrate that it has done so, the doctrine of "complementarity" should preclude any court action.

That may be easier said than done, however. In recent months, U.S. military lawyers have been working to match up the incidents the court is interested in with the various internal investigations conducted by the U.S. military. The dearth of information on many of these incidents makes this a challenging task. But there's a much more fundamental issue. The ICC has as part of its mandate investigating and prosecuting "those most responsible" for serious crimes. Its investigations thus far in other conflicts have bypassed lower-level officials and have moved directly to commanders and even political leaders. Because the United States has mostly avoided grappling with whether senior officials bear criminal responsibility for abusive interrogation practices, U.S. officials may have trouble convincing the ICC prosecutor that they have done enough.

For that reason, the new ICC report increases the still-small probability of a full-blown confrontation between the world's superpower and the fragile young court. Over the last decade, the political fights in the United States about the ICC have mostly faded into the background. The second George W. Bush administration and Barack Obama's administration have taken small but meaningful steps toward a productive working relationship. But if the court's interest in U.S. misdeeds in Afghanistan continues, that truce could end.