

US Military and CIA Leaders May be Investigated for War Crimes

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Featured image: A US Marine Corps V-22 Osprey aircraft prepares to land at forward operating base Nawa in Helmand province, Afghanistan, Dec. 17, 2010. (Image: [Mass Communication Specialist 2nd Class Kevin S. O'Brien / US Navy](#))

On November 3, the chief prosecutor of the International Criminal Court (ICC) informed the court's Pre-Trial Chamber, "[T]here is a reasonable basis to believe that war crimes and crimes against humanity have been committed in connection with the armed conflict in Afghanistan."

In what Amnesty International's Solomon Sacco called a "seminal moment for the ICC," Chief Prosecutor Fatou Bensouda asked the court for authorization to commence an investigation that would focus on US military and CIA leaders, as well as Taliban and Afghan officials.

Bensouda wrote in a November 14, 2016, report that her preliminary examination revealed "a reasonable basis to believe" the "war crimes of torture and ill-treatment" had been committed "by US military forces deployed to Afghanistan and in secret detention facilities operated by the Central Intelligence Agency, principally in the 2003-2004 period, although allegedly continuing in some cases until 2014."

The chief prosecutor noted the alleged crimes by the CIA and US armed forces "were not the abuses of a few isolated individuals," but rather were "part of approved interrogation techniques in an attempt to extract 'actionable intelligence' from detainees." She added there was "reason to believe" that crimes were "committed in the furtherance of a policy or policies ... which would support US objectives in the conflict of Afghanistan."

In accordance with its Rome Statute, the ICC only asserts jurisdiction over people whose home country is unwilling or unable to bring them to justice. In explaining why this war crimes investigation falls under the ICC's jurisdiction, Bensouda wrote that the US Department of Justice investigations regarding ill-treatment of 101 detainees were limited to whether interrogation techniques used by CIA interrogators were unauthorized and violated criminal statutes. The US Attorney General (AG) said the Justice Department would not prosecute anyone who acted in good faith and within the guidance provided by the Office of Legal Counsel (OLC).

The AG investigated only two incidents and found the evidence insufficient to obtain convictions. In one case, Gul Rahman froze to death after being stripped and shackled to a cold cement floor in the secret Afghan prison known as the Salt Pit. In the other, Manadel al-

Jamadi died in Iraq's Abu Ghraib prison after he was suspended from the ceiling by his wrists which were bound behind his back. Former military policeman Tony Diaz, who witnessed al-Jamadi's torture, said that blood gushed from his mouth like "a faucet had turned on" when he was lowered to the ground. A military autopsy concluded that al-Jamadi's death was a homicide. However, the AG ultimately refused to prosecute the Bush officials responsible for the torture and deaths of those two men.

In 2008, ABC News reported that Dick Cheney, Condoleezza Rice, Donald Rumsfeld, George Tenet and John Ashcroft met in the White House and micromanaged the torture of terrorism suspects by approving specific torture techniques such as waterboarding. George W. Bush admitted in his 2010 memoir that he authorized waterboarding. Cheney, Rice and John Yoo – author of the OLC's most egregious torture memos – have made similar admissions.

Were the ICC to pursue its investigation, the United States, which is not a party to the Rome Statute, would very likely refuse to relinquish any US person to the ICC. During the Bush administration, Congress passed the American Service-Members Protection Act, which says if US persons are sent to the ICC in The Hague, the US military can forcibly extract them. The act also restricts US cooperation with the ICC and prohibits military assistance to states parties to the Rome Statute unless they sign bilateral immunity agreements with the US.

States which sign these "Article 98" agreements — referring to the section of the Rome Statute that addresses treaties between countries — pledge not to hand over US nationals to the ICC. The United States has reportedly extracted those agreements from over 100 countries — primarily small nations, or fragile democracies with weak economies. Moreover, the US government has withdrawn military aid from several nations that refused to be coerced into signing them.

However, under the Rome Statute, the ICC can take jurisdiction over a national of even a non-party state if he or she commits a crime in a state party's territory. The US vehemently objects to this, but it's nothing new. Under well-established principles of international law, the crimes being prosecuted in the ICC — genocide, war crimes, crimes against humanity — are crimes of universal jurisdiction.

The doctrine of *universal jurisdiction* permits any country to try foreign nationals for the most egregious crimes, even without any direct relationship to the prosecuting country. That means other nations can bring US leaders to justice for war crimes and crimes against humanity.

Indeed, the United States has asserted jurisdiction over foreign nationals in anti-terrorism, anti-narcotics trafficking, torture and war crimes cases. The US government tried, convicted and sentenced Charles "Chuckie" Taylor Jr. to federal prison for torture committed in Liberia. Israel tried, convicted and executed Adolph Eichmann for his crimes during the Holocaust.

There will be strong political pressure to avoid liability for US leaders. But Bensouda has undoubtedly withstood heavy pressure by asking the court to approve an investigation into crimes committed in Afghanistan. She also invariably faced considerable pushback for opening a preliminary examination in January 2015 of possible war crimes committed by Israel and the Palestinians in Gaza. Bensouda is expected to announce the results of that examination in December.

The ICC has been criticized for focusing almost exclusively on African leaders. This is

apparently changing with possible investigations into the conflicts in Afghanistan and Palestine.

If a full investigation of US officials proceeds as requested, it “would send a clear signal to the Trump administration and other countries around the world that torture is categorically prohibited, even in times of war, and there will be consequences for authorizing and committing acts of torture,” according to Jamil Dakwar, director of the ACLU’s Human Rights Program.

During the presidential campaign, Donald Trump declared he would “immediately” resume waterboarding and would “bring back a hell of a lot worse than waterboarding” because the United States is facing a “barbaric” enemy. He labeled waterboarding a “minor form” of interrogation.

“The long overdue message that no one is above the law is particularly important now, as the Trump administration ramps up military machinations in Afghanistan and embraces the endless war with no plan in sight,” Katherine Gallagher, a senior lawyer at the Center for Constitutional Rights, said in a statement.

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