



# Can the International Criminal Court Investigate U.S. Personnel?

June 30, 2020

On June 11, 2020, President Trump issued [Executive Order 13928](#), authorizing sanctions against certain individuals involved in the International Criminal Court (ICC) Prosecutor’s investigation of whether U.S. military and intelligence personnel committed war crimes during the conflict in Afghanistan. The ICC is an international tribunal [created](#) by the [Rome Statute](#) to serve as the first permanent tribunal to try individuals for “the most serious crimes of concern to the international community as a whole.” Currently, [123 countries](#) are parties to the Rome Statute, but the United States is not, having first signed the Rome Statute but later [withdrawing](#) its intent to join. This Sidebar outlines the basis upon which the ICC Prosecutor may initiate investigations; discusses the disagreement between the United States and the Prosecutor about the legality of the request to investigate the actions of U.S. personnel; and assesses whether the United States may attempt to stop the investigation.

## Background

In November 2017, the Office of the Prosecutor for the ICC [requested](#) authorization to investigate alleged war crimes committed by U.S. military and intelligence personnel in Afghanistan, and in countries linked to the conflict. The Prosecutor had been preliminarily examining the events in Afghanistan since 2006. The request [stated](#) that the Prosecutor’s information from its preliminary examination provided “a reasonable basis to believe that” U.S. military personnel in Afghanistan subjected “at least 54 detained persons . . . to torture, cruel treatment, outrages upon personal dignity, rape and/or sexual violence.” Further, the request [indicated](#) that the information also “provided a reasonable basis to believe” that U.S. intelligence personnel subjected “at least 24” individuals to similar treatment during interrogations in secret detention facilities (so-called “black sites”) in Afghanistan, Poland, Lithuania, and Romania.

In April 2019, the ICC’s Pre-Trial Chamber [denied](#) the Prosecutor’s request, finding that although the ICC had jurisdiction, the likelihood of a successful prosecution was “extremely limited” given that nearly eleven years had elapsed since the Prosecutor began examining the situation and the limited cooperation with and resources available for a full investigation and prosecution. In March 2020, the ICC’s Appeals Chamber [reversed](#) this determination, deciding that the Pre-Trial Chamber should not conduct an “interests of justice” inquiry at the preinvestigation stage and should assess “only whether there is a

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reasonable factual basis for the Prosecutor to proceed with an investigation.” The Appeals Chamber then [authorized](#) the Prosecutor to conduct a full investigation.

Following this authorization, on June 11, 2020, the President issued Executive Order 13928. The order permits relevant U.S. federal agencies to sanction individuals and entities involved with or assisting the investigation of U.S. personnel actions during the conflict in Afghanistan. These sanctions may affect the personal property of such individuals or entities and lead to suspension of U.S. entry visas. The immigration-related sanction expands on the State Department’s March 2019 [policy](#) “of U.S. visa restrictions on those individuals directly responsible for any ICC investigation of U.S. personnel,” which was used to [revoke](#) the ICC Prosecutor’s U.S. visa. For more information about the contents of the executive order, see this [CRS Insight](#).

## Legal Basis for Investigations

The Office of the Prosecutor for the ICC may open an investigation in [three circumstances](#). First, the Prosecutor may begin an investigation if the United Nations (U.N.) Security Council refers a matter to the Prosecutor in accordance with [Chapter VII](#) of the U.N. Charter. Chapter VII of the charter permits the Security Council to take actions to address acts of aggression or threats to the international peace, as with the situations in [Darfur, Sudan](#) and [Libya](#). Second, any signatory to the [Rome Statute](#) may refer a matter to the Prosecutor, as with the situation in [Venezuela](#). Third, the Prosecutor may seek to open a preliminary investigation on her own initiative, as with [Afghanistan](#). In this third case, however, the Prosecutor must obtain approval for an investigation from the ICC’s Pre-Trial Chamber, the ICC [division](#) that handles the judicial aspects of a case before trial (e.g., issuing arrest warrants, deciding whether there is sufficiency of evidence to go to trial).

In all of these circumstances, an investigation may proceed only if the Prosecutor determines that the conduct qualifies as one of “the most serious crimes of concern to the international community as a whole,” which the Rome Statute [identifies](#) as (1) genocide; (2) crimes against humanity; (3) war crimes; and (4) the crime of aggression.

Additionally, the Prosecutor must possess a reasonable factual basis for concluding that ICC will have jurisdiction over the individuals alleged to have committed crimes listed in the Rome Statute. The ICC may obtain jurisdiction over individuals in several ways. The most straightforward case is when a country [ratifies](#) the Rome Statute, thereby consenting to ICC jurisdiction over the country’s nationals and acts occurring in that country’s territory. The ICC may also assert jurisdiction over individuals of a country not party to the Rome Statute in [limited circumstances](#). First, a nonparty country may agree to ICC jurisdiction for a specific inquiry or crime (i.e., on a case-by-case basis). Second, in some cases, the ICC may assert jurisdiction over individuals of a country not a party to the Rome Statute if the conduct occurred in the territory of a country or was carried out by a national of a country that is a party or has otherwise consented to ICC jurisdiction.

Even if the ICC has jurisdiction, the court may ultimately find an investigation [inadmissible](#) (i.e., the ICC may not hear and adjudicate a case) for several other reasons. First, the ICC may not conduct a trial if the alleged conduct has been “investigated or prosecuted by a State which has jurisdiction over it.” This does not apply, however, if (1) the country was “unwilling or unable to genuinely” carry out these functions or (2) a decision not to prosecute “resulted from the unwillingness or inability of the State genuinely to prosecute.” Additionally, an investigation may not proceed if the person whose conduct is at issue has been tried in another court or if the case is not of “sufficient gravity to justify further action.”

## Is the Investigation of U.S. Personnel Legal?

The United States and ICC Prosecutor disagree as to whether the request to investigate the actions of U.S. personnel during the Afghanistan conflict is legal under the Rome Statute. First, the United States maintains that any investigation is illegal because the United States is not a party to the Rome Statute and [has not consented](#) to the ICC's jurisdiction. By contrast, the Prosecutor has argued that the Office may open an investigation because Afghanistan, and the three other countries where certain crimes allegedly took place, are all parties to the Rome Statute, and the conduct at issue occurred within their territories. Thus, the Prosecutor contends, the conduct falls into one of the limited circumstances when the ICC may exercise jurisdiction over individuals who are nationals of a nonparty. Assuming that the Prosecutor eventually identifies any U.S. individual as a suspect during the investigation and seeks to arrest or summon such individual, that person could seek to [challenge](#) the ICC's jurisdiction.

Second, the United States [argues](#) that the United States investigated the conduct at issue, thus precluding the Prosecutor from a separate investigation. The Prosecutor disagrees, [contending](#) that the United States' investigations did not cover "those who appear most responsible for the crimes allegedly committed." The Appeals Chamber [held](#) that the Prosecutor need not present definitive findings on this issue when seeking authorization for an investigation. This may suggest that if the Prosecutor concludes there is sufficient evidence to prosecute any U.S. personnel, an individual may reassert the argument that the case is inadmissible because of the prior U.S. investigation.

## Can the United States Stop an Investigation?

It is unclear whether the United States can eventually stop the ICC Prosecutor's investigation. As discussed above, two legal questions remain open for further argument as the investigation continues: (1) whether the ICC may assert jurisdiction over U.S. personnel and (2) whether a prosecution is ultimately inadmissible due to prior U.S. investigations. While these questions remain undecided, the Prosecutor's investigation may continue. In the context of this legal uncertainty, the executive order authorizing sanctions against individuals involved in the investigation and the 2019 visa restriction policy may be viewed as a way to [deter](#) the investigation.

Assuming that the United States cannot halt an investigation, it may seek to prevent arrests or prosecutions of U.S. personnel through several means. First, the United States and Afghanistan signed an [agreement](#) in 2002 prohibiting the transfer of U.S. personnel to the ICC without the United States' consent. This agreement, [one of many](#) the United States has entered into with various countries, reflects the U.S. position that [Article 98](#) of the Rome Statute permits such mutual arrangements (known as "Article 98 Agreements") to avoid ICC custody. Article 98 prohibits the ICC from requiring a country to surrender an individual if doing so would be inconsistent with that country's obligations under an international agreement. However, the U.S. interpretation [diverges](#) from that of some other countries, which take a narrower view of Article 98. In particular, some nations contend that Article 98 applies only to agreements predating the Rome Statute that might conflict with ICC jurisdiction and to a limited set of new agreements, such as Status of Forces Agreements (SOFAs). SOFAs set out, among other things, when a country's forces are subject to the domestic laws of the country in which they are stationed. Whether the ICC would recognize the U.S.-Afghanistan arrangement is unclear, as it has never ruled on the validity of these arrangements. If the ICC upholds the U.S. interpretation and validity of the bilateral agreement, then U.S. personnel in Afghanistan (or in any other country with which the United States has a similar bilateral agreement) could avoid prosecution. If the ICC rejects the U.S. interpretation, the ICC could conclude that Afghanistan is obligated to surrender U.S. personnel. Whether Afghanistan does so, or the United States attempts to prevent this, may ultimately turn on political rather than legal considerations.

The United States may also seek to rely on Article 98 in a different way. Specifically, it may invoke a [set of SOFAs](#) between the United States, the International Security Assistance Force (ISAF), the North Atlantic Treaty Organization, and Afghanistan to prevent prosecutions. These SOFAs apply to different periods of the conflict in Afghanistan and cover different groups of personnel. Thus, which, if any, SOFA might apply to any named U.S. individual is uncertain. For instance, the [ISAF-Afghanistan SOFA](#) applies to U.S. military personnel who are part of ISAF, the U.N.-authorized mission in Afghanistan, but not those who were part of the U.S. coalition forces operating under a separate command structure and potentially not to U.S. intelligence personnel.

The United States may also attempt to rely on domestic law to hinder ICC prosecutions. U.S. law [permits](#) the President to “use all means necessary and appropriate to bring about the release of” U.S. military personnel and others working on behalf of the U.S. Government, among others, that the ICC detains. Domestic law also [prohibits](#) the use of federal funds to extradite U.S. citizens to other countries that must surrender these U.S. citizens to the ICC, unless those countries guarantee they will not surrender any U.S. citizen to the court. While these mechanisms may not legally prevent prosecution, if applied, they may render it impractical to pursue.

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