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The ICC's brave first step towards global justice – Release of the Annual Report on Preliminary Examinations 2014

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Fokus

The first potential ICC trial concerning a Western Superpower has come significantly closer with this year's annual Report on Preliminary Examination where the ICC announced further investigations of potential U.S. war crimes conducted in Afghanistan.

Sources:

Report on Preliminary Examination Activities 2014
<http://www.icc-cpi.int/iccdocs/otp/OTP-Pre-Exam-2014.pdf>

"The War Over U.S. War Crimes in Afghanistan Is Heating Up" by David Bosco, Foreign Policy
<http://foreignpolicy.com/2014/12/03/the-war-over-u-s-war-crimes-in-afghanistan-is-heating-up-icc-hague/>

On December 2nd, 2014 the ICC's Office of the Prosecutor under the lead of Fatou Bensouda released its annual Report on Preliminary Examinations. This year's report constitutes a landmark in the Court's rather reluctant approach towards political powder kegs. For the first time the judicial body takes the risk of confronting and thereby disgruntling a major "Western power" with alleged war crimes. The ICC currently focuses on the U.S.-American detention practice and possible use of torture in Afghanistan between February 2003 and June 2004. Not only is this step long overdue and crucial in order to establish a fair and equitable criminal jurisprudence but it once again provokes an international discussion about the Court's jurisdiction. For the sake of determining whether a situation meets the legal criteria to warrant investigations by the Criminal Court, the Office of the Prosecutor examines all situations that come to its attention potentially qualifying as international core crimes under Art. 7 and 8 Rome Statute. This preliminary examination includes various phases in which the prosecutor considers both the Court's jurisdiction and matters of admissibility. Lastly, it identifies the interests of justice. The U.S.-American torture claims were qualified as "Situations under phase 3 (Admissibility)". The United States until today neither ratified the Rome Statute nor accepted the ICC's jurisdiction and therefore remain a non-party to the Court. This precludes the ICC's personal jurisdiction over the alleged war crimes conducted by U.S. forces. However, a strategic move by the Afghan Government in 2003 opened the back door to its territorial jurisdiction. It probably was not coincidental that Afghanistan signed and ratified the Rome Statute within a year after its entry into force in 2002. In doing so, the state made sure that the criminal judges in The Hague had jurisdiction over the crimes conducted on its territory regardless of the troops' nationality. The U.S.-American Point Person on Global Justice, Stephen Rapp, clearly expressed his unhappiness with The Hague's exhaustion of, in this case not merely procedural rights when stating: "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". International Public Law is traditionally governed by consent. The USA is a strong supporter of this principle because it creates the freedom of shaping one's own rules and thus escaping international responsibility. However, even one of the biggest military players in the world cannot control the discretion of an independent international Court. The ICC's territorial jurisdiction therefore opens the loophole for prosecution of non-member state actors. The Prosecutor's Office will now continue to "analyze allegations of crimes committed in Afghanistan" and determine if it will open an investigation of the situation. Interestingly enough, the Court's newly discovered courage to confront military powers with their history of armed conflicts, which has also led to further investigations of the Russo-Georgian-war in 2008. Until now, the issue of complementarity seemed to preclude this case's admissibility. Russia for years claimed to conduct own investigations relating to the conflict. The ICC however, became impatient when even after six years no significant progress to this end had been made. The Court specifically noted that the crimes attributed to South Ossetian forces fell outside of the Russian investigation. A decision on the question of whether the ICC seeks authorization from the Pre-trial Chamber to open investigation is to be expected in the near future. The next year will show whether the Criminal Court will finally live up to its own original mandate: prosecuting international crimes regardless of the perpetrator's political weight.

Verantwortung

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