

Preliminary Examination in Afghanistan

Written for AMICC by Rebecca Leaf on June 10th, 2015

The Background

Largely in response to the 9/11 terrorist attacks, an international coalition led by the United States launched attacks on Afghanistan suspecting the then-government of harboring those responsible for the attacks. The former Afghan government, the Taliban, was consequently ousted. Since 2001, there has been an ongoing struggle between a number of forces within Afghanistan even after a new transitional government gained sovereignty in 2002. These forces include anti-government forces (the ousted Taliban, Haqqani network and Hezboe-Islami Gudbuddin), and pro-government forces (NATO forces, with a sizable number of US troops). Over the course of the past 14 years, there have been reports of acts that may be deemed war crimes or crimes against humanity as defined under the Rome Statute, allegedly carried out by several forces involved in the conflict.

Afghanistan ratified the Rome Statute in 2003. Thus, crimes committed after this time by or done unto Afghan nationals that are of the nature of the crimes listed in Article 5 of the Rome Statute fall under the jurisdiction of the International Criminal Court. The ICC launched a preliminary examination of the current conflict in 2007. This involves seeking and analyzing information on the actions of all sides involved in this situation.

Talking Points

1. Actions of the prosecutor
2. Possibility of prosecuting against members of the Taliban and other anti-government Forces
3. Possibility of prosecuting against members of pro-government Forces
4. Possibility of prosecuting against United States officials
5. Effect that charges would have on the United States

1. Actions of the Prosecutor

The Office of the Prosecution (OTP) of the International Criminal Court has been investigating possible crimes committed in Afghanistan since its ratification onwards, beginning in 2007. In the OTP's 2014 report, the Office stated that they believe that the information available at the time of the report's publication includes sufficient evidence that crimes under articles 7 and 8 of the Statute (crimes against humanity and war crimes, respectively) have been committed in the situation in Afghanistan. The Prosecution believes that they have found sufficient evidence that of the following crimes:

- 7(1)(a) – widespread systematic murder
- 7(1)(e) – widespread systematic imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law

- 8(2)(c)(i) – Article 3 of Geneva Conventions of 12 August 1949: violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment and torture
- 8(2)(c)(ii) – committing outrages upon person dignity in particular humiliating and degrading treatment
- 8(2)(c)(iv) – the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable
- 8(2)(e)(i) – intentionally attacks against the civilian population as such or against individual civilians not taking direct part in hostilities
- 8(2)(e)(iii) – intentionally directing attacks against personnel, installations, material units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the charter of the united nations as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict
- 8(2)(e)(iv) – intentionally directing attacks against buildings dedicated to religio, education art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives

Crimes such as abduction, other forms of ill-treatment, the use of human shields, the imposition of punishments by parallel judicial structures and the recruitment and use of children to participate actively in hostilities, are still being investigated on both the anti- and pro-government sides.

2. The Possibility of Prosecuting against Members of the Taliban and other Anti-Government Forces

The International Criminal Court has been investigating possible crimes committed over the course of this situation and has continued to do so through 2015. The Taliban and other anti-government forces have drawn a great deal of attention to their crimes and the intentions behind them. The Taliban Code of Conduct (Layha) establishes that its leadership promotes the killing of specific individuals including former police and military personnel, private security contractors, construction workers, interpreters, truck drivers, UN personnel, NGO employees, journalists, doctors, health workers, teachers, students, tribal and religious elders, members of parliament, governors and mullahs, district governors, provincial council members, government employees at al levels, and individuals who joined the Afghanistan Peace and Reintegration Program and their relatives.

In publicly announcing their involvement in these acts, the Taliban and other anti-government forces take responsibility for a number of crimes under the Rome Statute. These include article 7(1)(a), murder as a crime against humanity, and 8(2)(c)(iv), intentionally directing attacks against the civilian population or against civilians under article 8(2)(e)(i). The specific targets of the crimes also make it possible for the Taliban to be charged under article 8(2)(e)(iii) for intentionally targeting UN personnel, NGO

employees and health workers. That they took responsibility for the targeting of students, teachers and places of education (specifically schools for educating girls) also indicates their guilt under article 8(2)(b)(ix). Also, as the UN Special Representative for Children and Armed Conflict and UNAMA have reported more than 200 incidents of child recruitment by anti-government armed groups in the period from 2010 to 2013, the Office is continuing to assess whether anti-government forces can also be charged under article 8(2)(b)(xxvi). Several other war crimes on their part are still under investigation. This does not rule out the possibility that forces on the other side of the conflict may be charged.

3. The Possibility of Prosecuting against Members of the Pro-Government Forces

Afghanistan's principal intelligence agency, the National Directorate for Security, the Afghan National Police, the Afghan Local Police and the Afghan National Army, may be responsible for a number of alleged incidents in which prisoners were tortured or ill-treated, which is defined as a war crime under the Rome Statute. These abuses include brutal beatings, suspension by the wrists or ankles, electric shocks, twisting and wrenching of the genitals, stress positions and burning with cigarettes. For this reason, they may be charged under article 8(2)(c)(ii).

Other crimes with which pro-government forces may be charged include intentionally directing attacks against the civilian population as such, or against individual civilians not taking direct part in hostilities article 8(2)(e)(i). This was allegedly committed during government air strikes in which civilians were killed, but the primary targets were combatants. The Office may not be able to pursue these charges as the Rome Statute does not have a provision for the war crime of intentionally launching a disproportionate attack in the context of a non-international armed conflict. As these attacks were by Afghan forces on anti-government Afghan forces, the government will likely not be charged under article 8 (2)(e)(i).

The Afghan government has also been accused of recruiting children to be active in the conflict, but the Office has not been able to verify these claims.

4. The Possibility of Prosecuting against United States officials

In the most recent report on the ICC's preliminary examination activities, the ICC took note of the "enhanced interrogation methods" that were apparently utilized by US armed forces in Afghanistan in the period 2003-2008, described in the US Senate Armed Services Committee's inquiry. In the most recent report, it was stated that the information regarding possible crimes committed by US forces were still being assessed. The methods of enhanced interrogation described in the report include food deprivation, deprivation of clothing, environmental manipulation, sleep adjustment, use of individual fears, use of stress positions, sensory deprivation and sensory overstimulation. The investigatory report of the ICC goes on to say that whether this qualifies as torture as defined in the Geneva Convention on which Article 8 of the Rome Statute is based, depends on the duration and severity of these methods. In order for the US to be brought up on charges for use of these methods, several issues would have to be addressed:

- *Isolated Cases of Systematic Activities:*

Under Article 8, the Court has jurisdiction when war crimes are committed as part of a plan or policy. Documents such as the Senate Intelligence Committee report on the tactics utilized in a CIA run program that lasted for at least eight years indicate that the methods that have sparked international outrage were done with the approval of senior C.I.A. officials. This means that these acts that many would label torture were not isolated incidents but part of a policy. As such, these acts may arguably fall under the jurisdiction of the International Criminal Court.

- *Complementarity:*

Under Article 17(1)(a) of the Rome Statute, a case is inadmissible if it is already “being investigated or prosecuted by a State which has jurisdiction over it.”

Many would argue that this does not apply to the argument of whether or not US forces may be charged in the ICC for their actions against Afghan nationals. Others would argue that the US courts have tried at least one individual for carrying out methods that may be seen as torture, suggesting that the ICC would not have jurisdiction in the matter.

The latter group might cite the conviction of former independent contractor for the C.I.A., David A. Passaro, and the court martialing of a few dozen members of the military. Considering that these individuals were deemed responsible for isolated incidences of cruelty towards Afghan prisoners, an argument could be made that the United States has not genuinely carried out an investigation of systematic cruelty. If we accept that a series of acts defined as illegal under the Geneva Convention occurred due to a policy approved by senior military and CIA forces, then those most responsible for these acts have not yet been held responsible. The ICC could use this argument to move forward with the case.

5. Effect that Charges would have on the United States

As the Court does not have its own method of enforcing their orders, it is reliant on the cooperation of other countries to execute court orders and warrants. The arrest of senior military and CIA officials seems highly unlikely considering the current political climate within the United States.