

The ICC and Afghanistan: Brief of the OTP Request for Investigation

Brief Overview of the Office of the Prosecutor's Request to Pre-Trial Chamber III for Approval of a Formal Investigation into the Situation in Afghanistan

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SUMMARY

On November 20, 2017, The Prosecutor of the International Criminal Court (ICC), Fatou Bensouda, submitted a Request for authorization from Pre-Trial Chamber III to begin a formal investigation into the situation in the Islamic Republic of Afghanistan. Her team had completed the preliminary examination into the situation. The Prosecutor said she had found a "reasonable basis" to believe that crimes under ICC jurisdiction had been committed by individuals within three distinct parties in the situation, including:

1. crimes against humanity and/or war crimes by the Taliban, Haqqani Network, and affiliated armed groups;
2. war crimes by members of the Afghan National Security Forces (ANSF), particularly members of the National Directorate for Security (NDS) and the Afghan National Police (ANP);
3. and war crimes by members of United States of America (US) armed forces in Afghanistan and members of the Central Intelligence Agency (CIA) in "black site" detention facilities in Afghanistan and on other State Parties' territories, specifically in Poland, Romania and Lithuania.

The Prosecutor also examined the large number of civilian casualties and detainee transfers alleged to have been made by members of the International Security Assistance Force (ISAF). The Request stated that she did not believe thus far that there is a reasonable basis for prosecutions of these individuals, but the Pre-Trial Chamber requested further information about this. Based on the respective states' Rome Statute ratification dates, the ICC has jurisdiction over crimes related to the Afghanistan situation in Poland and Romania since July 1, 2002, in Afghanistan since May 1, 2003, and in Lithuania since August 1, 2003. The Prosecutor asserts that the specified charges and incidents presented in the Request meet both the ICC's threshold for gravity (severity) of the crimes and also complementarity, due to a lack of relevant national proceedings against individuals viewed as most responsible for the gravest crimes. These senior individuals with the most command and control over specific plans or policies that bring about such crimes are the focus of ICC investigations and trials.

The central investigative sources identifiable through the redacted public Request are: witnesses; victims/survivors; reports from the United Nations, NGOs, think tanks, and university institutes; precedents from other legal cases; and public documents from respective governments and organizational structures (e.g. December 2014 US Senate Select Committee on Intelligence Report on the Central Intelligence Agency's Detention and Interrogation Program, US Department of Justice reports and memoranda, US Department of Defense "Church report," US Senate Armed Services Committee report, the Taliban's *Layha* and *fatwas*). The full lists of identified people or groups of interest and over 200 incidents of greatest concern are withheld in confidential annexes.

CHARGES

The Request clarifies the status of this situation as a non-international armed conflict as of June 2002 when the Afghan Transitional Administration was fully established. This satisfies the ICC's requirements for war crimes claims. Specifically, the list of charges stated against the Taliban, Haqqani Network, and affiliated armed groups includes:

Crimes against humanity: murder, imprisonment or other severe deprivation of physical liberty, and persecution against an identifiable group or collectivity on political grounds and on gender grounds;

War crimes: murder, intentionally directing attacks against the civilian population, intentionally directing attacks against humanitarian personnel, intentionally directing attacks against protected objects, conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities, and killing or wounding treacherously a combatant adversary.

The list of charges stated against the members of the Afghan National Security Forces includes:

War crimes: torture and cruel treatment; outrages upon personal dignity; and sexual violence.

The list of charges stated against the members of US armed forces and members of the CIA includes:

War crimes: torture and cruel treatment, outrages upon personal dignity, and rape and other forms of sexual violence.

The Request notes that the threshold of gravity (seriousness) of crimes can be from single acts or sustained conduct. Some acts above reach it independently and others reach it through sustained action or in combination with other acts. The Request also indicates that personnel, contractors, and other individuals under the effective authority and control of the US armed forces and CIA are included for consideration within these respective departments. If the investigation is approved, the charges and specified incidents within the Request are not deemed exhaustive and are therefore subject to change and elaboration upon attaining further resources for evidence-gathering through a formalized process. Specifically, the Request states that any armed group affiliation with Al Qaeda would be further investigated in an authorized investigation.

JURISDICTION

The Rome Statute states that the ICC has jurisdiction over crimes committed either within the territory of a state party or by nationals of a state party. Afghanistan is a State Party, so the ICC has jurisdiction over crimes committed on its state territory since May 1, 2003 that are within the ICC's purview of gravity and complementarity. The CIA is accused of detaining alleged participants in or individuals with ties to armed groups involved in the conflict in Afghanistan and therein transferring the detainees from Afghanistan to sites in Eastern Europe. The crimes in question at CIA black sites in Poland, Romania, and Lithuania are within ICC jurisdiction because the activities took place within the territories of these three State Parties. This jurisdictional framework also prevents the ICC from investigating treatment of any Afghanistan-related detainees in Guantanamo Bay, Cuba, because neither Cuba nor the United States is a State Party to the ICC.

POTENTIAL NEXT STEPS

The Prosecutor's examination at this stage was undoubtedly thorough, resulting in a 181-page report. Nonetheless, preliminary examinations are constricted by her capacity to verify claims, the security challenges of travel in Afghanistan, and the limited information available at this stage (from public sources and through correspondence with various parties). In the Pre-Trial Chamber's deliberation thus far, it requested both victims' views and participation through January 31st and further information from the Prosecutor to fill information gaps in the Request and to provide supplemental resources.

If the Pre-Trial Chamber approves the Prosecutor's Request, this will show that the Chamber agrees that there is a reasonable basis to believe that the crimes have been committed. Moreover, it will allow the Prosecutor to initiate a formal investigation with broader evidence gathering, as well as further witness, victim/survivor, and stakeholder engagement. If the Pre-Trial Chamber thereafter approves a request by the Prosecutor for an arrest warrant for any individual implicated in the above crimes, the Rome Statute compels State Parties to arrest any of the designated individuals regardless of their nationality and transfer custody to The Hague if he or she should enter State Party territory.

For a more detailed summary of the Request, please reference AMICC's corresponding Overview.

ADDITIONAL ANTICIPATED QUESTIONS AND RESPONSES

How does the Court apply complementarity, and how might the US use it to transfer any Americans against whom crimes are alleged from ICC jurisdiction to US domestic jurisdiction?

The ICC assesses complementarity based on 1) whether there are ongoing national-level cases regarding the individuals and crimes of interest and 2) if the state is “unwilling or unable” to handle such cases, including investigations and prosecutions. If any state makes a complementarity argument to maintain or transfer a case to a domestic judiciary, ICC judges must be convinced that giving up jurisdiction involves a good faith decision that the national judiciary will have the capacity and aim to fully and fairly handle the necessary cases in the best interest of justice. Based on public record, there have only been a limited number of prosecutions from American courts in response to domestic investigations and trials. More critically for an ICC prosecution, there appears to be no US criminal investigation or charges against the most senior level leadership responsible for the conduct/crimes in question. This lack of domestic judicial action may call into question an American argument for complementarity. However, at the same time, American politicians are very likely to separately not approve of foreign judges pronouncing on the quality of the US legal system.

Why can Americans be tried through foreign judicial processes, rather than the jury of peers standard?

Individuals of any nationality are subject to the jurisdiction of the criminal justice system of the state in which they commit a crime. Thus, Americans who commit crimes abroad are subject to the legal processes of foreign governments. The only exceptions to this include individuals with diplomatic status and service members under status of forces agreements. While status of forces agreements reserve a state’s right to criminal jurisdiction over its accused military personnel for conduct in the other state in question, the ICC’s jurisdiction does not change in regard to alleged grave crimes within the relevant territory. In such cases, if the sending state is a non-State Party, the ICC must coordinate with it for compliance with the Court’s jurisdiction.

The Rome Statute establishes the ICC as a court of last resort to take cases countries do not want to or cannot deal with themselves or to better handle the gravest crimes. Therefore, the transfer of cases to the ICC is not seen as governments delegating cases to an alternative jurisdiction, but rather as passing cases to an additional part of their national judicial structures. To assist and demonstrate this, many states adopt the Rome Statute into domestic legislation upon ratification. This means that domestic processes use the definitions of crimes in the Rome Statute for consistency, not by shifting domestic legal definitions or interpretations. Additionally, the Rome Statute bars the ICC from recognizing domestic amnesties due to the gravity of the crimes.

ICC chambers operate with panels of three judges for the Pre-Trial and Trial chambers respectively. Creators of the Rome Statute considered that the level of gravity of cases under ICC jurisdiction and its international scope would make a fair trial by a jury of peers infeasible. The Rome Statute accordingly established the alternative of judge panels with varied nationality and set term limits.

How does the ICC approach chain of command questions?

The Request delineates specific instances of senior level decision-making or memos on policy determinations and thereafter examines when the circumstances in a crime of interest involve action based on senior-level policy proscriptions or are the result of localized supervisory alterations of policies. The Request also assesses command structures of each relevant entity based on organizational hierarchy, policy approval procedures, and operational manuals.