

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

Summary 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 three distinct parties in the situation, including:

1. crimes against humanity and/or war crimes by the Taliban, Haqqani Network (HQN), 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 scale 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. 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 charged crimes and complementarity. Complementarity—deference to national legal systems—did not apply because of a lack of relevant national proceedings against individuals viewed as most responsible for the gravest crimes.

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. From November 2017 through January 2018, Afghans who say they were victims submitted close to seven hundred statements of representation to the Office of the Prosecutor as a part of the process for including victims in the investigative process and to consider victims' opinions on the case's viability for procuring justice.¹ Each statement can be one individual, someone representing multiple victims, a community leader on behalf of a larger community

¹ Registry. "ICC-02/17-29-AnxI-Red, Annex I-Red to the Final Consolidated Registry Report on Victims' Representations Pursuant to the Pre-Trial Chamber's Order ICC-02/17-6 of 9 November 2017." International Criminal Court, February 20, 2018, 9. https://www.icc-cpi.int/RelatedRecords/CR2018_01452.PDF.

or village, or a civil society group on behalf of numerous victims, so these statements could represent millions of Afghans.

JURISDICTION

The Rome Statute states that the ICC has jurisdiction over crimes committed either within the territory of a State Party by nationals of any country 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. The CIA is accused of detaining alleged participants in or individuals with ties to armed groups involved in the conflict in Afghanistan and then 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 are State Parties to the ICC.

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, which satisfies the parameter for war crimes claims. Specifically, the list of charges stated in the Request 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 currently 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 in the Request 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 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 categories. If the investigation is approved, the charges and specified incidents within the Request can be subject to change and elaboration upon further 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.

CRIMES AND COMMAND CONTROL

Armed Groups:

The United Nations Assistance Mission in Afghanistan (UNAMA) reported that the Taliban and other armed groups are responsible for over 17,000 civilian deaths since 2009, including almost 7,000 deliberate killings of civilians. Both the Taliban and HQN have often committed violent acts of terrorism using IEDs, suicide bombings, etc. These groups' tactics and intentions are clear from their publicly declared policies of attacking civilians through the *Layha* (Taliban military code of conduct), *fatwas*, public statements of responsibility, and lists of civilian targets. UNAMA also distinguished that many of

the locations targeted by suicide bombings were civilian areas with no apparent military purpose; these included markets, civilian government offices, hospitals, or mosques. The Prosecutor adds a critical caveat to this classification: “Although the Taliban leadership has instructed their fighters to avoid ‘civilian’ casualties, the Taliban’s definition of ‘civilian’ is considerably narrower than, and therefore at odds with, the definition under international humanitarian law. The Taliban definition of ‘civilian’, as evinced from a number of their statements, appears to refer generally to the category ‘common people’ and members of the civilian population understood by the Taliban to be innocent bystanders and therefore not to be targeted.”² Taliban targets have included, however, some teachers instructing ideas divergent to their religious beliefs, laborers building bases, translators, and civilians who voted in elections, so they define civilians as bystanders who do not contribute to or cooperate with any party that opposes them. Contrarily, the definition of civilian under customary international law is all individuals who are not members of armed forces in international armed conflict, and the definition has expanded to more ambiguously refer to civilians not in armed forces or militant groups when in non-international armed conflict. The Taliban and HQN have a clear alliance relationship through their leadership, policies, and operations; however, the Taliban and Al Qaeda’s respective goals have diverged in scope over the past fifteen years, so their tactical coordination will be evaluated on a case-by-case basis if an investigation proceeds.

Afghan National Security Forces:

The Afghanistan Independent Human Rights Commission (AIHRC), UNAMA, and President Karzai’s 2013 investigative commission have all reported torture at detention facilities of the Afghan government. The Request also states a reasonable basis to believe the commission of sexual violence crimes by ANSF, NDS, and ANP. This violence is deemed widespread, although it is not clear whether it would constitute a pervasive policy. The ANA falls under the Ministry of Defense, and the ANP is under the control of the Ministry of the Interior. President Karzai established the Afghan Local Police (ALP) in 2010 as an armed group under government control, reporting to district chiefs of police. The NDS is Afghanistan’s intelligence body.

While the Afghan Parliament passed an amnesty law in 2007 for crimes committed during the conflict, this amnesty does not apply to ICC cases due to protocols in the Rome Statute. The Afghan government has more recently revised its Criminal Procedure Code and Penal Code to better incorporate Rome Statute crimes and to limit the applicability of such domestic exemptions.

US Armed Forces and the CIA:

The Request identifies reasonable basis for crimes against at least 54 detainees by members of the US armed forces in Afghanistan and for crimes against at least 24 detainees by members of the CIA in Afghanistan, Poland, Romania, and Lithuania, predominantly between 2003-2004. These individual cases were chosen from a broader pool of reported victims. The Request notes that the threshold for severity can be from single acts or sustained conduct. Some acts indicated reach this bar independently and others reach the requisite scale through sustained action or in combination with other acts.

² Office of the Prosecutor. “Public redacted version of ‘Request for authorisation of an investigation pursuant to article 15’, 20 November 2017, ICC-02/17-7-Conf-Exp.” International Criminal Court, November 20, 2017, 49-50. https://www.icc-cpi.int/CourtRecords/CR2017_06891.PDF. [Hereafter, Office of the Prosecutor. “Request.” ICC.]

To be clear for a largely American audience, some of the torture methods used by Americans against detainees are detailed below for clarity:

- Prolonged solitary confinement;
- Sensory overstimulation, including by exposure to loud music or other noise;
- Manipulation of the environment/extreme temperatures;
- Manipulation of phobias and cultural, religious, and sexual taboos, including by use of dogs, nudity, “diapering”, sexual humiliation, or offensive use of items of religious significance;
- Use of “stress positions”;
- Suspension, such as from the ceiling with shackles;
- Sleep deprivation and/or manipulation;
- Food deprivation and/or manipulation;
- Degrees of physical assault, including blows or kicks, the “rough take down”, and threats of assault that could cause greater physical injury;
- Close confinement to restrict physical movement, for example by placing detainees in boxes;
- sexual violence, including by “rectal rehydration” or “rectal feeding” applied with excessive force; and
- “Waterboarding” to simulate drowning (pouring water over a cloth covering the mouth and nose of a restrained person).

Some of the above examples of tactics were particularly used to exploit cultural taboos to humiliate, such as actions toward religious items, nudity, and the use of dogs. The Request quoted the Report of the Senate Select Committee on Intelligence about the consequences for torture victims, such as behavioral and psychological symptoms, including “visions, paranoia, insomnia,” and attempted self-harm.³

Specific tactics were created to extract actionable intelligence. The Request describes review and authorization methods within the US armed forces, DOD, CIA, and other branches of government for various torture techniques. The Request quotes the Report of the US Senate Committee on Armed Services that “[the] abuse of detainees in U.S. custody cannot simply be attributed to the actions of ‘a few bad apples’ acting on their own. The fact is that senior officials in the United States government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees.”⁴

Crimes by the US Armed Forces:

The Request notes that such interrogation techniques violated the US Army Field Manual 34-52 on intelligence interrogation. Furthermore, President Bush issued an executive directive in February 2002 that authorized a unilateral indemnification of the application of Geneva Conventions common Article 3 (regarding conduct in armed conflict and treatment of detainees), stating that this Article did not apply to Al Qaeda or Taliban detainees. While he said that they had to be treated “humanely” as in the article’s terminology, he declared that detainees did not have prisoner of war status. The authorizations for techniques varied over time, particularly after the deaths of two detainees at Bagram Airbase. The

³ Office of the Prosecutor. “Request.” ICC, 96.

⁴ Office of the Prosecutor. “Request.” ICC, 106.

Congressional Detainee Treatment Act in December 2005 created further constraints. Both the Church Report in 2005 and Schlesinger Report in 2004 argued that DOD leadership did not propagate policies that enabled such conduct. However, the Prosecutor's Request states, "the available information shows that: (i) CJTF-180 Command approved an interrogation policy that included the use of the enhanced interrogation techniques described above; (ii) this interrogation policy was brought to the attention of DOD Working Group on Interrogations and to the Office of the Secretary of Defense (although it was neither formally approved nor rejected); (iii) there is a reasonable basis to believe that a number of conflict-related detainees in Afghanistan were in fact subjected to those techniques; and (iv) there is a reasonable basis to believe such conduct constitutes torture, cruel treatment, outrages upon personal dignity, rape and/or sexual violence."⁵

Crimes by the CIA:

Following September 11, 2001, limitations on the CIA were significantly eased. On September 17, 2001, President Bush expanded CIA counterterrorism authorities. This included authority to covertly capture and detain people who they connected to threats of violence or terrorism; however, the memo did not mention interrogations or coercive interrogation techniques. In 2002, two contract psychologists created enhanced interrogation methods from Survival, Evasion, Resistance, and Escape (SERE) training, and the CIA presented 12 techniques to US National Security Council attorneys and to the Office of Legal Council (OLC) for the Department of Justice (DOJ) opinion and formal guidance. The OLC offered a narrow interpretation of the prohibition on torture in US law to enable greater flexibility around proposed interrogation techniques, including approval of ten of the techniques. The Prosecutor's Request states, "The CIA Director formally designated the [Counter-Terrorism Center (CTC)] Renditions Group as the responsible entity for the management and maintenance of all CIA interrogation facilities in early December 2002."⁶ The Report of the Senate Select Committee on Intelligence noted later that through subsequent iterations of proposed techniques and approvals, the CIA provided inaccurate information to the DOJ. This Senate Committee Report also elaborated that the CIA "'actively avoided or impeded congressional oversight of the program', 'impeded effective White House oversight and decision-making', and 'impeded oversight by the CIA's Office of Inspector General'", in addition to leaking confidential information to the media with inaccurate information on effectiveness of interrogation tactics and ordering the destruction of videotapes documenting CIA interrogations.⁷ In 2003, guidelines included criteria for techniques that required approval from the Director of the Counter-Terrorism Centre at CIA headquarters, in addition to a broader approval for "standard techniques." In December 2005, the Congressional Detainee Treatment Act created further constraints on the CIA, as well. President Bush acknowledged the CIA program in September 2006 and further limited the authorized interrogation techniques. In January 2009 through Executive Order 13491, President Obama required that the CIA close its detention facilities and disallowed any interrogation techniques beyond those of the US Army Field Manual 2-22.3. The Prosecutor's Request describes that "compared to the localised approval of certain interrogation techniques within the US military command structure in Afghanistan, the CIA's use of the interrogation techniques described above was authorised as official policy. This occurred either pursuant to the parameters authorised by the DOJ or authorisation going beyond those parameters

⁵ Office of the Prosecutor. "Request." ICC, 110-111.

⁶ Office of the Prosecutor. "Request." ICC, 41.

⁷ Office of the Prosecutor. "Request." ICC, 151.

provided by the CIA Director or Director of CTC. In addition, the use of some techniques appears to have been approved by senior CIA staff on the ground.”⁸

COMPLEMENTARITY

Complementarity is the Court’s term for its obligation to defer to domestic legal systems of countries with jurisdiction over an accused person. 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.

The Rome Statute establishes the ICC as a court of last resort to take cases countries cannot or do not want to 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, due to the gravity of the crimes, the Rome Statute bars the ICC from recognizing domestic amnesties.

NATIONAL PROCEEDINGS

Armed Groups:

There have not been any prosecutions of members of armed groups identified in the Request as of interest in connection to crimes under ICC jurisdiction. The Afghan government’s national action plan adopted in 2005 to address transitional justice remains unimplemented so far and seems to be void. While this 2005 plan did not include amnesties, the 2007 general amnesty passed through Afghanistan’s parliament entered into force in 2009. However, domestic amnesties do not hold in ICC cases. Therefore, the Request determines that the specified cases (which remain classified) are admissible.

Afghan National Security Forces:

The Afghan government has only prosecuted a small number of low-level supervisors or perpetrators of torture against detainees. Following President Karzai’s investigation into torture in 2013, the Afghan Attorney General’s Office reportedly followed up on relevant cases and referred 55 cases for criminal investigation; however, all cases were dismissed and charges dropped. The Request elaborated on this: “According to the information provided by the Attorney General’s Office of Afghanistan to UNAMA, cases were dismissed inter alia on the basis that the victim had withdrawn the allegation, the victim could not be located, or there were no visible marks of torture on the victim.”⁹ Separately, a small number of individuals were convicted for crimes of torture in 2014-2015; however, much disciplinary action against implicated officials involved reassignments or suspensions. The Prosecutor assesses that there is a limited capacity for victims of torture to see accountability, particularly at senior levels, and therefore, she deems the crimes in question admissible.

⁸ Office of the Prosecutor. “Request.” ICC, 120.

⁹ Office of the Prosecutor. “Request.” ICC, 137.

US Armed Forces and the CIA:

The Request's analysis of relevant US national proceedings in the public document is more restricted to publicly available information, both due to a decision by the US authorities to not share some of the requested information with the Office of the Prosecutor and the redaction of confidential information in the public report. The public information pertaining to relevant US prosecutions illuminates that they seem limited to some perpetrators of detainee abuse but not against the individuals who developed, authorized, or oversaw the practices. In some cases, disciplinary or administrative action was taken against perpetrators, but the lack of transparency around the progression of relevant cases through the justice system or disciplinary proceedings poses a challenge to the Prosecutor's capacity to confirm US judicial action toward accountability.

On crimes by members of the US armed forces, the Prosecutor states that the information available does not demonstrate that the US judicial system adequately addresses the crimes in question, specifically relating to crimes against at least 54 victims specified in the Request. Regarding crimes by members of the CIA, the Request details: "the US DOJ has determined that it *will not prosecute any person who acted in good faith* within the scope of the legal guidance given by the OLC regarding the interrogation of detainees. In addition, only *limited inquiries appear to have been undertaken against persons who acted outside of the scope* of that guidance, including for the use of techniques that were not authorised by the OLC, or use of authorised techniques in ways that diverged from the specific authorisation given, or because enhanced interrogation techniques were applied by interrogators who had not been authorised to use them. Nor has the use of 'standard techniques' appeared to have undergone any investigative scrutiny."¹⁰ There were, however, criminal investigations around detainee treatment that resulted in detainee deaths and some private civil actions that resulted in dismissals or a settlement. In regard to criminal investigations regarding relevant crimes committed by members of the CIA in Eastern Europe, there are some ongoing criminal investigations in Poland, Romania, and Lithuania, so the Prosecutor will assess whether these cases sufficiently cover the same persons and conduct of concern as detailed in the Request, or whether further cases are needed in this area, if the ICC investigation progresses.

The Request also includes a note that, "the Appeals Chamber has indicated that a State challenging the admissibility of a case has the burden of proof to show that a case is inadmissible," making a clear statement to any opponents that the bar would be high for them to prove the case inadmissible.¹¹

POTENTIAL NEXT STEPS

The Prosecutor's examination at this stage was undoubtedly thorough, resulting in a 181-page report. Nonetheless, preliminary examinations are constrained 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. On December 5, 2017, the Pre-Trial Chamber requested that the

¹⁰ Office of the Prosecutor. "Request." ICC, 143-144. [italics added for specific emphasis]

¹¹ Office of the Prosecutor. "Request." ICC, 142.

Office of the Prosecutor provide additional information regarding media reports and communications about allegations against international troops' special forces, as well as clarification and additional information about the overall assessment of actions of concern by international military forces. The Prosecutor responded on December 12, 2017 with the requested information and clarification that there is no reasonable basis to believe that the international military forces committed crimes that fall under ICC jurisdiction. The Pre-Trial Chamber requested on February 5, 2018 that the Prosecutor provide some of the referenced reports and further information about the structures and policies of Afghan Forces, US forces, and Islamic State in time frames less detailed in the original Request. On February 9, 2018, the Prosecutor responded with supplemental information in confidential Annexes and pointing to US DOD manuals, while also clarifying that the intent of the Request was to prove a reasonable basis for investigation after which the investigation would accumulate the exhaustive list of relevant crimes and alleged perpetrators. She also offered a clarification on US forces' more recent conduct: "In light of the change in interrogation policies of US forces in 2006, the reduction in numbers of US forces after 2011, and the changed role of US (and other international) forces in Afghanistan at the beginning of 2015, the Prosecution considers the likelihood of detention related crimes by US forces after 2011 to be significantly lower than in the period prior to 2006."¹²

If the Pre-Trial Chamber approves the Prosecutor's Request, it will show that the Chamber agrees that there is a reasonable basis to believe that crimes occurred. It will also 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 ICC crimes, the Rome Statute obliges State Parties to arrest any of the designated individuals and transfer custody to the Hague if he or she should enter State Party territory regardless of the individual's nationality.

IMPLICATIONS

State Parties to the Rome Statute may face a confrontation with the US over arrest and transfer of any Americans for whom the ICC has an arrest warrant if he or she travels to the territory. Many State Parties have been particularly vocal about compliance with the Rome Statute and supporting the strength of the ICC as an arbiter of international justice; therefore, if such an arrest warrant is issued, it is possible that an individual who was a senior level DOD or CIA official during the period of interest and under an arrest warrant could be arrested if traveling in the territory of a State Party.

ADDITIONAL ANTICIPATED QUESTIONS AND RESPONSES

How might the US utilize complementarity to transfer any Americans against whom crimes are alleged from ICC jurisdiction to US domestic jurisdiction?

Based on public record, there have not been many prosecutions from American courts in response to domestic investigations and trials. More critically to an ICC investigation, there appears to be no 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 the legitimacy of an American argument for complementarity into question. Additionally, American politicians are very likely to not approve of foreign judges exercising judgment over the sanctity of the US legal system.

Why can Americans be tried through foreign judicial processes, especially when they do not operate with a jury of peers?

¹² Office of the Prosecutor. "Prosecution response to the Second Order to the Prosecutor to provide Additional Information." International Criminal Court, February 9, 2018, 5. https://www.icc-cpi.int/CourtRecords/CR2018_00959.PDF

Under international law and the Rome Statute, individuals of any nationality are subject to the jurisdiction of the criminal justice system of the state in which they commit a crime, so 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. Status of forces agreements reserve a state's right to criminal jurisdiction over its accused nationals for conduct in the other state in question; however, this does not change the ICC's jurisdiction about alleged grave crimes within the relevant territory. In such cases, the ICC must coordinate with the non-State Party for compliance with its jurisdiction.

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 panels of judges 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 surrounding a crime of interest involves action based on senior-level policy proscription or localized supervisory manipulation of policies. The Request also assesses command structures of each relevant entity based on organizational hierarchy, policy approval procedures, and operational manuals.