



FACTSHEET

Afghanistan and the International Criminal Court

Last updated 21 November 2017

A possible 12th ICC investigation

The situation in the Islamic Republic of Afghanistan has been the focus of a preliminary examination by the Office of the Prosecutor of the International Criminal Court (ICC) since 2007. The situation was assigned to an ICC Pre-Trial Chamber on 3 November 2017, following notification by the ICC Prosecutor of her decision to request authorization to open an investigation into Rome Statute (RS) crimes allegedly committed in relation to the armed conflict in Afghanistan.¹

On 20 November, the ICC Prosecutor filed her official request for the Pre-Trial Chamber to authorize an investigation into alleged war crimes and crimes against humanity committed since 1 May 2003 on the territory of Afghanistan, and since 1 July 2002 on the territories of other states parties to the RS in the context of the armed conflict in Afghanistan. According to the Court's Rules of Procedure and Evidence, the Court's Regulations, and past experience, a decision by judges on whether the request satisfies legal criteria under the Rome Statute could take between one and three months from the date of the official request.

According to the Prosecutor's request, there is a reasonable basis to believe war crimes and crimes against humanity were committed by the Taliban and its affiliated Haqqani Network, as well as war crimes by members of the Afghan National Security Forces, the United States (US) armed forces, and the US Central Intelligence Agency. The request argues that an ICC investigation would serve the interests of justice due to the gravity of the alleged crimes and the absence of relevant national criminal proceedings.

This factsheet provides an overview of the government of Afghanistan's legal relationship with the ICC, the scope of the specific situation under preliminary examination by the Office of the Prosecutor, and what the future may hold.

ICC Prosecutor requests investigation into the situation in Afghanistan

At the time of issuing its 2016 preliminary examination report (14 November 2016), the Office of the Prosecutor (OTP) stated that the preliminary examination was considered to be at the admissibility phase (*Phase 3*), following initial assessments (*Phase 1*) and a relevant

¹ https://www.icc-cpi.int/Pages/item.aspx?name=171103_OTP_Statement



FACTSHEET

subject-matter determination (*Phase 2*) by the ICC Office of the Prosecutor (OTP).² During the admissibility phase, the Prosecutor assesses whether potential cases are being genuinely investigated and prosecuted domestically, and whether they rise to the gravity threshold for prosecution before the ICC.

The preliminary examination report stated that a final decision on whether to request Pre-Trial Chamber authorization to begin an investigation into the situation in Afghanistan would be “imminent.” Almost exactly one year later, the OTP signaled it was prepared to make such a request.

In its 2016 preliminary examination report, the OTP already made a positive determination on admissibility, subject to further information received by relevant national authorities or any subsequent investigation. The Prosecutor’s decision to request a formal investigation into the situation in Afghanistan followed reports that information regarding domestic investigations and prosecutions had been submitted to the Court in March and April 2017³ and had failed to present reasonable grounds for a successful admissibility challenge by the Afghan government.

If authorized by judges, the OTP’s investigation will consider alleged war crimes and crimes against humanity committed by any party to the armed conflict since 1 May 2003 on the territory of Afghanistan, as well as alleged war crimes since 1 July 2002 that are closely linked to the situation and were committed on the territories of other States Parties to the Rome Statute.

Afghanistan, a Rome Statute State Party since 2003

The government of Afghanistan deposited its instrument of ratification of the RS, the founding treaty of the ICC, on 10 February 2003. The ICC can exercise jurisdiction over RS crimes committed on the territory of Afghanistan or by its nationals from 1 May 2003 onwards as the RS enters into force for a State on the first day of the month after the 60th day following the deposit of its instrument of ratification, acceptance, approval or accession with the United Nations Treaty Office.

The preliminary examination also covers alleged RS crimes committed on the territories of other States Parties – specifically Poland, Romania, and Lithuania – in the context of the armed conflict in Afghanistan. Poland and Romania became States Parties to the RS on 1 July 2002, and Lithuania on 1 August 2003.

2017 saw the government of Afghanistan adopt a new criminal code incorporating provisions on war crimes, crimes against humanity, genocide, and the crime of aggression—the four core international crimes within the subject-matter jurisdiction of the ICC. The new criminal code, which also includes provisions on command responsibility, recruitment of soldiers under 18 years of age, and torture, may prove crucial to Afghanistan’s ability to address Rome Statute crimes within the domestic jurisdiction.

The new Afghan criminal code is set to enter into force in February 2018.

² https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf

³ <https://www.afghanistan-analysts.org/investigating-post-2003-war-crimes-afghan-government-wants-one-more-year-from-the-icc/>



FACTSHEET

Several sides in a complex situation

In the wake of the 11 September 2001 attacks in the United States (US), the US government launched *Operation Enduring Freedom*, a joint US, United Kingdom (UK), and Afghan operation in Afghanistan against the Taliban, a Sunni Islamic fundamentalist movement suspected of harboring terrorist Osama Bin Laden.

Even after the Taliban were ousted from power at the end of 2001, hostilities continued between the then new transitional Afghan government, backed by international forces, and organized armed groups the Taliban, the Haqqani Network, and Hezb-e-Islami Gulbuddin (HIG).

According to some reports, over 31,000 Afghan civilians have been killed between the launch of *Operation Enduring Freedom* in 2001 and mid-2016, with at least a further 40,000 civilians injured.⁴

Based on communications received by the OTP, the ICC Prosecutor has stated reason to believe that crimes falling within the jurisdiction of the ICC were committed in the context of the non-international armed conflict (NIAC) taking place in Afghanistan. Specifically, *“crimes against humanity of murder, and imprisonment or other severe deprivation of physical liberty; and the war crimes of murder; cruel treatment; outrages upon personal dignity; the passing of sentences and carrying out of executions without proper judicial authority; intentional attacks against civilians, civilian objects and humanitarian assistance missions; and treacherously killing or wounding an enemy combatant.”*⁵

Alleged crimes have been attributed not only to the Taliban, their affiliate Haqqani Network, and Afghan government forces, but also to US military forces. Other states' armed forces have also been implicated in the conflict but do not appear among the groups identified in the OTP's preliminary examination reports.

In the case of criminal conduct by US and Afghan government forces, much of the preliminary examination appears to deal with grave abuses against conflict-related detainees—detained on the territories of (various) state parties—with the 2016 preliminary examination report specifically highlighting the war crimes of torture, cruel treatment, outrages upon personal dignity, and rape and other sexual violence alleged.

According to information received by the OTP, over 17,000 civilian deaths between January 2007 and December 2015 could be attributed to anti-government armed groups such as the Taliban. The report further highlights attacks by the Taliban and affiliated groups against protected objects, such as schools, hospitals, mosques, and humanitarian organizations.

⁴http://watson.brown.edu/costsofwar/files/cow/imce/papers/2016/War%20in%20Afghanistan%20and%20Pakistan%20UPDATE_FINAL_corrected%20date.pdf

⁵ <https://www.icc-cpi.int/afghanistan>



FACTSHEET

Examining conduct by non-states parties

While the US is not party to the RS, the fact that the alleged crimes took place within the territories of Afghanistan and other States Parties means that the Court is legally able to prosecute US nationals suspected of committing RS crimes within this context, following the jurisdictional provision established in article 12.a of the Statute.

Members of the US military and the US Central Intelligence Agency (CIA) are believed to have used interrogation techniques amounting to war crimes in the form of *“torture, cruel treatment, outrages upon personal dignity, and rape.”*⁶ The gravity of the alleged crimes committed by US military forces specifically is *“increased by the fact that they were reportedly committed pursuant to plans or policies approved at senior levels of the US government, following careful and extensive deliberations,”* according to the 2016 preliminary examination report on the situation.⁷

Complementarity: Will the situation in Afghanistan be admissible?

The ICC’s exercise of jurisdiction over RS crimes is complementary to that of national jurisdictions, meaning the Court will intervene only when the State in question is unable or unwilling to carry out genuine investigations or prosecutions. This is one of the criteria Pre-Trial Chamber judges will assess in arriving at their decision on whether to authorize an OTP investigation.

Once the ICC’s complementary exercise of jurisdiction has been triggered, States Parties to the RS – and according to some, non-states parties in the case of United Nations Security Council-referred situations – are obligated to cooperate with the Court in relation to investigations and prosecutions.

In the case of Afghanistan, the OTP noted in its 14 November 2016 preliminary examination report that no members of any Afghani anti-government forces had been prosecuted for RS crimes allegedly occurring during the period under examination. Meanwhile, according to the report, only two Afghan National Directorate of Security officials had been prosecuted for ill-treatment of detainees.

While more recent reports suggest that the government of Afghanistan shared with the OTP in 2017 information concerning 15 cases it has prosecuted, the same reports note that those cases deal primarily with low-level Afghan security personnel as well as two senior members of the Haqqani network—and were thus unlikely to convince the OTP that the Afghan government is holding high-level government perpetrators to account.⁸

According to the same reports, the two cases against senior members of the Haqqani network resulted in convictions and death sentences related to *“financing terrorist attacks,”* thus likely falling outside of the subject-matter jurisdiction of the ICC.

In a further setback for domestic accountability efforts according to the 2016 preliminary examination report, a general amnesty law, passed by the Afghan parliament in 2007, entered into force in 2009. *“The ‘Law on Public Amnesty and National Stability’ provides legal immunity to all belligerent parties*

⁶ https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf

⁷ https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf

⁸ <https://www.afghanistan-analysts.org/investigating-post-2003-war-crimes-afghan-government-wants-one-more-year-from-the-icc/>



FACTSHEET

including those individuals and groups who are still in opposition to the Islamic State of Afghanistan, without any temporal limitation to the law's application or any exception for international crimes.”⁹

Furthermore, a September 2016 peace agreement between the Afghan government and the insurgent group Hezb-e-Islami Gulbuddin, which has since been implicated in orchestrating attacks that led to civilian casualties, granted amnesty to all commanders and fighters of the party who participated in the peace process.

Although the government of Afghanistan has argued that neither the amnesty law nor the peace agreement amount to blanket immunity, the OTP has indicated that it is far from satisfied with the explanation provided and with the scarce information shared regarding national prosecutions of senior officials purported to have committed RS crimes.

In the US, national prosecutions related to RS crimes committed by US troops within the context of the armed conflict in Afghanistan are virtually nonexistent. Both the Department of Defense and the Department of Justice have conducted investigations into detainee abuse by military and CIA personnel respectively, although both departments failed to indict or prosecute any senior officials. According to the 2016 preliminary examination report, limited information was available to the OTP on court-martial proceedings and non-judicial punishments for US forces in relation to the detainee abuse in Afghanistan.

Cooperation: A concern for potential ICC investigation?

The 2016 OTP preliminary examination report notes that the government of Afghanistan had up until that time (November 2016) refused to cooperate with requests for information to aid the OTP's efforts in determining admissibility.

While indicating in 2016 that it is willing to cooperate fully with the ICC, the Afghan government has since made several reported attempts to delay the decision on an ICC investigation, largely in relation to claimed admissibility concerns and political interests related to the peace process in the country.

The government of Afghanistan reportedly wrote to ICC President Silvia Fernández de Gurmendi on two known occasions since the time of the 2016 preliminary examination report (in November 2016 and January 2017) to request that the ICC postpone, for a period of one year, the decision on opening any formal investigation.¹⁰ In its request, the government claimed a risk of the ICC investigation jeopardizing the existing peace deal with Hezb-e-Islami Gulbuddin.¹¹

⁹ https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf

¹⁰ <https://www.afghanistan-analysts.org/publication/aan-thematic-dossier/thematic-dossier-xvi-afghanistans-war-crimes-amnesty-and-the-international-criminal-court/>

¹¹ Qaane, Ehsan, *Investigating Post-2003 War crimes: Afghan Government wants “one more year” from the ICC*, Afghanistan Analysts Network, 27 June 2017.



FACTSHEET

According to sources¹², the Afghan government continued to oppose an ICC investigation late in 2017, including during a meeting between President Ashraf Ghani and ICC Prosecutor Fatou Bensouda at the UN General Assembly on 22 September 2017. According to the Afghan focal point on the ICC Nader Nadery, who was present for the meeting and called the Prosecutor's admissibility arguments unconvincing, "*President Ghani told [Bensouda] that morally he is at the side of the ICC [to provide justice for war victims] but legally he is not.*"

About the ICC and Rome Statute system

Established by international treaty, the RS, the ICC is the only permanent international judicial body capable of trying individuals for genocide, crimes against humanity and war crimes when national courts are unable or unwilling to do so. It is an independent institution¹³ and can only prosecute crimes that occurred from 2002 onwards—the date of its establishment.

The Court may only exercise jurisdiction¹⁴ if:

- The accused is a national of a state party or a state that has accepted the jurisdiction of the Court; or
- The alleged crime took place on the territory of a state party or a non-state party which has made an ad hoc declaration accepting the jurisdiction of the Court; or
- The UN Security Council has referred the situation to the prosecutor, irrespective of the nationality of the accused or whether the state is a party to the Rome Statute.

An investigation may be opened by the ICC prosecutor in three ways:

- A referral of a situation by a state party; or
- A referral by the UN Security Council; or
- Of own accord (*proprio motu*) following a preliminary examination. Authorization by ICC judges required.

Central to the Court's mandate is the principle of complementarity, which holds that it is the primary responsibility of states themselves to investigate and prosecute those suspected of having committed crimes. The ICC will only act if states are unable or unwilling to investigate and prosecute alleged perpetrators on their own.

Criminal responsibility will be applied equally to all persons without distinction as to whether he or she is a head of state or government, a member of a government or parliament, an elected representative or a government official.

¹² <https://www.afghanistan-analysts.org/publication/aan-thematic-dossier/thematic-dossier-xvi-afghanistans-war-crimes-amnesty-and-the-international-criminal-court/>

¹⁴ "ICC - ICC at a Glance." *International Criminal Court*. Accessed March 2015: http://www.icc-cpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/icc%20at%20a%20glance.aspx



FACTSHEET

About the Coalition for the ICC

We are 2,500 civil society organizations, small and big, in 150 countries fighting for global justice for genocide, crimes against humanity and war crimes.

Join the fight for global justice: www.coalitionfortheicc.org

Where to find more information

[Reports on the protection of civilians](#), United Nations Assistance Mission in Afghanistan, UN Office of the High Commissioner for Human Rights

[Torture of detainees persists in Afghanistan](#), United Nations Assistance Mission in Afghanistan

[Annual Protection of Civilian reports](#), Afghanistan Independent Human Rights Commission.

[“Today We Shall All Die” Afghanistan’s Strongmen and the Legacy of Impunity](#), Human Rights Watch

[“Just Don’t Call It a Militia” Impunity, Militias, and the “Afghan Local Police”](#), Human Rights Watch

[The Human Cost The Consequences of Insurgent Attacks in Afghanistan](#), Human Rights Watch

[Lessons in Terror Attacks on Education in Afghanistan](#), Human Rights Watch

[Webpage on Afghanistan and the ICC](#), Coalition for the ICC