



Situation in Afghanistan

Summary of the Prosecutor's Request for authorisation of an investigation pursuant to article 15

20 November 2017

I. Introduction

1. On 20 November 2017, the Prosecutor requested authorisation from the Pre-Trial Chamber to proceed with an investigation of the situation in the Islamic Republic of Afghanistan in the period since 1 July 2002, pursuant to article 15(3) of the Rome Statute (“Statute”). Specifically, the Prosecutor has sought authorisation to investigate alleged crimes committed on the territory of Afghanistan in the period since 1 May 2003, as well as other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation and were committed on the territory of other States Parties in the period since 1 July 2002.
2. Afghanistan has experienced more than 35 years of violent conflict, much of which pre-dates the Rome Statute’s entry into force for Afghanistan on 1 May 2003. Since that time, the armed conflict in the country has intensified continuously, as an armed insurgency led by the Taliban movement wages a guerrilla-style war against the current government and the international forces supporting it, in an effort to return to power and re-impose its rule on the country. As the armed conflict has intensified, the incidence of alleged crimes within the jurisdiction of the International Criminal Court (“Court”) being reported has increased. Since 2009, when accurate statistical reporting on civilian casualties began, more than 26,500 civilians are reported to have been killed by parties to the armed conflict in Afghanistan. Civilians continue to suffer from a deteriorating security situation in many parts of the country and to near daily attacks.
3. The information available provides a reasonable basis to believe that members of the Taliban and their affiliates are responsible for alleged crimes committed within the context of the situation, constituting crimes against humanity and war crimes, as part of a widespread and systematic campaign of intimidation, targeted killings and abductions of civilians perceived to support the Afghan government and foreign entities, or to oppose Taliban rule and ideology. The information available also provides a reasonable basis to believe that members of the Afghan

National Security Forces (“ANSF”), in particular members of the National Directorate for Security (“NDS”) and the Afghan National Police (“ANP”), engaged in systemic patterns of torture and cruel treatment of conflict-related detainees in Afghan detention facilities, including acts of sexual violence. Finally, the information available provides a reasonable basis to believe that members of the United States of America (“US”) armed forces and members of the Central Intelligence Agency (“CIA”) committed acts of torture, cruel treatment, outrages upon personal dignity, rape and sexual violence against conflict-related detainees in Afghanistan and other locations, principally in the 2003-2004 period.

4. Due to the very large number of conflict related crimes reportedly occurring on the territory of Afghanistan since 1 May 2003 and the territories of other States Parties since 1 July 2002, and the multiplicity of armed groups and forces, the alleged crimes identified in the Prosecutor’s Request and its annexes represent only the most prevalent and well-documented allegations. Indeed, should the Pre-Trial Chamber’s decide to authorise an investigation under article 15(4), this should not limit the Prosecution’s investigation into only the specific crimes set out in this Request; rather, the Prosecution should be able to conduct an investigation into any other alleged crimes that fall within the scope of the authorised situation. In particular, the situation in Afghanistan is one in which crimes allegedly continue to be committed on a near daily basis, by a wide range of armed actors, including some newly emerging entities, both in support of and against the Government.
5. Near total impunity has been the rule, not the exception, for the above crimes. Following decades of war, which have decimated State institutions, and continuing abuses against civilians by armed groups wielding power, Afghan warlords and their supporters in Parliament passed an amnesty law in 2007 for all crimes committed in connection with the conflict, including war crimes and crimes against humanity. Only more recently have the Criminal Procedure Code and Penal Code been amended to explicitly incorporate Rome Statute crimes and to exempt them from statutes of limitation. In the US, despite a number of congressional inquiries that revealed unprecedented details of the interrogations conducted by armed forces and the CIA, either no national

investigations or prosecutions have been conducted or are ongoing against the groups of persons involved in the conduct alleged or the information available is insufficient to identify the contours of any relevant national proceedings.

6. In light of the gravity of the acts committed, and the absence of relevant national proceedings against those who appear to be most responsible for the most serious crimes within the situation, the Prosecutor submits that the potential cases that would arise from her investigation of the situation would be admissible. Taking into account the gravity of the crimes and the interests of the victims, there are no substantial reasons to believe that an investigation would not serve the interests of justice.

II. Jurisdiction

A. Alleged crimes within the jurisdiction of the Court

7. On the basis of the information available, and without prejudice to other possible crimes within the jurisdiction of the Court which may be identified during the course of an investigation, there is a reasonable basis to believe that, at a minimum, the following crimes against humanity have been committed: murder (article 7(1)(a)), imprisonment or other severe deprivation of physical liberty (article 7(1)(e)) and persecution against an identifiable group or collectivity on political and gender grounds (article 7(1)(h)); and the following war crimes have been committed: murder (article 8(2)(c)(i)); cruel treatment and torture (article 8(2)(c)(i)); outrages upon personal dignity, in particular humiliating and degrading treatment (article 8(2)(c)(ii)); intentionally directing attacks against civilians (article 8(2)(e)(i)); intentionally directing attacks against personnel or objects involved in a humanitarian assistance or peacekeeping mission (article 8(2)(e)(iii)); intentionally directing attacks against protected objects (article 8(2)(e)(iv)); rape and other forms of sexual violence (article 8(2)(e)(vi)); using, conscripting or enlisting children under the age of fifteen years (article 8(2)(e)(vii)); and killing or wounding treacherously a combatant adversary (article 8(2)(e)(ix)).

Places of alleged commission of the crimes

8. The above crimes are alleged to have been committed on the territory of Afghanistan, in all 34 of Afghanistan's provinces. Kandahar and Helmand appear to be the most affected provinces, with a high degree of conflict-related violence throughout the relevant time period. While from 2003 to 2008 the insurgency was mostly confined to the south and south-eastern regions of Afghanistan, since 2009, anti-government armed groups have expanded their influence to some of the provinces surrounding Kabul (in particular Wardak and Logar), as well as some provinces in the north (in particular Kunduz, Baghlan, Badakhshan, Balkh, Faryab and Jawjzan). US military detention facilities were set up at Bagram Airfield (near Kabul) and across six provinces in south-eastern Afghanistan.
9. Since Afghanistan is a State Party, the Court may exercise jurisdiction over all alleged crimes committed on Afghan territory since 1 May 2003, irrespective of the nationality of the accused. In addition, a limited number of alleged crimes associated with the Afghan armed conflict are alleged to have been committed on the territories of Poland, Romania, and Lithuania, which are all parties to the Statute. Since such crimes were allegedly committed in the context of and associated with the armed conflict in Afghanistan, they are sufficiently linked to and fall within the parameters of the present situation.

Time period of alleged commission of the crimes

10. The crimes allegedly committed on the territory of Afghanistan in the period since 1 May 2003 fall within the Court's jurisdiction *ratione temporis*, since Afghanistan deposited its instrument of accession to the Rome Statute on 10 February 2003 and the Statute entered into force for Afghanistan on 1 May 2003.
11. In relation to the crimes that took place in the context of and were associated with the armed conflict in Afghanistan that were allegedly committed on the territory of other States Parties, the Statute entered into force for Poland and Romania on 1 July 2002 and for Lithuania on 1 August 2003.

12. Accordingly, the situation for which the Prosecutor seeks authorisation encompasses not only alleged crimes committed in Afghanistan since 1 May 2003, but also other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation in Afghanistan and were committed and were committed on the territory of other States Parties since 1 July 2002.

Persons or groups involved

13. The armed conflict in Afghanistan during the relevant period has been classified by the Prosecution as of non-international character, between the Afghan Government, supported by the International Security Assistance Force ("ISAF") and US forces on the one hand (pro-government forces), and non-State armed groups, particularly the Taliban, on the other (anti-government groups). The participation of international forces does not change the non-international character of the conflict since these forces became involved in support of the Afghan Transitional Administration established on 19 June 2002.

14. As a result of its examination, the Prosecution has determined that there is a reasonable basis to believe that, at a minimum, the following crimes within the Court's jurisdiction have occurred:

- Crimes against humanity and war crimes by members of the Taliban and their affiliated Haqqani Network;
- War crimes of torture, outrages upon personal dignity and sexual violence by members of the Afghan National Security Forces, in particular the NDS and the ANP;
- War crimes of torture, outrages upon personal dignity and rape and other forms of sexual violence, by members of the US armed forces on the territory of Afghanistan and members of the CIA in secret detention facilities both in Afghanistan and on the territory of other States Parties, principally in the 2003-2004 period.

15. The Prosecution has also examined allegations of other crimes committed by international armed forces operating in Afghanistan. In particular, since 2009, when the United Nations Assistance Mission to Afghanistan (“UNAMA”) began to record civilian casualties systematically, it has documented approximately 1,820 civilian deaths.
16. Having reviewed information on a large number of incidents attributed to the international forces, the Prosecution has determined that, although these operations resulted in incidental loss of civilian life and harm to civilians, in most incidents that information does not provide a reasonable basis to believe that the military forces intended the civilian population as such, or individual civilians not taking direct part in hostilities, to be the object of the attack.
17. Nonetheless, if an investigation is authorised into the Situation, these as well as any other alleged crimes that may occur after the start of investigations could nonetheless be subjected to proper investigation.

B. Legal characterisation and reasons that the listed crimes fall within the jurisdiction of the Court

Acts allegedly committed by members of the Taliban and affiliated armed groups

18. The Prosecution has examined the information available on crimes allegedly committed by anti-government armed groups, in particular the Taliban and their affiliates, in the context of the armed conflict in Afghanistan. According to this information, anti-government armed groups have been responsible for more than 17,000 civilian deaths since 2009, as well as almost 7,000 deliberate and targeted killings of civilians. In the period since 1 May 2003, insurgent groups have allegedly launched numerous attacks on protected objects, including schools, civilian government offices, hospitals, shrines and mosques, and humanitarian organisations.
19. The Taliban leadership has expressly declared its policy of attacking civilians publicly in official documents issued by the Taliban leadership

such as the *Layha* and in fatwas; in public statements by Taliban officials or spokespersons who claimed that particular civilians were the primary object of an attack; and in public lists of civilians to be killed or captured.

20. There is a reasonable basis to believe that the Taliban and their affiliates have committed the crimes against humanity of murder (article 7(1)(a)), imprisonment or other severe deprivation of physical liberty (article 7(1)(e)), and persecution against any identifiable group or collectivity on political grounds and on gender grounds (article 7(1)(h)). These crimes were allegedly committed as part of a widespread and/or systematic attack against civilians perceived to support the Afghan government and/or foreign entities, or to oppose Taliban rule and ideology, involving the multiple commission of violent acts in pursuance of the policy of the Taliban leadership to seize power from the Government of Afghanistan and impose its rule and system of beliefs by lethal force. In particular, women and girls have been deliberately attacked by the Taliban and their affiliates to prevent them from studying, teaching, working or participating in public affairs, through intimidation, death threats, abductions and killings.

21. There is also a reasonable basis to believe that since 1 May 2003, the Taliban and their affiliates have committed the following war crimes in the context of a non-international armed conflict: murder (article 8(2)(c)(i)), intentionally directing attacks against the civilian population (article 8(2)(e)(i)), intentionally directing attacks against humanitarian personnel (article 8(2)(e)(iii)), intentionally directing attacks against protected objects (article 8(2)(e)(iv)), conscripting or enlisting children under the age of fifteen years or using them to participate actively in hostilities (article 8(2)(e)(vii)), and killing or wounding treacherously a combatant adversary (article 8(2)(e)(ix)). These war crimes were committed on a large scale and as part of a plan or policy.

Acts allegedly committed by members of the Afghan National Security Forces

22. Multiple sources have reported on the prevalence of torture in Afghan Government detention facilities, including the Afghanistan Independent

Human Rights Commission, UNAMA, and a fact-finding commission appointed by the President of Afghanistan in 2013.

23. The information available provides a reasonable basis to believe that members of the ANSF have committed the war crimes of torture and cruel treatment under article 8(2)(c)(i); outrages upon personal dignity pursuant to article 8(2)(c)(ii); and sexual violence under article 8(2)(e)(vi). Governmental authorities alleged to have tortured conflict-related detainees include the NDS, the ANP as well as the Afghan National Army (“ANA”), the Afghan National Border Police (“ANBP”) and the Afghan Local Police (“ALP”).
24. The information available does not clearly indicate that the alleged crimes by members of the ANSF against conflict-related detainees have been committed as part of one or more plans or policies at the facility, district or provincial level. However, the information available indicates that the alleged crimes were committed on a large scale.

Acts allegedly committed by members of the US armed forces and of the CIA

25. The information available provides a reasonable basis to believe that in the period since 1 May 2003, members of the US armed forces have committed the war crimes of torture and cruel treatment (article 8(2)(c)(i)), outrages upon personal dignity (article 8(2)(c)(ii)) and rape and other forms of sexual violence (article 8(2)(e)(vi)). These crimes were committed in the context of a non-international armed conflict. Moreover, the information available provides a reasonable basis to believe that in the period since 1 July 2002, members of the CIA have committed the war crimes of torture and cruel treatment (article 8(2)(c)(i)), outrages upon personal dignity (article 8(2)(c)(ii)), and rape and other forms of sexual violence (article 8(2)(e)(vi)). These crimes were committed in the context of a non-international armed conflict, both on the territory of Afghanistan as well as on the territory of other States Parties to the Statute.
26. In particular, the information available provides a reasonable basis to believe that at least 54 detained persons (selected from a wider range of reported victims) were subjected to torture, cruel treatment, outrages

upon personal dignity, rape and/or sexual violence by members of the US armed forces on the territory of Afghanistan, primarily in the period 2003-2004. The information available further provides a reasonable basis to believe that at least 24 detained persons (selected from a wider range of reported victims) were subjected to torture, cruel treatment, outrages upon personal dignity, rape and/or sexual violence by members of the CIA on the territory of Afghanistan and other States Parties to the Statute (namely Poland, Romania and Lithuania), primarily in the period 2003-2004.

27. The information available indicates that these alleged crimes took place in the context of and were associated with the armed conflict in Afghanistan. In particular, those crimes were allegedly committed against conflict-related detainees suspected of being members of the Taliban and/or Al Qaeda or otherwise suspected of cooperating with them.

III. Admissibility

28. At the article 15 stage, admissibility is assessed in relation to 'potential cases' which may be brought. Having identified potential cases arising from the conduct of three separate groups of alleged perpetrators - members of the Taliban and their affiliates (anti-government groups); members of the Afghan National Security Forces; and members of the US armed forces or the CIA - the Prosecution has found that these potential cases that would likely arise from an investigation of the situation in Afghanistan would be currently admissible. If the Chamber authorises an investigation into the Situation, the Prosecution will continue to assess the existence of national proceedings for as long as the situation remains under investigation, including in relation to any additional information that may be provided by relevant States with jurisdiction at the article 18 stage.

A. Members of the Taliban and affiliated armed groups

Complementarity

29. The information available indicates that at this stage no national investigations or prosecutions have been conducted or are ongoing against those who appear most responsible for the crimes allegedly committed by members of the Taliban and affiliated armed groups.
30. The Afghan Parliament passed a general amnesty in 2007, which entered into force in 2009. The “Law on Public Amnesty and National Stability” provides legal immunity to all belligerent parties including “those individuals and groups who are still in opposition to the Islamic State of Afghanistan”, without any temporal limitation or any exception for international crimes.
31. More recently, efforts have been taken by the Government of Afghanistan to build its capacity to meet its obligations under the Rome Statute and to facilitate national investigations and prosecutions of ICC crimes. In particular, in 2014 the Government of Afghanistan updated the country’s Criminal Procedure Code in order, *inter alia*, to exempt Rome Statute crimes from the ordinary statutes of limitations. The Government of Afghanistan has also promulgated a new Penal Code which now explicitly incorporates Rome Statute crimes and specifies superior responsibility as an available mode of liability. The Penal Code Bill was adopted by Afghanistan’s parliament in May 2017.
32. In the light of the information available, the Prosecution has assessed that the potential case(s) it has identified concerning crimes allegedly committed by members of the Taliban and affiliated armed groups would currently be admissible, meaning that there is no conflict of jurisdiction between Afghanistan and the Court.

Gravity

33. Over the period 2009-2016, 50,802 civilian casualties (17,700 deaths and 33,032 injuries) were attributed to anti-government armed groups, mostly

from their use of improvised explosive devices as well as suicide and complex attacks. The information available suggests that much of the alleged conduct was committed with particular cruelty or in order to instil terror and fear among the local civilian population. Victims were deliberately targeted on a discriminatory basis based on their actual or perceived political allegiance or on gender grounds, with attacks particularly directed at civic and community leaders. The campaign of targeted killings of politicians, government workers, tribal and community leaders, teachers, and religious scholars has also deprived local Afghan communities of functioning institutions. In many parts of the country, the Afghan population has been denied access to humanitarian assistance and basic government services, including health care, as a direct consequence of the insurgent strategy of targeting government workers and aid workers, including medical staff and deminers.

34. Other crimes were committed in a manner calculated to inflict maximum harm and injury on the largest number of victims, such as through suicide bombings in crowded public gatherings, including in mosques during Friday prayers. The widespread use of perfidious tactics has also placed the civilian population at increased risk of attack from governmental and international forces, contributing to increased civilian casualties. The alleged crimes have had a particularly broad and severe impact on women and girls. Girls' education has come under sustained attack, thereby depriving thousands of girls of their right to access education.

B. Members of the Afghan National Security Forces

Complementarity

35. The information available indicates that at this stage no national investigations or prosecutions have been conducted or are ongoing against those who appear most responsible for the crimes allegedly committed by members of the Afghan National Security Forces. Despite the notoriety, scale and systemic nature of the allegations of torture and cruel treatment, in particular in NDS and ANP detention facilities, to date the Afghan authorities appear to have instituted only a limited number of

proceedings relating to the torture and cruel treatment of conflict-related detainees. Further, those proceedings were instituted only against low level interrogators, direct perpetrators, and/or at most their immediate superiors, and not against those who appear to be most responsible for such criminal conduct.

36. Moreover, no national investigations or prosecutions have been conducted or are ongoing in Afghanistan with respect to crimes allegedly committed by members of international forces, in line with status of forces agreements in place between Afghanistan and the United States as well as between Afghanistan and ISAF troop-contributing countries, which provide for the exclusive exercise of criminal jurisdiction by the authorities of the sending State.

Gravity

37. The alleged crimes have been committed on a large scale, with reports that torture has been practised institutionally in certain facilities. High percentages of detainees have reported having experienced torture or cruel treatment. Facilities in which torture was found to be prevalent or systematic are located in multiple provinces across the country and are not limited to any one particular geographical region.

38. The manner in which these crimes are alleged to have been committed also appears to have been particularly cruel, prolonged and severe, calculated to inflict maximum pain and has included acts of sexual violence. The alleged crimes had severe short-term and long-term impacts on detainees' physical and mental health, including permanent physical injuries.

C. Members of the US armed forces and the CIA

Complementarity

39. The information available indicates that at this stage no national investigations or prosecutions have been conducted or are ongoing

against those who appear most responsible for the crimes allegedly committed by members of the US armed forces.

40. Although the US has asserted that it has conducted thousands of investigations into detainee abuse, to the extent discernible, such investigations and/or prosecutions appear to have focused on alleged acts committed by direct physical perpetrators and/or their immediate superiors. None of the investigations appear to have examined the criminal responsibility of those who developed, authorised or bore oversight responsibility for the implementation by members of the US armed forces of the interrogation techniques set out in the Prosecutor's Request. Despite a number of efforts it has undertaken, the Prosecution has been unable to obtain specific information or evidence with a sufficient degree of specificity and probative value that demonstrates that proceedings were undertaken with respect to cases of alleged detainee abuse by members of the US armed forces in Afghanistan within the temporal jurisdiction of the Court, of which it has identified at least 54 victims.

41. The information available indicates that at this stage no national investigations or prosecutions have been conducted or are ongoing against those who appear most responsible for the crimes allegedly committed by members of the CIA. The limited inquiries and/or criminal proceedings that were initiated appear to have been focussed on the conduct of direct perpetrators and persons who did not act in good faith or within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees. No proceedings appear to have been conducted to examine the criminal responsibility of those who developed, authorised or bore oversight responsibility for the implementation by members of the CIA of the interrogation techniques set out in the Prosecutor's Request.

42. In relation to proceedings conducted in other States, criminal investigations are reportedly ongoing in Poland, Romania and Lithuania regarding alleged crimes committed in relation to the CIA detention facilities on their respective territories. If the Chamber authorises the investigation, the Prosecution will continue to assess the progress of any

relevant national proceedings in order to determine whether they encompass the same persons and substantially the same conduct as identified in the course of any investigations by the Prosecution, and if so, whether they are genuine.

Gravity

43. The groups of persons likely to be the focus of future investigations include persons who devised, authorised or bore oversight responsibility for the implementation by members of the US armed forces and members of the CIA of the interrogation techniques that resulted in the alleged commission of crimes within the jurisdiction of the Court.
44. With respect to the US armed forces, the alleged crimes appear to have been inflicted on a relatively small percentage of all persons detained by US armed forces which, during the time period when the alleged crimes occurred, totalled approximately 10,000 persons. The alleged acts also appear to have occurred during a limited time period, after which the use of all such techniques by US armed forces worldwide was formally rescinded and the US Army Field Manual restored the Geneva Conventions as the basis for the treatment and interrogation of all detainees. Nonetheless, the acts allegedly committed were serious both in their number and in their effect, and although implemented pursuant to authorised interrogation policies adopted locally rather than at headquarters level, implicated personal responsibility within the command structure.
45. The treatment of CIA detainees appears to have been particularly grave on a qualitative assessment. The alleged crimes appear to have been committed with particular cruelty, involving the infliction of serious physical and psychological injury, over prolonged periods, and including acts committed in a manner calculated to offend cultural and religious values, and leaving victims deeply traumatized. Detainees who were subjected to “enhanced interrogation techniques” and extended isolation exhibited psychological and behavioural issues, including hallucinations, paranoia, insomnia, and attempts at self-harm and self-mutilation.

46. In addition, several factors also indicate underreporting with respect to alleged mistreatment of conflict-related detainees by both members of the US armed forces and by members of the CIA.

IV. Interests of justice

47. The seriousness and extent of war crimes and crimes against humanity allegedly committed in Afghanistan, highlighted by the extended period of time over which crimes have been and continue to be committed, the wide range of perpetrators among all parties to the conflict, the recurring patterns of criminality, and the limited prospects for accountability at the national level, all weigh heavily in favour of an investigation. In light of the mandate of the Prosecutor and the object and purpose of the Statute, and based on the information available, the Prosecution has identified no substantial reasons to believe that the opening of an investigation would not serve the interests of justice.

V. Conclusion

48. For the reasons set out above and on the basis of the information presented and the supporting material, the Prosecutor has requested the Pre-Trial Chamber to authorise the commencement of an investigation into the situation in the Islamic Republic of Afghanistan since 1 July 2002.

49. In compliance with rule 50, on filing of the Request, the Prosecutor provided notice to victims or their legal representatives of her intention to request authorisation to commence an investigation and informed them that pursuant to regulation 50(1) of the Regulations of the Court, they have until 31 January 2018 to make representations to the Chamber.