



Afghanistan and the International Criminal Court Questions & Answers

1) Why is the International Criminal Court (ICC) Prosecutor requesting to open an investigation into the situation in Afghanistan – and why now?

Afghanistan acceded to the Rome Statute of the International Criminal Court on 10 February 2003. It thereby granted the ICC jurisdiction over crimes under the Rome Statute, including war crimes and crimes against humanity, committed on the territory of Afghanistan or by its nationals from 1 May 2003 onwards.

After having formally given notice on 3 November 2017 that it will submit a request to open an investigation into the situation in Afghanistan, the Office of the Prosecutor (OTP) of the ICC filed a request with the Pre-Trial Chamber to open an investigation into the situation in Afghanistan. The OTP concluded that there exists a reasonable basis to believe that international crimes within the Court's jurisdiction had occurred since May 2003. Specifically, the OTP sought authorization to investigate alleged crimes against humanity and war crimes on the territory of Afghanistan since 1 May 2003 by the Afghan National Security Forces (ANSF), in particular, members of the National Directorate for Security (NDS) and the Afghan National Police (ANP), and by the Taliban and affiliated groups, but also war crimes committed by US armed forces on the territory of Afghanistan and by members of the US Central Intelligence Agency (CIA) in secret detention facilities in Afghanistan and on the territory of other States Parties, namely Poland, Romania and Lithuania, since 1 July 2002 and principally in the period of 2003-2004.

The OTP publicly announced it was conducting a preliminary examination into the situation in Afghanistan in 2007. The preliminary examination lasted a decade, during which the OTP assessed the seriousness of the information received, whether there was a reasonable basis to believe that the alleged crimes would fall within the Court's jurisdiction, and the admissibility of potential cases in terms of gravity, the interests of justice, and complementarity (i.e. if genuine investigations and prosecutions for these crimes were being carried out nationally).¹ The Prosecutor's 181-page request to investigate sets forth in detail the legal and factual basis for concluding that each condition has been met.

2) What is the scope of the international crimes being considered?

The OTP has requested the authorization of the ICC Pre-trial Chamber judges to open an investigation into three sets of crimes on the territory of Afghanistan:

- (1) **crimes against humanity and war crimes**, including murder, imprisonment or other severe deprivation of physical liberty, persecution on political and gender grounds, and intentionally directing attacks at civilians, humanitarian personnel and/or protected objects, and conscription of children under the age of 15 by the Taliban and affiliated armed groups;
- (2) **war crimes**, including torture, cruel treatment, outrages upon personal dignity, and sexual violence by Afghan government forces, namely members of the ANSF, and
- (3) **war crimes**, including torture, cruel treatment, outrages upon personal dignity, rape and other forms of sexual violence by US military forces and members of the CIA. The OTP has requested to

¹ The framework for the Prosecutor initiating an investigation is set out in Article 53(1) (a)-(c) of the Rome Statute.

initiate an investigation into alleged **war crimes** committed by US armed forces and members of the CIA not only on the territory of Afghanistan, but also by US actors operating in secret detention facilities operated by the CIA in Poland, Romania, and Lithuania since 1 July 2002, principally focusing on the period of 2003-2004.²

The Prosecutor notes that since accurate statistical reporting on civilian casualties began in 2009, more than 26,500 civilians are reported to have been killed by parties to the armed conflict in Afghanistan.³ The United Nations Assistance Mission in Afghanistan (UNAMA) has been reporting civilian casualties systematically since 2009. In the period from 1 January 2009 to 30 June 2016, UNAMA recorded 63,934 civilian casualties (22,941 deaths and 40,993 injured).⁴ In 2016, UNAMA attributed 60% of all civilian casualties to anti-government forces and 23% to pro-government forces.⁵ Approximately 45,000 civilian casualties (17,000 deaths and 28,000 injuries) were attributed to anti-government groups between January 2007 and June 2015, primarily from their use of improvised explosive devices.⁶ In the first half of 2017, UNAMA reported an increase in civilian deaths compared to the same period in 2016, with 1,662 killed and 3,581 injured.⁷

3) How can the ICC OTP request to open an investigation even if Afghanistan did not refer the situation to the ICC?

The OTP can investigate a situation if a State Party to the Rome Statute refers this situation to the ICC (something which happened, for example, in Uganda), or if the United Nations Security Council (UNSC) refers the situation to the ICC (this happened with the current investigation in Libya and Darfur/Sudan). A State that is not a party to the ICC can also lodge a declaration accepting the exercise of jurisdiction by the Court, pursuant to Article 12(3) of the Rome Statute.

In addition, the Rome Statute provides that the Prosecutor can seek to open an investigation *proprio motu* (Article 15(1)). This means that the Prosecutor, after a thorough preliminary examination of the situation, can decide, without being seized by a State Party or the UNSC, to request the Pre-Trial Chamber judges to authorize the opening of a formal investigation (this happened with the current investigation in Georgia and Burundi). The OTP has stated that it has received 125 communications pursuant to Article 15 in relation to the situation in Afghanistan since the opening of its preliminary examination in 2007.⁸ Given the gravity of the crimes involved and the absence of investigations and prosecutions nationally for these crimes, the OTP decided to request authorization to open an investigation.⁹

The ICC Pre-Trial Chamber III now has to decide whether to confirm there is a reasonable basis to believe that international crimes have been committed and subsequently authorize the commencement of an official investigation into the situation in Afghanistan.

2 International Criminal Court, 'Request for authorisation of an investigation pursuant to article 15', 20 November 2017, ICC-02/17-7- Conf-Exp, available at: https://www.icc-cpi.int/CourtRecords/CR2017_06891.PDF

3 International Criminal Court, 'Request for authorisation of an investigation pursuant to article 15', 20 November 2017, para. 2.

4 UNAMA OHCHR, 'Afghanistan: Midyear Report 2016 Protection of Civilians in Armed Conflict,' July 2016, available at: <http://www.ohchr.org/Documents/Countries/AF/ProtectionCiviliansArmedConflict2016.pdf>, p. 1.

5 UNAMA Midyear Report 2016, p. 3.

6 Office of the Prosecutor, Report of the Preliminary Examination Activities 2016 ("OTP 2016 Report"), para. 216.

7 UNAMA OHCHR, 'Afghanistan: Midyear Report 2017 Protection of Civilians in Armed Conflict,' July 2017, available at: https://unama.unmissions.org/sites/default/files/protection_of_civilians_in_armed_conflict_midyear_report_2017_july_2017.pdf, p.3.

8 International Criminal Court, 'Request for authorisation of an investigation pursuant to article 15', 20 November 2017, para. 23.

9 International Criminal Court, 'Request for authorisation of an investigation pursuant to article 15', 20 November 2017.

4) How can US nationals be held accountable when the US is not a State Party to the Rome Statute?

The ICC can exercise its jurisdiction if the State on the territory of which the conduct in question occurred is a Party to the Rome Statute (Article 12(2)(a)). As a result, US nationals can be prosecuted for alleged crimes committed on the territory of any of the 123 States Parties to the Rome Statute, including on the territory of Afghanistan, Poland, Romania, or Lithuania. However, the principle of complementarity provides that where genuine national investigations and prosecutions into such crimes are carried out, the ICC does not have jurisdiction. The Prosecutor concluded that no such investigations or prosecutions of US officials have been conducted by the US. Moreover, the OTP requested specific information on proceedings in the US, but did not receive information it could rely on in cases of alleged detainee abuse by members of the US armed forces in Afghanistan.¹⁰

Even though US nationals can be held accountable for international crimes that occur on the territory of States Parties, the US has pursued the conclusion of so-called ‘Article 98 agreements’¹¹ with a number of States, including Afghanistan and Romania, seeking to block the transfer of US nationals to the ICC.¹² The validity of such non-transfer agreements is disputed in international law, particularly because the use of such agreements is against the letter and spirit of the ICC Statute. In effectively promoting impunity through such agreements, ICC States Parties would in fact be breaching their obligations under international law.

5) Why are situations on the territory of Poland, Romania and Lithuania being targeted in the ICC Prosecutor’s request for investigation in this case?

The ICC Prosecutor has a reasonable basis to believe that US agents who were engaged in the so-called ‘CIA torture or black site detention program’ committed crimes within the jurisdiction of the Court on the territories of Poland, Romania, and Lithuania.¹³ As States Parties to the Rome Statute, the Court has jurisdiction over alleged crimes committed on their territories and US nationals could be held accountable for these crimes.

Criminal investigations are reportedly ongoing in Poland, Romania, and Lithuania, although such investigations are not commonly understood to include US nationals. The information available has not allowed the OTP to discern the actual contours of such national cases and to determine whether their scope could cover the potential cases under analysis by the OTP.¹⁴ This is why they remain in the scope of the OTP requested investigation and why the OTP has stated that it will continue to assess the progress of any relevant national proceedings to determine if they encompass the same persons and the same conduct and, if so, whether they are genuine.¹⁵

10 International Criminal Court, ‘Request for authorisation of an investigation pursuant to article 15’, 20 November 2017, para. 290-296.

11 Article 98 (“Cooperation with respect to waiver of immunity and consent to surrender”) of the Rome Statute provides: [...]

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

12 38 States have acknowledged signing such an agreement, but the exact number remains unclear. U.S. Department of State Archive – Countries Who Have Signed Article 98 Agreements, available at: <https://2001-2009.state.gov/r/pa/prs/ps/2003/21539.htm> and International Criminal Court – Article 98 Agreements Research Guide, Georgetown Law Library. Available at: <http://guides.ll.georgetown.edu/c.php?g=363527&p=2456091>

13 The Rome Statute entered into force on 1 July 2002 for Poland and Romania and on 1 August 2003 for Lithuania.

14 OTP Report on Preliminary Examination Activities 2016, 14 November 2016, para. 223, available at: https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf.

15 International Criminal Court, ‘Request for authorisation of an investigation pursuant to article 15’, 20 November 2017, para. 333.

6) Can the denial of access to education for girls amount to a crime against humanity?

Yes, the denial of education for girls based on their gender can amount to a crime against humanity. In this specific investigation, the OTP has found that the crime against humanity of persecution on gender grounds (Article 7(1)(h) of the Rome Statute), allegedly committed by the Taliban and affiliated groups, has had a particularly broad and severe impact on the lives of women and girls¹⁶.

Moreover, the alleged attacks on schools, more specifically schools for girls, resulting in many girls being denied access to education, could also amount to a war crime under Article 8(2)(b)(ix) of the Rome Statute.

7) Has the ICC OTP already identified alleged perpetrators?

In its 2016 report on preliminary examinations and its request for the Pre-Trial Chamber's authorization to open an investigation, the OTP has identified potential cases from the conduct of three separate groups of perpetrators:

- Members of the Taliban and their affiliated Haqqani Networks (anti-government groups);
- Members of the Afghan authorities, namely the Afghan National Security Forces (ANSF), in particular members of the National Directorate for Security (NDS) and the Afghan National Police (ANP); and
- Members of the US armed forces and members of the CIA.

The Prosecutor is investigating the commission of **war crimes** by the Taliban and their affiliates, by Afghan authorities, and by members of the US armed forces and the CIA. In addition, the OTP is investigating the commission of **crimes against humanity** by the Taliban and affiliates.

The OTP also has specific information that at least 54 persons in US custody were allegedly tortured, subjected to 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. Moreover, at least 24 detained persons 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 Poland, Romania, and Lithuania.¹⁷ The information indicates that the use of enhanced interrogation techniques, applied cumulatively and in combination with each other over a prolonged period of time, would have caused serious physical and psychological injury to the victims.

The Prosecutor has not identified any suspects by name at this stage. No arrest warrants will be issued before an investigation has been formally opened by the ICC Pre-Trial Chamber and thoroughly carried out by the ICC Prosecutor. ICC proceedings are still at a very early stage.

8) Are there any domestic proceedings in the US concerning international crimes allegedly committed by US nationals?

US civilian and military courts can exercise their jurisdiction over conduct that would constitute a crime within ICC subject-matter jurisdiction.¹⁸ However, there have been no prosecutions of high or mid-level US military or civilian leaders for any crimes arising out of post-9/11 US detention and interrogations.¹⁹ Likewise, there have not been any prosecutions of high or mid-level contractors working with the military or

¹⁶ International Criminal Court, 'Request for authorisation of an investigation pursuant to article 15', 20 November 2017, para. 112 and following.

¹⁷ International Criminal Court, 'Request for authorisation of an investigation pursuant to article 15', 20 November 2017, para. 189.

¹⁸ OTP Report on Preliminary Examination Activities 2016, para. 219. See 18 U.S.C. § 2441 (War Crimes Statute); 18 U.S.C. § 2340 (Torture Statute).

¹⁹ International Criminal Court, 'Request for authorisation of an investigation pursuant to article 15', 20 November 2017, para. 299.

the CIA in Afghanistan or on the territory of other States Parties.²⁰ There are no reported ongoing investigations into any such crimes by the US Department of Justice.

There has been one conviction of a former CIA independent contractor for a crime in Afghanistan and the court-martialing of a few dozen low-level members of the military.²¹ Although the US indicated that “more than 70 investigations resulted in trial by courts-martial, close to 200 investigations resulted in either non-judicial punishment or adverse administrative action, and many more were investigated and resulted in action at a lower level,”²² specific information on the incidents and persons forming the subject-matter of those proceedings is limited,²³ and excludes mid- and high-level officials. The OTP notes that there appears to have been no criminal investigation or prosecution of any person who devised, authorised or bore responsibility for the interrogation techniques constituting torture.²⁴

A two-year preliminary review (August 2009 - June 2011) by the US Department of Justice examined the treatment of 101 detainees in CIA custody, which led to a full criminal investigation of two cases of detainees who had died in CIA custody.²⁵ Neither investigation resulted in any indictment or prosecution.

9) Have there been any domestic proceedings in Afghanistan concerning international crimes allegedly committed since May 2003 by Taliban members, Afghan government forces, or US soldiers?

There have been only a limited number of proceedings against alleged perpetrators of international crimes in Afghanistan. Despite its obligations as a State Party to the Rome Statute, Afghanistan had not updated its 1976 Criminal Code to cover international crimes, which has frustrated domestic efforts to deliver justice to victims of gross human rights violations until 2017.²⁶ In May 2017, Afghanistan adopted a new criminal code which incorporates provisions on war crimes, crimes against humanity, genocide, and the crime of aggression. This new implementing legislation including provisions on command responsibility as well as recruitment of child soldiers, could play a pivotal role in deciding Afghanistan’s ability to address Rome Statute crimes within its own national jurisdiction.²⁷ The Criminal Code will enter into force in 2018. However, the new Criminal Code will have no retroactive effect, and will be inapplicable to past crimes.

Moreover, the 2007 Law on Public Amnesty and National Stability grants legal immunity to “all political parties and belligerent groups who fought each other during the past two and a half decades,” without any temporal limit on the law’s application or any exceptions with regard to international crimes. Between 2014 and 2016, some members of the ANSF were reportedly prosecuted for their conduct, but the available information is limited and the information available suggests that no national investigations or prosecutions have been conducted or are ongoing against those who appear most responsible for the crimes allegedly committed.²⁸

20 International Criminal Court, ‘Request for authorisation of an investigation pursuant to article 15’, 20 November 2017, para. 312, 330-334.

21 Coalition for the International Criminal Court, available at: <http://www.coalitionfortheicc.org/country/afghanistan>.

FIDH Member organisation Center for Constitutional Rights (CCR) has filed several cases against former US officials for their role in the torture of detainees at Guantanamo, Abu Ghraib, Afghanistan and secret “black sites” around the globe. For examples of such cases in France and Spain see: <https://ccrjustice.org/home/what-we-do/our-cases/accountability-us-torture-spain> and <https://ccrjustice.org/home/what-we-do/our-cases/accountability-us-torture-france>

22 The US stated this in November 2015 in its follow-up response to the UN Committee Against Torture’s Observations of November 2015, see OTP Report on Preliminary Examination Activities 2016, para. 220.

23 OTP Report on Preliminary Examination Activities 2016, para. 220.

24 International Criminal Court, ‘Request for authorisation of an investigation pursuant to article 15’, 20 November 2017, para. 328.

25 OTP Report on Preliminary Examination Activities 2016, para. 221.

26 Coalition for the International Criminal Court, available at: <http://www.coalitionfortheicc.org/country/afghanistan>

27 Coalition for the International Criminal Court, available at: <http://www.coalitionfortheicc.org/country/afghanistan>

28 International Criminal Court, ‘Request for authorisation of an investigation pursuant to article 15’, 20 November 2017, para. 276-288.

10) What are the next steps in the procedure?

Based on the precedents concerning Georgia, Côte d'Ivoire and Kenya, the ICC pre-trial judges have given victims until 31 January 2018 to submit “representations” to the ICC Victims Participation and Reparation Section (VPRS).²⁹ Victims will be able to share their personal views, as individuals or groups, on the opportunity of opening an investigation and on its scope.³⁰ This is not the only opportunity for victims to share their views and concerns, but it constitutes an important step to encourage the OTP investigation to focus on victims and reparations from the outset of the proceedings.

Once and if the ICC Pre-Trial Chamber III has authorized the commencement of the investigation, Article 18(1) stipulates that the Prosecutor has to notify all States Parties to the Rome Statute (and the States which would normally exercise jurisdiction) of this commencement. After the notification, a State may inform the Court within a month that it is investigating its nationals or others within its jurisdiction with regard to matters relating to the information provided in the notification. In such a case, Article 18(2) provides that “the Prosecutor shall defer to the State’s investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorise the investigation.”

During the period of investigation, the OTP will try to collect as much evidence as possible in order to prove beyond reasonable doubt that the alleged crimes have indeed occurred and that individuals can be held responsible for their commission. If the OTP has enough elements, it will ask for the issuance of arrest warrants.

11) Do States have to execute future arrest warrants?

At any time during the investigation period, the Pre-Trial Chamber can, upon a request by the Prosecutor, issue a warrant of arrest. Article 89(1) provides that “States Parties shall [...] comply with requests for arrest and surrender.” However, States do not always comply with this obligation. This poses one of the major challenges to the Court, which cannot itself enforce arrest warrants. It is fundamental that States comply with the Court’s requests to execute arrest warrants, because without State cooperation it is impossible for the ICC to initiate proceedings against a suspect.

12) Can victims participate in ICC proceedings and how?

Victims have the right to participate from the beginning in ICC proceedings. At an early stage, victims can participate through the submission of communications to the OTP (preliminary examination and investigation). They can also share their views and concerns on the interest and scope of an investigation into a situation through “victims’ representations” after the ICC Prosecutor has requested the opening of an investigation [See above, Question #10].

Victims’ participation is a key part of the accountability process before the ICC and thus constitutes an essential component of justice. Rule 90 of the Rules of Procedure and Evidence stipulates that victims have the right to legal representation before the Court. Victim participation allows victims to have an independent voice in the proceedings and to make their own representations with a view to establishing the truth. Moreover, victim participation provides significant benefits to both the proceedings and the victims themselves.³¹

29 International Criminal Court, ‘Order to the Victims Participation and Reparation Section Concerning Victims’ Representations’, 9 November 2017, ICC-02/17-6, available at: https://www.icc-cpi.int/CourtRecords/CR2017_06732.PDF

30 See for example the communication of pre-trial chamber in the case of the investigation in Georgia: https://www.icc-cpi.int/iccdocs/otp/Article_15_Application--Notice_to_victims-ENG.pdf

31 FIDH, ‘Five Myths About Victim Participation in ICC Proceedings.’ December 2014, available at: <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/16592-five-myths-about-victim-participation-in-icc-proceedings>

Moreover, victims have the right to receive legal aid and they can apply for reparations. The ICC has established a reparations regime that is not connected to victim participation. Consequently, victims do not have to participate in the (pre-) trial phases to be eligible for reparations.³² The ICC follows the general principle of international law that reparation “must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”³³ The costs of these reparations are to be borne by the individual found guilty, or, if he/she is indigent, the ICC Trust Fund for Victims may be ordered to provide the said reparations.³⁴

13) Is this the first investigation of the ICC outside Africa?

No, it is not. The ICC is currently investigating the situation in Georgia. The investigation into the situation in Georgia focuses on alleged crimes against humanity and war crimes committed in the context of an international armed conflict between 1 July and 10 October 2008 in and around South Ossetia.

Moreover, six out of the ten preliminary examinations underway concern States outside of Africa: Palestine, Colombia, Iraq/UK, Registered Vessels of Comoros, Greece, Cambodia and Ukraine.

The current request by the OTP to open another investigation into a situation outside of Africa is a reaffirmation that the ICC aspires to be a global court of last resort.

32 The ICC reparations regime is set out in Article 75 of the Rome Statute and Rules 94 to 98 of the Rules of Procedure and Evidence.

33 Permanent Court of International Justice, *Chorzow Factory*. Case Merits 1928, PCIJ, Sr. A, N. 17 (September) at 47, available at: http://www.icj-cij.org/pcij/serie_A/A_09/28_Usine_de_Chorzow_Compotence_Arret.pdf

34 See also: FIDH, ‘Enhancing Victims’ Rights Before the ICC.’ November 2013, available at: <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/14259-fidh-report-enhancing-victims-rights-before-the-icc-a-view-from-situation>