

IV. COMPLETED PRELIMINARY EXAMINATIONS

AFGHANISTAN

Procedural History

230. The preliminary examination of the situation in the Islamic Republic of Afghanistan (“Afghanistan”) was announced in 2007. The Office has received a total of 125 communications pursuant to article 15 in relation to the situation in Afghanistan.
231. By memorandum of 30 October 2017, the Prosecutor notified the President of the Court, in accordance with regulation 45 of the Regulations of the Court, of her intention to submit a request for authorisation of an investigation into the situation in the Islamic Republic of Afghanistan pursuant to article 15(3) of the Statute.
232. On 3 November 2017, the Presidency of the Court assigned the Situation in the Islamic Republic of Afghanistan to PTC III.
233. On 20 November 2017, the Office requested authorisation from the PTC 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 Statute.²⁰ Specifically, the Office 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.

Preliminary Jurisdictional issues

234. Afghanistan deposited its instrument of ratification to the Statute on 10 February 2003. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of Afghanistan or by its nationals from 1 May 2003 onwards.
235. In relation to the crimes in the context of, and that 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.

²⁰ [Public redacted version of “Request for authorisation of an investigation pursuant to article 15”](#), 20 November 2017, ICC-02/17-7-Conf-Exp. The present chapter summarises the public Request for authorisation, which includes relevant references to sources used.

Contextual Background

236. In response to the attacks of 11 September 2001 on Washington D.C. and New York City, on 7 October 2001 the US launched military operation 'Enduring Freedom' ("OEF") in Afghanistan. The purpose of the operation was to fight Al Qaeda and the Taliban government which harboured Al Qaeda and its leadership. As part of the initial phase of the operation, the US organised and armed Afghan anti-Taliban forces operating under the coalition known as the 'Northern Alliance'. By the end of the year, the Taliban were ousted from power.
237. In order to establish permanent governance institutions, a number of Afghan leaders started talks under the auspices of the UN. The 2-5 December 2001 Bonn Conference resulted in the Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, otherwise known as the Bonn Agreement. The Bonn Agreement also requested the UN Security Council to establish a UN mandated force to assist in the maintenance of security for Kabul and its surrounding areas until the new Afghan security and armed forces were fully constituted and functioning. On 20 December 2001, the UN Security Council adopted resolution 1386 establishing an International Security Assistance Force ("ISAF"). In parallel to the ISAF mission, US forces continued military operations pursuant to OEF against supporters of the Al Qaeda network.
238. In tandem to the process of establishing Afghan governing institutions, the security situation continued to deteriorate, primarily due to the increasing level of insurgency, largely attributable to the Taliban, which began to rebuild its influence starting in 2002. The three largest anti-government armed groups operating in Afghanistan historically have been the Taliban, the Haqqani Network, and Hezb-e-Islami Gulbuddin ("HIG"). Al Qaeda also remains a focus of military operations by international forces in Afghanistan. Since 2015, groups calling themselves Daesh/Islamic State Khorasan Province ("Daesh/ISKP") have emerged and have been held responsible (or claimed responsibility) for a number of attacks against civilians in Kabul as well in Nangarhar province.
239. The number of international forces deployed to support the Afghan Government peaked at over 100,000 in 2010-2011, the majority of which were US armed forces, but with approximately 50 other countries contributing troops to ISAF, including states that are not members of NATO. The US-led OEF continued in Afghanistan alongside the NATO-led ISAF mission until the end of December 2014, when both combat missions officially concluded, and were replaced by Operation Freedom's Sentinel and Operation Resolute Support, respectively. The new missions are focused primarily on training, advising and assisting the ANSF, although Operation Freedom's Sentinel also conducts counter-terrorism operations against the remnants of Al Qaeda.

Subject-Matter Jurisdiction

240. 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 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.
241. As a result of its examination, the Office 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 ("ANSF"), in particular the National Directorate for Security ("NDS") and the Afghan National Police ("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.
242. The Office has also examined allegations of other crimes committed by international armed forces operating in Afghanistan. In particular, since 2009, when the UN Assistance Mission to Afghanistan ("UNAMA") began to record civilian casualties systematically, it has documented approximately 1,820 civilian deaths.
243. Having reviewed information on a large number of incidents attributed to the international forces, the Office 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.
244. 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.

245. More recently, during the preparation of its Request, the Office received media reports and article 15 communications concerning allegations made against special forces of certain international forces operating in Afghanistan. Should authorisation be granted to open an investigation, these and any other alleged crimes that may occur after the commencement of the investigation, as well as any attendant assessments concerning complementarity and gravity, could be assessed further within the scope of the authorised situation.

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

246. The Office 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.

247. 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.

248. 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.

249. 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 15 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

250. 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.
251. 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”).
252. 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

253. 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.
254. 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.

255. 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. Interrogation techniques were designed and implemented as part of a policy to obtain actionable intelligence, and appear to have been discussed, reviewed, and authorised within the US armed forces, the US Department of Defence (“DoD”), the CIA, and other branches of the US Government.

Admissibility Assessment

256. 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 ANSF; and members of the US armed forces or the CIA - the Office has found that these potential cases that would likely arise from an investigation of the situation in Afghanistan would be currently admissible. The Office will continue to assess the existence of national proceedings for as long as the situation remains under investigation, should the Chamber authorise the investigation, including in relation to any additional information that may be provided by relevant States with jurisdiction at the article 18 stage.

Members of the Taliban and affiliated armed groups

Complementarity

257. 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.
258. The Government of Afghanistan adopted a national action plan on transitional justice in 2005, which stated that no amnesty should be provided for war crimes, crimes against humanity and other gross violations of human rights, and set out other activities geared towards truth-seeking and documentation, and the promotion of reconciliation and national unity. The action plan remains unimplemented and appears to have become obsolete.

259. Instead, 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.
260. More recently, efforts have been taken by the Government of Afghanistan to build its capacity to meet its obligations under the 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.
261. Upon review of this and other information, the Office has concluded 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

262. Over the period 2009-2016, 50,802 civilian casualties (17,770 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 de-miners.
263. 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.

Members of the Afghan National Security Forces

Complementarity

264. Despite the particularly high prevalence of prohibited acts against conflict-related detainees in certain detention facilities run by the NDS or ANP, the information available does not indicate that relevant national proceedings have been carried out against those most responsible for such alleged crimes. Accordingly, the Office has assessed that the potential case(s) it has identified concerning crimes allegedly committed by members of the ANSF would currently be admissible, meaning that there is no conflict of jurisdiction between Afghanistan and the Court.

Gravity

265. 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.
266. 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.

Members of the US armed forces and the CIA

Complementarity

267. 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.
268. 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 that resulted in the alleged commission of crimes within the jurisdiction of the Court. Despite a number of efforts it has undertaken, the Office 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.

269. 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 that resulted in the alleged commission of crimes within the jurisdiction of the Court.
270. 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 Office 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 Office, and if so, whether they are genuine.
271. 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 US 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

272. 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.

273. 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, and to have occurred during a limited time period. 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.
274. 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 traumatised. 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.

Interests of Justice

275. 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 Office has identified no substantial reasons to believe that the opening of an investigation would not serve the interests of justice.

OTP Activities

276. During the reporting period, the Office has completed its comprehensive assessment of statutory criteria for a determination whether there is a reasonable basis to proceed with an investigation into the situation in Afghanistan pursuant to article 53(1) of the Statute.
277. Following the publication of the *OTP Report on Preliminary Examination Activities 2016*, various stakeholders, including appropriate State authorities engaged with the Office. In particular, the announcement by the Prosecutor in November 2016 that she would imminently decide on whether to open investigations prompted the submission of additional information, which required careful analysis. The Office took note of the efforts undertaken by the Afghan authorities over the

course of the past year to build its capacity to meet its obligations under the Statute, such as efforts to amend the penal code and the criminal procedural code to facilitate national investigations and prosecutions of ICC crimes.

278. The Office further engaged with competent stakeholders to discuss matters relevant for the issue of the “interests of justice”, including the gravity of crimes and the interests of victims of alleged crimes committed in Afghanistan.
279. The Office also seized a number of opportunities to reinforce its cooperation activities with relevant States and other external partners, emphasising that the effective cooperation is of the utmost importance for the work of the Office in this situation.

Conclusion

280. For the reasons set out above and on the basis of the information presented and the supporting material, on 20 November 2017 the Prosecutor has requested the PTC III to authorise the commencement of an investigation into the situation in Afghanistan in the period since 1 July 2002.²¹
281. 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.

²¹ [The Prosecutor of the International Criminal Court, Fatou Bensouda, requests judicial authorisation to commence an investigation into the Situation in the Islamic Republic of Afghanistan](#), 20 November 2017.