

No Investigation in Afghanistan

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By: James Hendry

On April 12, 2019, Pre-Trial Chambers II released its decision denying the request of the Prosecutor for authorization to investigate the situation in the Islamic Republic of Afghanistan (here). The decision of the Chambers is interesting not only because it carefully sets out the criteria for authorization of an investigation, but also provides extensive reasoning for rejecting a request under article 15 of the Rome Statute in the interests of justice.

Introduction

It would have been a huge investigation. The article 15 Request proposed commencing an investigation into alleged crimes committed on the territory of Afghanistan since May 1, 2003 as well as other crimes with a nexus to the armed conflict there and sufficiently linked to it but committed on the territories of other States Parties since July 1, 2002. Earlier, the Chamber asked for more information on allegations that would be made against a number of international forces operating in Afghanistan and further information on the structure, organization and conduct of Afghan Forces, the Islamic State and the United States (especially about its interrogation practices).

The Prosecutor alleged that there was a non-international armed conflict between organized groups on one side and the Afghan Government and supporting international forces on the other. Statistical data was offered to show that since 2009, thousands of civilians have been victims of violence that might constitute crimes within the jurisdiction of the Court. The Prosecutor classified the responsibility for the violence into three 'categories' of offenders, alleging all created a reasonable basis for belief in the commission of crimes.

First, the Taliban and other anti-government troops clashed with Afghan and international forces inflicting serious suffering on their perceived supporters and other civilians, one annex detailing a description of horrendous acts in 25 provinces. The Taliban and others were also alleged to have attacked UN, NGO and humanitarian institutions, Afghan Forces and members of the International Security Assistance Force (ISAF) established by the Security Council and also to have used child soldiers. The Prosecutor based her submissions mainly on findings of the United Nations Assistance Mission in Afghanistan (UNAMA) and the Afghan Independent Human Rights Commission (AIHRC), with support from almost 700 victim representations on behalf of millions of victims (para. 27). The Prosecutor alleged that the conduct qualified as crimes against humanity under article 7 and war crimes in a non-international armed conflict under article 8.

Second, the Prosecutor made allegations against Afghan National Security Forces in that they had committed crimes against persons *hors de combat* by detaining them for reasons related to the armed conflict. Once again, the Prosecutor relied on information provided by UNAMA, AIHRC and an *ad hoc* UN fact-finding body, all alleging these detainees had been tortured.

Third, US Forces and the CIA were to be investigated about the interrogation of detainees and the infliction of suffering on persons *hors de combat* inside and outside of Afghanistan. The Prosecutor relied on findings of the US Senate Select Committee on Intelligence, the US Armed Service Committee and the US Department of Defence. The Prosecutor alleged possible war crimes committed by international forces such as drone attacks and air strikes killing civilians that could not yet be established but might be shown when full information was gathered and analyzed. She was not asking for authorization at this point in respect of this conduct but noted that it might be assessed after investigation was authorized.

Authorization proceedings

The Rome Statute provides in article 15(4) that the Prosecutor may start an investigation *proprio motu* with the authorization of a Pre-Trial Chamber if there is supporting material demonstrating that there is a reasonable basis to proceed and the matter appears to be within the Court's jurisdiction. Article 53 of the Statute states that the Prosecutor must consider in making a decision to request authorization, whether the information gathered reveals a reasonable basis to proceed on the basis of a crime within the Court's jurisdiction, whether the case is admissible under article 17 of the Statute and, under article 53(1)(c), whether, in spite of the gravity of the crime and interests of the victims, there are 'substantial reasons to believe that an investigation would not serve the interests of justice'.

The Chamber's function in authorizing an investigation

The Chamber summarized its function as setting boundaries on the discretion of the Prosecutor when acting on her own 'to avoid manifestly ungrounded investigations due to lack of adequate factual or legal fundaments' (para. 32). It noted that its most critical function was 'to determine that the investigation would serve the interests of justice, to avoid engaging in investigations which are likely to remain inconclusive' (para. 33). The Chamber said that what was at stake was more than the Court's credibility, but 'its very function and legitimacy' (para. 34). It must decide whether the investigation would be in the best interests of justice, including the gravity of the conduct, victims' potential interests and that the investigation would be 'feasible and meaningful under the relevant circumstances' (para. 35). What is at stake under article 15 is the legality and appropriateness of investigation of whether crimes in the Court's jurisdiction have been committed.

If authorized, the Prosecutor must investigate thoroughly and quickly. The Chamber noted that in a complex situation such as the one before it, this might be critically difficult during a preliminary examination that had been going on for many years (para. 36). In assessing available information to decide whether the Prosecutor had a reasonable basis to believe a crime was committed in the Court's jurisdiction, the Chamber said that it must consider the information's inherent qualities (such as completeness, relevance and consistency) but also the authority of its sources. At the pre-investigative stage, the Chamber noted that the Prosecutor was acting on information which was not yet evidence (para. 36). The Chamber must scrutinize the incidents or category of incidents and possibly the groups of offenders identified by the Prosecutor and must not extend the scope of the investigation based on its assessment of the information. The Chamber noted that once it has determined that all relevant requirements are met, it must set limits on the authorized investigation because the Prosecutor can only investigate incidents specifically mentioned in the request and authorized by the Chamber as well as those incidents 'within the authorization's geographical, temporal and contextual scope or closely linked to it' (para. 40) and not the whole 'situation' (para. 42). The Chamber rejected the Prosecutor's argument that it should be able to expand its investigation to cases that are 'sufficiently linked' to the authorized situation. A 'close link' cannot be predetermined: it depends on such factors as the temporal, territorial, and material parameters of the authorized investigation such as connections between perpetrators, identity of pattern or policy (para. 41).

The Chamber made it clear that the Prosecutor decides on the feasibility of an investigation and its likelihood of leading to a prosecution, balancing the expectation of cooperation by national authorities and surrender of suspects with the interest of justice, including the interests of victims. Once the Prosecutor makes an article 15 request, the matter is turned over to the Pre-Trial Chamber to scrutinize the Prosecutor's judgment (para. 43).

The Chamber's review

Once turned over to the Chamber, authorization follows proof of jurisdiction over the person or place, that the crime comes under the Statute and that it meets the limits of the Court's temporal jurisdiction.

Sources of information

The Chamber found that the Prosecutor relied on authoritative, reliable and credible sources, specifically from the UNAMA, AIHRC and US government Senate investigations. It concluded that there was a reasonable basis for the belief that the incidents alleged occurred.

Jurisdiction

- **Jurisdiction over the territory**

The Prosecutor sought to investigate events that took place on Afghan territory as well as other crimes with a nexus to the non-international armed conflict that were 'sufficiently linked' to the situation and committed on the territory of a State Party. The Prosecutor argued that the Court had jurisdiction over persons either captured in Afghanistan and tortured outside, or captured outside Afghanistan, specifically referring to a CIA global programme including persons with no direct connection with the armed conflict in Afghanistan but linked to Al Qaeda or Taliban. The Prosecutor further put to the Chamber that it would be 'sufficient' if the capture either occurred in the context of the armed conflict or was 'associated' with it (para. 51).

The Chamber stated that the Court has jurisdiction if the conduct was completed on the territory of a State Party or was initiated there and continued in the territory of a non-State Party or *vice versa* (para. 50). The Chamber noted that the relevant nexus between the conflict and alleged criminal conduct was only satisfied if the victims were captured in Afghanistan, the territory in which the conflict was taking place. The jurisdictional link would not be there if the person was captured in Afghanistan but the mistreatment was inflicted on the territory of a non-State Party. The Chamber then held that humanitarian law did not extend outside the territory of Afghanistan where the non-international armed conflict was occurring and, as a result, excluded those persons captured outside that territory (para. 55). This directly affected the CIA allegations. The Chamber noted that the pre-investigation process was not expected to produce specific information about the identity of those who are criminally responsible for the identified conduct (para. 57). Also, the fact that most of the conduct was committed in Afghanistan made it unnecessary to determine whether the Court's jurisdiction was engaged by the nationality of the perpetrators. It added that the agreement between the US and Afghanistan referred to in article 98 not to surrender a national of the United States without its consent did not deprive the

Court of jurisdiction over the persons covered by the agreement (para. 59).

- **Jurisdiction over the subject-matter**

With respect to subject-matter jurisdiction, the Chamber was satisfied that there was a reasonable basis to believe that the incidents identified in the request qualified as crimes against humanity or war crimes because the contextual elements were present. The Chamber was satisfied that there was a reasonable basis to believe that the Taliban and other anti-government groups pursued 'widespread and systemic attacks directed against any civilian population' consisting of multiple acts pursuant to an organizational policy as set out in article 7 of the Statute. This belief was based mostly on credible UNAMA reports. The Chamber also found that there was a reasonable basis for belief that there was a non-international conflict exceeding internal disturbances and riots or sporadic violence between Afghan government forces against organized groups as required by article 8(2)(c) and (e) of the Statute. It found there was a reasonable basis for belief that the anti-government forces were organized armed groups with the meaning of article 8 based on their internal structure, fighting force, availability of weapons and funding, their ability to plan and conduct military operations and the seriousness of their violent conduct.

Limits of the authorization

The Chamber made it clear in relation to other acts allegedly committed by international forces, that the its authorization would not extend to all events in the 'situation', but only those incidents and groups of offenders it authorized pursuant to the article 15 Request.

Admissibility

The Chamber decided that the case was admissible under article 17 based on its assessment of potential crimes and offenders that might arise from the requested investigation. The two-part Pre-Trial Chamber's assessment of admissibility assessed whether the relevant States were conducting national proceedings in the same matter as in the request (based on the most serious conduct and offenders in issue) (complementarity), and if not, whether the gravity threshold was met. Under article 17, the case is inadmissible if there are national investigations or prosecutions pending, or where the State has investigated and then decided not to prosecute, unless the State is unwilling or unable to genuinely carry out the investigation or prosecution (paras. 71-2).

- **National Proceedings**

The Chamber agreed that potential cases arising from the authorized investigation would be admissible under article 17. It accepted the Prosecutor's assertion that no national investigations or prosecutions were underway against the Taliban or other armed groups against those likely most responsible and that members of such groups who have been captured and detained have principally been accused of crimes against the State under national legislation. The Prosecutor also submitted that there was a general amnesty in force in 2009 providing legal immunity to all belligerent parties, without time limits or exception for international crimes. The Prosecutor submitted there were no

investigations or prosecutions against members of the Afghan Forces who were likely most responsible based on UNAMA and AIHRC reports going back to 2012. The Prosecutor stated that information against the US and CIA showed no national investigations of those likely most responsible, rather than direct perpetrators, and that oversight reports show under-reporting and investigating detainee abuse were insufficient. The information did not show that criminal investigation or prosecutions have been conducted on incidents identified by the Prosecutor, only administrative or non-judicial measures that do not result in inadmissibility.

- **Gravity**

The Chamber found that the gravity threshold was met in respect of all the categories of crimes that the Prosecutor sought to investigate. The Prosecutor submitted information on the Taliban and other armed groups' crimes, the level of responsibility of perpetrators, the high number of victims, the large-scale commission of brutal criminal conduct over a long time, the manner of the commission and the devastating impact on innocent people. The Prosecutor submitted with respect to the Afghan forces, information about the level of responsibility of potential offenders, the multitude of victims, the nature of the crimes, including torture, and their modalities and the impact on their victims. The Prosecutor submitted information on the level of responsibility of the US and CIA, the number and seriousness of the crimes, the possible issue of command responsibility and the impact on victims.

The Chamber and the interests of justice

Despite positive findings on other relevant factors, the Chamber ultimately decided that the interests of justice did not permit authorization under article 53(1)(c). The Prosecutor did not make detailed submissions on this point and 680 out of 699 victim applications welcomed an investigation to bring culprits to justice, preventing crime and establishing the truth. In the absence of guidance on how to conduct this analysis, the Chamber undertook a careful examination of this issue based on the paramount objectives of the Rome Statute, the overall credibility of the Court as well as its organizational and financial sustainability (para. 88). The Chamber deduced that an investigation would only be in the interests of justice if it would be effective and lead to prosecution in a timely way.

The Chamber noted that the Court was not meant or equipped to address all scenarios where the most serious crimes were committed but to achieve success by focusing on those that would lead to a successful prosecution (para. 90). Here, the length of time between crimes and the request, the poor cooperation from parties, and the question about whether evidence and suspects would be available at this stage were relevant factors. The problems that caused the overly lengthy pre-investigation would likely remain. During this phase, the Prosecutor had not been able to fully secure the evidence or protection of witnesses. The complexity of the political context and its volatility made it very hard to gauge the possibility of cooperation in investigation or surrender of suspects. The nature of the crimes and context would require significant resources. Noting that future resources for the Court are questionable, the Prosecutor might have to reallocate financial and human resources to the detriment of other cases that might have better prospects of success (para. 95). An unsuccessful investigation would not meet victims' objectives. The Chamber noted that only victims of specific cases could play a

meaningful role as participants in proceedings, and if such cases cannot proceed this meaningful role would never materialize. Victims' expectation would be aspirations only, which might create hostility towards the Court, hindering its pursuit of its objectives in the future (para. 96).

Conclusion

The Chamber responded to the Prosecutor's article 15 Request in this case which involved the investigation of a significant portion of the most recent portion of a conflict (13 of the 699 victims' submissions was made on behalf of several millions of victims) (para. 27). Though it found that most of the criteria for authorization of the request were met, the Chamber reasoned that its authorization was not in the interests of justice. The Chamber was concerned about the likelihood of success of the investigation, the low level of cooperation of the parties (consider the recent US position on the Court, and the likelihood of cooperation from the Taliban and other armed anti-government groups), the impact of a big investigation on the Prosecutor's resources and their diversion from potentially successful proceedings, and the antipathy towards the Court that the disappointment of victims' objectives might create and above all, how this would impact on the Court's mission. Some commentators have expressed concern about the Court sacrificing its credibility. OpenGlobalRights is concerned that the Court has set a dangerous precedent, sacrificing the rule of law and the aspirations of multitudes of victims over many years to political and practical concerns (here). The Center for Constitutional Rights blames the Court for rejecting justice especially for US torture in the face of US 'bullying' (here). Parisa Zangeneh of IntLawGrrls emphasizes how long the Afghan people have waited for international justice only to lose to practical considerations where the request did not even include a strong focus on US conduct (here). On the other hand, Mark Kersten (here) advocates a valiant though doomed David and Goliath fight with the US, raising expectations about the Court's willingness to engage in a hopeless fight for US cooperation that no one will blame them for losing but which will boost the perceived legitimacy of the Court. He later writes (here) that the decision is a blend of the practical with the aspirational, properly allowing the Court to take its own interests into account. He is probably right.

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