

**INTERNATIONAL CRIMINAL COURT'S INVESTIGATION IN AFGHANISTAN-
IMPLICATIONS FOR PAKISTAN**

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About the Author

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Abstract

The International Criminal Court (“ICC”) is an intergovernmental judicial forum. The Rome Statute is a multilateral treaty that serves as this Court’s foundational and governing document. States which become Party to the Rome Statute become Member States of the ICC. In 2020, the Prosecutor of the ICC requested authorization from the Pre-Trial Judges to initiate an investigation into alleged war crimes and crimes against humanity in relation to the armed conflict in Afghanistan since 2003. Owing to the proximity of the conflict to Pakistan, and the fact that the Request for Authorization by the Prosecutor mentioned Pakistan, it is worth exploring whether the investigation by the ICC will have any implications for Pakistan.

Keywords: International Criminal Court, Afghanistan, Pakistan, Investigation, Taliban

I) Introduction

The International Criminal Court (“ICC”) is an intergovernmental judicial forum. The ICC investigates and, where warranted, tries individuals charged with crimes under the jurisdiction of the Court: genocide, war crimes, crimes against humanity and the crime of aggression.

The ICC can only investigate and prosecute “natural persons” who are over the age of 18. The ICC cannot investigate or prosecute governments, corporations, political parties, or rebel movements, but may investigate individuals who are members of groups. Also, the ICC can only exercise jurisdiction over nationals from a state within the Court’s jurisdiction (e.g. State Party; non-State Party that consents to jurisdiction or was referred by the United Nations Security Council (“UNSC”)).

The Rome Statute of the ICC (“Rome Statute”) is a multilateral treaty that serves as the ICC’s foundational and governing document. States which become Party to the Rome Statute become Member States of the ICC. Currently, Afghanistan is a State Party to the Rome Statute but Pakistan and the United States are not.

II) The Case of Afghanistan

On 5 March 2020, the Appeals Chamber of the ICC unanimously decided to authorize the Prosecutor of the ICC to commence an investigation into the alleged crimes under the jurisdiction of the Court, in relation to the situation in Afghanistan.

On 26 March 2020, Afghanistan made a request under Article 18(2) of the Rome State which states that, “*a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes [within the jurisdiction of the Court]. At the request of that State, 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 authorize the investigation.*”

However on 31 October 2022, the Pre-Trial Chamber of the ICC authorized the Prosecutor to resume the investigation into Afghanistan. This was done because it was understood that Afghanistan was not doing enough to investigate the crimes under the jurisdiction of the Court, something it had undertaken to do when making the request in March 2020.

The initial request by the Prosecutor of the ICC, made in 2020, included possible war crimes and crimes against humanity in Afghanistan, including those allegedly committed by the United States forces and the Central Intelligence Agency (“CIA”). The United States government publicly opposed this decision of the ICC, with the then Secretary of State, Mike Pompeo, calling the decision, a “breathtaking action by an unaccountable political institution,

masquerading as a legal body.”¹ However, in 2022, when the investigation was resumed, the new Prosecutor of the ICC, defended omitting the United States from the investigation in Afghanistan, saying the “worst crimes” were committed by the Taliban and the ISIL (ISIS).

III) Pakistan’s Proximity to the ICC’s Investigation

Owing to how the jurisdiction of the Court works, discussed below, the ICC’s investigation into Afghanistan has implications for Pakistan.

The timeline and background of the Afghanistan case, relevant to Pakistan, is as follows:

- i. In 2007, the preliminary examination of the situation in Afghanistan was made public.
- ii. In early 2014, a group of victims (“Cross-border Victims”) located in Pakistan, submitted a dossier to the Prosecutor of the ICC which contained evidence of crimes, within the jurisdiction of the ICC that had been committed in Pakistan but launched from Afghanistan. This dossier ran to many hundreds of pages of evidence, gathered by a non-governmental organization in Pakistan, the Foundation for Fundamental Rights, and a non-governmental organization in the United Kingdom, Reprieve, on behalf of the Cross-border Victims.
- iii. On 20 November 2017, the Prosecutor requested authorization from the Pre-Trial Judges of the ICC, to initiate an investigation into alleged war crimes and crimes against humanity in relation to the armed conflict in Afghanistan since 1 May 2003. The Request involved investigating the following:
 - a. The Taliban and affiliated groups for crimes against humanity and war crimes;
 - b. The Afghan National Security Forces for war crimes; and,
 - c. The armed forces of the United States and its CIA for war crimes.
- iv. On 12 April 2019, the Pre-Trial Chamber II, rejected the Prosecutor's request for authorization of an investigation, on the ground that the commencement of an investigation would not be in the interests of justice. The Prosecutor filed an appeal against that decision.
- v. On 11 October 2019, the Cross-border Victims applied for leave to make submissions stating that their position was not included in the Prosecutor’s request for authorization of an investigation.

¹ Npr, “International Criminal Court Allows Investigation Of U.S. Actions In Afghanistan”, March 5, 2020, retrieved from, <<https://www.npr.org/2020/03/05/812547513/international-criminal-court-allows-investigation-of-u-s-actions-in-afghanistan>>

- vi. On 24 October 2019, the Cross-border Victims were invited to file observations, by the Appeals Chamber of the ICC, by 15 November 2019.
- vii. On 15 November 2019, the Cross-border Victims filed submissions to the Appeals Chamber of the ICC. The Submission requested the Appeals Chamber to authorize the then Prosecutor, Ms. Bensouda, to conduct investigations and direct her to provide clarity as to her intended approach with regards to their complaints and whether and to what extent she intends to pursue an investigation into the crimes they have suffered.
- viii. On 5 March 2020, the Appeals Chamber of the ICC decided unanimously to authorize the Prosecutor to commence an investigation into alleged crimes under the jurisdiction of the Court in relation to the situation in Afghanistan. The Appeals Chamber found that the Prosecutor is authorized to investigate, the crimes alleged to have been committed on the territory of Afghanistan 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 in Afghanistan and were committed on the territory of other States Parties to the Rome Statute since 1 July 2002.

As a result of the authorization by the Appeals Chamber, the following should be noted:

- i. The Prosecutor's investigation centers on alleged crimes against humanity and war crimes committed by the Taliban and affiliated armed groups as well as by the Afghan National Security Forces in Afghanistan since 1 May 2003, when the country joined the ICC.
- ii. The Prosecutor has focused on the Taliban's crimes against humanity of murder, imprisonment or other severe deprivation of physical liberty, and persecution against identifiable groups of civilians, including on political and gender grounds. Taliban actions are believed to have resulted in tens of thousands of civilian casualties, and the Prosecutor will seek to identify Taliban leaders who orchestrated the killing and wounding of so many civilians.
- iii. The Afghan security forces are being investigated for several war crimes against hundreds of civilians: torture and cruel treatment; outrages upon personal dignity, such as humiliating and dehumanizing abuses and sexual violence.
- iv. The United States armed forces and CIA became the focus of an investigation for war crimes against around eighty victims who allegedly suffered torture and cruel treatment, outrages upon personal dignity, and rape and other forms of sexual violence.

IV) Jurisdiction & Functioning of the ICC

The ICC has jurisdiction to prosecute individuals for the international crimes of genocide², crimes against humanity³, war crimes, and the crime of aggression⁴. The jurisdiction of the ICC

² Rome Statute, Article 6- Genocide

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

³ Rome Statute, Article 7- Crimes against humanity

For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

⁴ Rome Statute, Article 8 *bis*- Crime of aggression

[An] "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, [...] qualify as an act of aggression:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

is intended to complement existing national judicial systems and it may therefore exercise its jurisdiction only when certain conditions are met, such as when national courts are unwilling or unable to prosecute criminals or when the UNSC or individual States refer situations to the Court.

Under Article 13 of the Rome Statute, there are three ways the exercise of the ICC's jurisdiction can be triggered where crimes under the Court's jurisdiction appear to have been committed:

- i. Any State Party to the Rome Statute may request the Prosecutor to carry out an investigation. This was done in the cases of the Democratic Republic of the Congo, Uganda, Central African Republic on two occasions, and Mali;
- ii. The UNSC may also refer a situation to the Prosecutor. To date, this possibility has materialized with respect to the situations in Darfur and Libya. UNSC referrals may also give the Court jurisdiction over States not Party to the Rome Statute;
- iii. The Prosecutor may open an investigation on her own initiative after the authorisation of the judges; this was the case for Kenya, Côte d'Ivoire, Georgia, Bangladesh/Myanmar and recently, Afghanistan. The Prosecutor cannot, on her own motion, initiate investigations with respect to States not Party to the Rome Statute unless the matter involves nationals of States Parties allegedly involved in committing Rome Statute crimes on the territory of the Non-State Party in question.

Exceptionally, States may accept the jurisdiction of the ICC on an ad hoc basis, by submitting a declaration pursuant to article 12(3) of the Rome Statute.

A State not party to the Rome Statute can accept the jurisdiction of the ICC with respect to crimes committed within its territory or by one of its nationals, and request the Office of the Prosecutor to carry out an investigation.

- ***Establishing Jurisdiction in Afghanistan***

The jurisdictional basis for the investigation in Afghanistan is Article 15 of the Rome Statute. Under this Article, the Prosecutor is allowed to initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the ICC. For the Prosecutor to exercise jurisdiction under Article 15, the crimes have to either be committed on the territory of a State Party or have to be committed by a national of the State Party. In the case of Afghanistan, the then Prosecutor, Ms. Bensouda, made a request for authorization to investigate war crimes and crimes against humanity allegedly committed on the territory of Afghanistan since May 1, 2003.

- *Extending Jurisdiction to Pakistan*

Whereas the Prosecutor's investigations should be limited to State Parties, like Afghanistan, Ms. Bensouda had obtained permission to investigate the actions of the United States armed forces and CIA officials as well. The United States, like Pakistan, is not a State Party to the Rome Statute. However, it should be noted that the ICC's jurisdiction is triggered when genocide, crimes against humanity, or war crimes occur on the territory of an ICC Member State. Hence, the Pretrial Chamber of the ICC ruled that United States nationals, responsible for crimes committed on the territory of Afghanistan, are subject to the ICC's jurisdiction.

Since the ICC has jurisdiction to investigate all crimes committed on the territory of Afghanistan since 2002, there is a chance that the Prosecutor's investigation may result in the Prosecutor finding a nexus between the conflict in Afghanistan and nationals in Pakistan. Even though Pakistan is not a State Party, any actions committed on the territory of Afghanistan or having a "nexus" with the crimes in Afghanistan, can be investigated by the Prosecutor. This understanding is based on the following:

- i. The Appeals Chamber, which authorized the investigation request made by the Prosecutor, stated that the authorization for an investigation should not be restricted to the incidents specifically mentioned in the Prosecutor's Request and incidents that are "closely linked" to those incidents can also be investigated. This effectively means that the Prosecutor is allowed to investigate actions and individuals that may be uncovered during the course of the investigation. Whereas, the actions of Pakistani officials are not within the scope of the Prosecutor's initial investigation, considering Pakistan's proximity to the conflict in Afghanistan, there is a chance that the initial investigations could implicate Pakistan.
- ii. The Appeals Chamber, in earlier cases such as Bangladesh, has also allowed investigations into actions or situations which have a "nexus" with the crimes in a State Party. The Appeals Chamber has noted that the "nexus" requirement for war crimes is recognized in the "elements of crimes".⁵ It has stated that,

"The penultimate element of each of the war crimes under the Court's jurisdiction requires that:
The conduct took place in the context of and was associated with an international armed conflict [or with an armed conflict not of an international character]."

⁵ "Decision assigning the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", 06 September 2018, ICC-RoC46(3)-01/18, ¶ 68

This effectively extends the jurisdiction of the ICC to actions that have been undertaken in furtherance of the crimes within the jurisdiction of the Court. That means that even if one element of the crime occurred on the territory of a Non-Party, as affirmed by the ICC in its decision regarding its jurisdiction over Myanmar in the Bangladesh case, the Court can still exercise jurisdiction.⁶ It is part of public record that,

“[a]fter the fall of Taliban Government, Al Qaeda “core” fled to the Federally Administered Tribal Areas in Pakistan, where it continued its operations, including with respect to the ongoing armed conflict in Afghanistan.”⁷

This statement by the Prosecutor indicates that Pakistan is already on the radar of the Court, with regards to the conflict in Afghanistan, and a nexus, if shown by the Prosecutor, could possibly extend the investigation to individuals in Pakistan.

- iii. Moreover, the Appeals Chamber agreed with the International Committee of the Red Cross (“ICRC”), that
- “an existing non-international armed conflict may spill over from the territory of the State in which it began into the territory of a neighboring State not party to the conflict.”⁸

This shows a recognition by the ICC that a conflict can cross jurisdictional boundaries.

The fact that Pakistan is involved in and impacted by the conflict in Afghanistan is further cemented by the active involvement of Cross-border Victims in the ICC case. Although these victims have only made submissions to the ICC to let their stories known, and have not implicated Pakistan in any way, it cannot be stated with certainty that any further investigations will not rope Pakistan into the investigation.

⁶ “Decision assigning the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, 06 September 2018, ICC-RoC46(3)-01/18, ¶ 64

“In this regard, the Chamber considers that the preconditions for the exercise of the Court’s jurisdiction pursuant to article 12(2)(a) of the Statute are, as a minimum, fulfilled if at least one legal element of a crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party.”

⁷ “Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan”, 05 March 2020, ICC-02/17 OA4, ¶ 67

⁸ “Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan”, 05 March 2020, ICC-02/17 OA4, ¶ 75

V) Recommendations

Relying on the facts and analysis above, there is a possibility, albeit small, that the investigation of the Prosecutor's Office of the ICC leads them to individuals situated in Pakistan. The concern lies in the proximity of Pakistan to certain individuals that may become the focus of the Court once the Prosecutor starts identifying individuals responsible for committing Rome Statute crimes in Afghanistan.

There has been one instance in which the ICC has asserted jurisdiction over a Non-Party, which has been in the Bangladesh/ Myanmar case. Bangladesh is a State Party to the Rome Statute but Myanmar is not. In this case the ICC asserted jurisdiction on the basis of territoriality, by stating that it could extend jurisdiction over Non-State Parties for actions committed on the territory of State Parties.

The investigation of the Prosecutor and the progression of the case at the ICC should be closely monitored to keep abreast of the direction that the case is taking. This will ensure that Pakistan is well prepared in the event that any question is asked of Pakistan.

In the event that the ICC's investigation implicates Pakistan, there are two options for Pakistan:

- i. Since the investigation will focus on non-State actors, Pakistan can cooperate with the ICC and aid the Court's investigation. This will portray Pakistan as an internationally responsible country and one that stands against the crimes listed in the Rome Statute.
- ii. Since Pakistan is not a Party to the Rome Statute, Pakistan can choose to not cooperate with the investigation of the Court. However, like the situation in the Bangladesh/ Myanmar case, the ICC can still give a ruling in the case.

It needs to be noted that whatever decision is made needs to take into consideration that the investigation into the situation in Afghanistan is not only centered on the Taliban in Afghanistan but also includes officials of the United States. Pakistan's response to possible investigation by the ICC will need to take political considerations into account, including Pakistan's relationship with Afghanistan and the United States.