

ANALYSIS WORLD

The Afghan Conflict and the Long Road to International Justice

In light of the current situation in Afghanistan, there is a need to review the efforts of the UN's International Criminal Court and the institution's past efforts to hold those guilty of war crimes to account.



Taliban fighters march in uniforms on the street in Qalat, Zabul Province, Afghanistan, in this still image taken from social media video, uploaded August 19, 2



Saumya Uma



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This is the first in a series of articles on the International Criminal Court. The Rome Statute creating the ICC entered into force on July 1, 2002 and the court is now in its 20th year. To mark the occasion, The Wire is publishing a series of articles evaluating its performance over the past two decades.

As major cities in Afghanistan fall to the Taliban, fuelled by the US's withdrawal of its troops, a new brutal chapter of the armed conflict unfolds itself with a humanitarian crisis of great proportions, mass killings, heinous crimes – particularly against women and girls, displacement and human misery. Against this volatile and complex tapestry, a call for accountability for the heinous crimes committed in the past, present and possibly in the near future, becomes necessary.

Commission of war crimes and crimes against humanity

War crimes have been committed in Afghanistan and against Afghan civilians for the past several decades. They have been committed by the Taliban, the Afghan government's forces and by international armed forces that stationed themselves in the country after the US-led invasion in 2001, including but not limited to US and UK troops.

From 1996-2001, the Taliban captured power in most parts of Afghanistan where it enforced an extremely harsh interpretation of Sharia (Islamic) law, subjecting many civilians to horrific brutalities. The Afghanistan Justice Project, in a report titled **Casting Shadows: War Crimes and Crimes Against Humanity 1978-2001**, documented the commission of war crimes and crimes against humanity in different phases of Afghanistan's political history – including during the Taliban's brutal military campaign – by the Taliban and by Afghan and foreign armed forces.

Also read: Afghanistan's Panjshir Valley Emerges Once Again as a Resistance Focal Point

The crimes documented include mass killings, enforced disappearances, summary executions of tens of thousands of Afghans, indiscriminate bombing and rocketing, torture, mass rape, sexual and gender based violence, persecution and other serious crimes. We cannot forget the Taliban's strict enforcement of Sharia law on women and girls, violating their civil, political, social, economic and cultural rights; subjecting them to brutal punishments such as public stoning for their perceived transgressions.

The defeat of the Taliban in late-2001 did not bring an end to the crimes they committed. The world has witnessed a Taliban resurgence after 2001 and many heinous crimes have been committed by the Taliban in subsequent years. In 2015, **Human Rights Watch documented** numerous violations of international humanitarian law by persons in authority within the Afghan governmental forces – military officials and police personnel – or persons with their backing, such as local militia commanders. Crimes documented include mass killings, summary executions, torture, rape, enforced disappearances and arbitrary detention. Additionally, heinous crimes

committed by US forces on Afghans, including indiscriminate and excessive use of force during arrests, arbitrary and indefinite detention, torture and custodial killings, have also been **documented**.

UN agencies such as the United Nations Assistance Mission in Afghanistan (UNAMA) have issued statistical reports annually since 2009, documenting civilian casualties (deaths and injuries) as well as crimes committed by all agencies. **A report of civilian casualties in armed conflict in 2020**, published in early-2021, attributed 62% of all civilian casualties to anti-government elements – including 45% of casualties to the Taliban – and 25% to pro-government forces – including 1% to international military forces. Additionally, the **sixth periodic report on torture**, published by the UN Office of the High Commissioner on Human Rights in February, 2021, is illustrative of the rampant torture of detainees in Afghanistan and calls for accountability mechanisms to be put in place.

Preliminary examination by the International Criminal Court

The International Criminal Court (ICC), established through the Rome Statute, is the first international judicial institution of a permanent nature that is capable of prosecuting individual perpetrators for war crimes, crimes against humanity, genocide and the crime of aggression. There are three ways in which a case can be taken up by the ICC: referral by the concerned state party, investigation by the prosecutor on their own initiative and referral by the UN Security Council. For the ICC prosecutor to begin investigation into a situation, a pre-trial chamber has to authorise the same on the basis of evidence presented before it.



The entrance of the International Criminal Court (ICC) is seen in The Hague, Netherlands. Photo: REUTERS/Jerry Lampen

Afghanistan became a state party to the Rome Statute on May 10, 2003. On the basis of numerous communications received by the Office of the Prosecutor (OTP) of the ICC from victims and human rights organisations, the OTP commenced a preliminary examination into the situation in Afghanistan in 2007. Its focus was on the alleged commission of ICC crimes in the context of the armed conflict between pro-government and anti-government forces. These include a range of acts constituting crimes against humanity and war crimes.

War crimes consist of grave breaches of Geneva Convention, 1949 and other serious violations of laws and customs as applied in international armed conflict. **The Rome Statute** lists out acts that constitute war crimes, including wilful killings, torture, extensive destruction and appropriation of property, unlawful deportation, unlawful confinement and intentional attacks against civilian populations and objects, vehicles and personnel delivering humanitarian assistance, and pillaging.

War crimes apply both to international and non-international armed conflict, with the latter forming a large part of the conflicts around the world in the last decade. Crimes against humanity, on the other hand, are crimes that may be committed during “peace times” and consist of a list of crimes, committed in a widespread or systematic manner, directed at a civilian population with knowledge of the attack.

The aim of the ICC prosecutor’s preliminary examination is “to collect all relevant information to reach a fully informed determination of whether there is a reasonable basis to proceed with an investigation” as required by the relevant provisions of the ICC Statute. A preliminary examination is a necessary step prior to the launch of a full-fledged investigation. During the preliminary examination, the OTP is mandated to consider jurisdictional matters, complementarity, gravity and the interests of justice.

Given the complexity of the Afghan situation and the alleged commission of crimes by multiple actors, – national and international – the OTP took a decade to complete the preliminary investigation. In comparison, it completed the preliminary examination in close to five years in the Palestine situation.

In November, 2017, the ICC prosecutor made a **request for authorisation of an investigation** into the situation in Afghanistan to a pre-trial chamber of judges. This is a necessary legal procedure that acts as an oversight mechanism on the prosecutor’s actions. The ICC prosecutor informed the pre-trial chamber that since 2009, more than 26,500 civilians have been reportedly killed. She relied upon UNAMA’s reports to illustrate the scale and gravity of the crimes and the extent of casualties.

Significantly, the request was made for commencing an investigation into three sets of ICC crimes: a) Crimes against humanity and war crimes by the Taliban and affiliated groups; b) War crimes committed by Afghan governmental agencies, such as members of the Afghan National Security Forces; and c) War crimes committed by US armed forces including the Central Intelligence Agency (CIA), not only within the territory of Afghanistan, but also in secret detention facilities that the CIA operated in Poland, Romania and Lithuania.

The erstwhile ICC prosecutor Fatou Bensouda argued before the pre-trial chamber that she had reasonable basis to believe that US armed forces had committed 54 instances of crimes and 24 additional instances were committed by the CIA on the territory of Afghanistan, mostly in 2003-4. She alleged that the CIA committed torture and sexual violence on Afghan nationals in its overseas detention facilities.

The three countries named by the prosecutor are significant as they are state parties to the Rome Statute and have a legal obligation to cooperate with the ICC. The prosecutor alleged that these three countries had detention centres within their territories where the CIA implemented its ‘CIA torture’ or ‘black site detention programme’ and committed ICC crimes.

Pre-trial chamber’s refusal to authorise an investigation



In April, 2019, the chamber **unanimously rejected the authorisation for investigation** on grounds that such an investigation by the prosecutor would not be in the ‘interests of justice’. While admitting that the evidence presented before it indicated that ICC crimes had probably been committed in Afghanistan, it noted that considerable time had elapsed since the commencement of the preliminary examination in 2006 and that the political scene in Afghanistan had undergone immense changes since then.

Interestingly, it also cited the lack of cooperation that the prosecutor had received from the Afghanistan government as grounds for rejection of the authorisation, which would hamper a thorough investigation and a successful prosecution. It drew attention to budgetary constraints at the ICC and opined that the scarce resources must be used to prioritise activities that would have “better chances to succeed”.



Current ICC prosecutor Karim Asad Ahmad Khan. Photo: Official ICC website

Needless to say, the pre-trial chamber’s judgment was a controversial one, heavily criticised by several human rights organisations. It indicated a tussle between the pre-trial chamber and the OTP over who has the primary responsibility

and authority to decide which situations would be investigated. The rejection also brought to the fore a hotly contested ideological issue: given its limited financial and human resources, should the ICC focus its attention on every situation where heinous crimes have been committed or should it prioritise its focus on those cases where it is likely to be more “successful” (in arresting, prosecuting, convicting and punishing the accused)?

In the initial years of the ICC’s functioning it took on situations referred to it by state parties themselves, probably as state cooperation would be more likely in such cases and so an investigation would be feasible and would have the potential to be successful. However, after nearly two decades of its existence, should the ICC assess ‘interests of justice’ by reducing it mechanically to whether an investigation is feasible and likely to be successful? The tension is between the principle and the pragmatic, and this tension is very real and palpable.

Also read: [How Afghanistan’s National Museum Survived the First Week of the Taliban’s Return to Kabul](#)

Reversal of decision by the appeals chamber of the ICC

The prosecutor, as well as some victims, appealed the decision. The appeals chamber in its [decision in March, 2020](#), reversed the pre-trial chamber’s judgement and unanimously authorised the prosecutor to commence an investigation into the alleged crimes within the jurisdiction of the ICC, committed in the territory of Afghanistan after May 1, 2003. The decision of the appeals chamber brought clarity to the mandate of the ICC prosecutor and pre-trial chamber and circumscribed the limits of their responsibilities.

By examining the drafting history and the relevant provisions of the ICC statute, the appeals chamber held that the prosecutor is mandated to assess the interests of justice only when a state party or the UN Security Council refers a situation to them for investigation, although this was not the case for Afghanistan. It categorically stated that the pre-trial chamber is mandated only to determine if, based on the evidence placed before it, there exists a reasonable factual basis and jurisdiction to authorise an investigation; it is not mandated to examine the interests of justice when the prosecutor applies for authorisation to commence an investigation of their own initiative.

The appeals chamber's decision was welcomed by the OTP, the victims and the supporters of justice. However, this opened up the possibility for investigating the role of the US armed forces in committing heinous crimes against Afghan nationals. Needless to say, the US government, which holds a record for shielding its nationals from accountability mechanisms in domestic and international spheres, made a push back.

Role of the United States in undermining the Afghan investigation

After the appeals chamber of the ICC announced its decision authorising the prosecutor's investigation into the Afghan conflict, the US made shameful attempts at shielding its military, intelligence and other personnel, thereby undermining the rule of law. The Trump administration issued **Executive Order 13928** dated June 11, 2020 which imposed sanctions on ICC officials who were investigating the complicity of US nationals.

The executive order further authorised US officials to block the assets of ICC employees and prevent ICC personnel from entering the US through visa restrictions. The order laid out

the US's perspective on the ICC investigation – that it threatened to infringe upon the country's sovereignty and impede its “critical national security and foreign policy work.” The US assault on the ICC's work undermined the only hope for justice for thousands of Afghan victims.

Incidentally, the Biden administration revoked the executive order through **Executive Order 14022**, dated April 1, 2021, on the grounds that the imposition of sanctions against ICC personnel had been “inappropriate and ineffective.” That is not to say that the Biden administration is supportive of the ICC; it aligns with its predecessors in objecting to the exercise of ICC jurisdiction over US nationals. However, it considers that its concerns can be better addressed through engagement with stakeholders of the ICC process rather than through sanctions.

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The issue of complementarity

In November, 2020, a damning report in Australia – **the Brereton War Crimes Report** – found credible evidence to conclude that 19 soldiers within an elite Special Air Services and commando regiment of the Australia Defence Forces had unlawfully killed at least 39 Afghan civilians and detainees, including children, in 23 incidents. The conclusion was reached after examining 57 incidents through interviews of over 423 witnesses amongst other evidence. The report was a product of a four-year inquiry by the Army Reserve Major General Paul Brereton, spurred on by information received from a military whistle-blower and local media reports about the grave misconduct of Australian soldiers who served in Afghanistan from 2005-2016.

The inquiry, made possible by the military leadership of Australia, resulted in 143 recommendations, including one that laid out that criminal investigations be initiated against 19 soldiers in Australian courts and that the Meritorious Unit Citation awarded to the concerned unit be rescinded. Along with the release of the report, the Chief of the Defence Force, General Angus Campbell **announced** his decision to accept all recommendations made in the report, much to the chagrin of Australia's veterans. An unspoken incentive for the same was to avert possible arrests and prosecutions by the ICC.

The ramifications of the Brereton report for international criminal justice are immense. The report made a small but significant inroad into the absolute impunity enjoyed by the international armed forces for their years of action in Afghanistan. It also highlighted the 'warrior culture' of violence, secrecy, fabrication and deceit.

The ripple effect was felt by the UK, the US and other governments that had sent their forces to Afghanistan, when the Afghanistan Independent Human Rights Commission asked them to take a leaf from Australia's book and open investigations into the possible commission of war crimes in Afghanistan by their troops. It would be in the interest of the political and military leadership of those countries to conduct sincere and effective internal inquiries and enforce

accountability on errant officials, rather than have them be hauled up by the ICC in a long-drawn legal process.

In the past, the US administration, under the leadership of Barack Obama, **closed without charges** the only two cases of detainees tortured to death by CIA officials – one of an Afghan detainee, Gul Rahman, held in a secret detention centre near Kabul referred to as the “Salt Pit” and the other of an Iraqi detainee in CIA custody in Abu Ghraib.

By the end of 2012, the Obama administration had aggressively and effectively whitewashed the heinous crimes committed by the CIA by way of its brutal interrogation techniques during its declared “war on terror”. Such techniques include ‘waterboarding’ and simulated drowning, which human rights advocates say amount to torture. Obama was cited as saying “we need to look forward as opposed to looking backwards.”

The importance of “looking backwards” and implementing accountability mechanisms for past crimes in order to “look forward” and prevent the commission of such crimes in the future was lost on the administration.

Given this past record, the US administration would need to demonstrate a genuine intent to investigate and prosecute its errant officials in relation to the Afghan conflict in order to effectively block an ICC investigation, even if that means that many skeletons tumble out of the closet.

The principle of complementarity, built into the Rome Statute of the ICC, works in activating and encouraging domestic mechanisms of accountability. The ICC would investigate and prosecute suspects for alleged ICC crimes only if the state concerned was either unwilling or unable to do so within the domestic legal system. ‘Willingness’ would be assessed not only through the commencement of formal investigations,

enquiries or prosecutions under domestic law, but also through assessing how genuine the intent of such legal processes was towards accountability.

The ICC would be most successful in its vision if domestic prosecutions of suspects – irrespective of the power they held – took place for ICC crimes, pre-empting the need for the ICC's intervention.

The complementarity principle has weighed in on the ICC's investigation in Afghanistan in another manner as well. The Afghanistan government, in April, 2020 requested the prosecutor to defer her investigations so that it could provide evidence to the ICC to show that it had the ability and willingness to prosecute those responsible for committing war crimes and crimes against humanity. Since the ICC is envisioned to be a court of last resort, – and with the principle of complementarity built into the Rome Statute – primacy is given to trials in the national courts rather than the ICC. Thereafter the government sent the OTP the details of cases that it was investigating or prosecuting in order to fix criminal responsibility on the concerned suspects.

The Afghan government provided a list of 151 cases that it had been purportedly investigating or prosecuting against government officials, 36 cases of which were serious crimes committed by Taliban officials in addition to a number of crimes by international forces, though these did not include any alleged crimes by the US military or the CIA.

In April, 2021 the prosecutor filed a **notification on the deferral request**, essentially informing the court and the public that it would continue to assess the 5,000-odd pages of information sent to it by the Afghan government to examine if there was tangible evidence that demonstrated that concrete steps were being taken to assign criminal responsibility. This

was necessary to make a decision on the government's request for deferring the ICC investigation.

Organisations such as **Human Rights Watch** have observed that Afghanistan's record on justice is poor and that it has failed to hold accountable both senior military and police officials as well as Taliban officials, who have been credibly accused of a range of crimes such as torture, sexual violence, extrajudicial executions and enforced disappearances. They further opined that the Afghanistan government has rewarded, not punished, some of the gravest offenders.

Peace versus justice?

The ICC's continued investigation into the Afghan conflict may hamper peace processes and provoke more hostility among all actors, possibly leading to the further commission of heinous crimes in the short run. Given the fast-changing political landscape of Afghanistan, this is a clear possibility. This brings to fore the sharply contested debate on peace versus justice. However, for long lasting peace in Afghanistan, perpetrators of serious crimes, whoever they may be, must be brought to justice.

The road to international justice for serious crimes committed in the Afghan conflict remains long and arduous, with a chequered history. The US's withdrawal of its military forces, the Taliban's success in capturing power in provincial capitals and a possible power-sharing arrangement between the Afghan government and the Taliban in the near future are bound to have a bearing on possibilities for justice.

Recent reports of heinous crimes by the Taliban include **executions of surrendering commandos, destruction of houses, indiscriminate and brutal killings of civilians, forced marriages of girls, sexual slavery of and violence against women** and so on, all of which amount to crimes against humanity and war crimes – some of the most serious crimes under international law. It remains to be seen if the Taliban can be held accountable for the same in the near future.

Despite the widespread and systematic nature of the heinous crimes, past efforts at accountability have not been successful. Had they been successful, the history of atrocities may not have repeated itself. The intervention of the ICC in recent years has been seen as giving a fresh lease of life to the decade-old international and domestic efforts to fix accountability for these crimes. But for now, international efforts will be needed to actively alleviate the humanitarian catastrophe that is unfolding in Afghanistan.

Dr. Saumya Uma is a co-founder of ICC-India: an anti-impunity campaign on the International Criminal Court and served as its national coordinator in the years 2000-2010. She is currently a Professor of Law at Jindal Global Law School, O.P. Jindal Global University, India and Board member of Women's Regional Network. The views expressed are her own.

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