

ICC Appeals Chamber authorises the Prosecutor to proceed with the investigation into the war crimes committed in the context of the conflict in Afghanistan

INTRODUCTORY TEXT: On 5 March 2020, the Appeals Chamber of the ICC reversed a 2019 decision of the Trial Chamber and authorised the Prosecutor to proceed with the investigation into the situation in Afghanistan. According to the Appeals Chamber, the Prosecutor is authorised to investigate into allegations of war crimes committed not just in Afghanistan, but also on the territory of other State Parties, where these satisfy the necessary nexus requirement.

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N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. Similarly, in some of the texts used in the case studies, the facts may not always be proven; nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

ICC, JUDGMENT ON THE APPEAL AGAINST THE DECISION ON THE AUTHORITY OF AN INVESTIGATION INTO THE SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN (5 March 2020)

[**Source:** ICC, Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ICC-02/17OA4, Appeals Chamber, 5 March 2020, available at https://www.icc-cpi.int/CourtRecords/CR2020_00828.PDF (footnotes omitted)]

REASONS

I. KEY FINDINGS

1. Article 15(4) of the Statute requires a pre-trial chamber to determine whether there is a reasonable factual basis for the Prosecutor to proceed with an investigation, in the sense of whether crimes have been committed, and that potential case(s) arising from such investigation appear to fall within the Court's jurisdiction. [...]

2. The pre-trial chamber's authorisation of an investigation should not be restricted to the incidents specifically mentioned in the Prosecutor's request under article 15(3) of the Statute and incidents that are 'closely linked' to those incidents.

II. INTRODUCTION

[...]

4. On 20 November 2017, the Prosecutor filed a request for authorisation of an investigation into crimes allegedly committed in the Islamic Republic of Afghanistan (hereinafter: 'Afghanistan') since 1 May 2003, as well as related crimes allegedly committed in other States Parties since 1 July 2002 (the 'Request'). The Request involved: (i) the Taliban and affiliated groups for crimes against humanity and war crimes; (ii) the Afghan National Security Forces for war crimes; and (iii) the armed forces of the United States of America (the 'United States') and its Central Intelligence Agency (the 'CIA') for war crimes.

5. On 12 April 2019, Pre-Trial Chamber II (the 'Pre-Trial Chamber') decided to reject the Prosecutor's Request and not to authorise an investigation by the Prosecutor into the situation in Afghanistan (hereinafter: 'Impugned Decision'). [...] In the Impugned Decision, the Pre-Trial Chamber concluded that, 'notwithstanding the fact that all the relevant requirements are met as regards both jurisdiction and admissibility, an investigation into the situation in Afghanistan would not serve the interests of justice'.

[...]

III. PROCEDURAL HISTORY

[...]

IV. MERITS

A. First ground of Appeal: Whether the Pre-Trial Chamber erred in law by seeking to make a positive determination of the interests of justice

[...]

3. *Determination by the Appeals Chamber*

[...]

46. [...] The Appeals Chamber finds that the Pre-Trial Chamber erred in deciding that ‘an investigation into the situation in Afghanistan at this stage would not serve the interests of justice’. It finds that the Pre-Trial Chamber’s decision under article 15(4) of the Statute should have addressed only whether there is a reasonable factual basis for the Prosecutor to proceed with an investigation, in the sense of whether crimes have been committed, and whether the potential case(s) arising from such investigation would appear to fall within the Court’s jurisdiction.

[...]

V. APPROPRIATE RELIEF

[...]

A. Whether the Impugned Decision should be reversed and the matter remanded to the Pre-Trial Chamber

53. As to whether the Appeals Chamber should reverse the Impugned Decision and remand the matter to the Pre-Trial Chamber, the Appeals Chamber notes that, in the Impugned Decision, the Pre-Trial Chamber found that ‘there is a reasonable basis to believe that the incidents underlying the Request occurred’. [...]

[...]

B. The scope of the authorisation

55. The Appeals Chamber recalls that the Prosecutor requested the Pre-Trial Chamber:

[T]o authorise the commencement of an investigation into the Situation in the Islamic Republic of Afghanistan in relation to 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.

56. Although the Pre-Trial Chamber decided not to authorise the investigation, it also made statements relating to the scope of any potential investigation, which, in the view of the Appeals Chamber, are based on legal error and an incorrect understanding of its role under article 15(4) of the Statute. They therefore require clarification. These concern the following issues: (i) whether the authorisation is limited to the incidents mentioned in the Request and those closely linked thereto; and (ii) whether certain acts committed outside

Afghanistan would amount to war crimes if the victims of these acts were captured outside Afghanistan. [...]

1. *Whether the scope of authorisation is limited to the incidents mentioned in the Request and those closely linked thereto*

57. The Appeals Chamber notes that, to support her request for authorisation of an investigation into the situation in Afghanistan, the Prosecutor presented information relating to numerous incidents, which, in her view, established a reasonable basis that crimes under the jurisdiction of the Court have been committed. The Prosecutor clarified, however, that she did not seek authorisation to investigate only in respect of these alleged crimes, but that she 'should be able to conduct an investigation into any other alleged crimes that fall within the scope of the authorised situation'.

58. The Pre-Trial Chamber, in contrast, emphasised that, if it were to authorise an investigation, the Prosecutor could only investigate incidents mentioned in the Request and authorised by the Chamber, 'as well as those comprised within the authorisation's geographical, temporal, and contextual scope, or closely linked to it'. The Pre-Trial Chamber stated that the closeness of the link between the incidents in respect of which the investigation is authorised and other incidents must be 'assessed taking into account the temporal, territorial and material parameters of the authorisation as granted' and that '[p]roximity in time and/or in location, identity of or connection between alleged perpetrators, identity of pattern or suitability to be considered as expression of the same policy or programme, are [...] among the factors allowing a Chamber to establish such connection'. [...]

[...]

61. [T]he Appeals Chamber considers that restricting the authorised investigation to the factual information obtained during the preliminary examination would erroneously inhibit the Prosecutor's truth-seeking function. [...] Therefore, the Appeals Chamber considers that authorisation 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 in the manner described by the Pre-Trial Chamber.

[...]

2. *Whether certain acts committed outside Afghanistan would amount to war crimes if the victims of these acts were captured outside Afghanistan*

65. In the Request, the Prosecutor provided information relating to alleged war crimes amounting to serious violations of article 3 common to the four Geneva Conventions ('Common Article 3') of torture and cruel treatment, outrages upon personal dignity, and rape and other forms of sexual violence, committed as part of a policy, by members of the CIA in a number of detention facilities in Afghanistan, as well as in detention facilities located on the territory of other States Parties. The Prosecutor presented information relating to

individuals who were allegedly mistreated by the CIA as part of this program. Some of these individuals were allegedly captured outside Afghanistan; at least one individual was captured on the territory of Afghanistan, while the location of capture of the remaining individual was unclear. In all instances, the mistreatment was alleged to have taken place on the territory of States Parties.

66. The Prosecutor described the CIA detention program as 'global in nature' and indicated that it 'included persons with no direct connection to the conflict in Afghanistan, such as persons detained in connection with other armed conflicts or otherwise suspected of planning attacks against the United States'. However, for the purpose of the Request, the Prosecutor referred only to crimes allegedly committed on the territory of States Parties against individuals that she considered to have a nexus to the armed conflict in Afghanistan. The Prosecutor specified that she had included alleged crimes committed against individuals who were suspected by the CIA to be members of the Taliban and/or Al Qaeda, or of cooperating with those groups, or having 'links with or information about Al-Qaeda "core" or "central" group, allegedly responsible for the 11 September 2001 attacks'. She submitted that the 'detainees were interrogated for their (actual or perceived) knowledge of Taliban and Al Qaeda operations and planned attacks, locations of Taliban and Al Qaeda leaders or training camps, and other intelligence information about each organisation'. Conversely, she indicated that she had excluded the reported mistreatment of persons who were 'allegedly linked to other "franchise" Al Qaeda groups or other terrorist organisations'.

67. The Prosecutor explained her view of the nexus of the alleged crimes to the conflict in Afghanistan in the following terms:

The US-led [Operation Enduring Freedom] was triggered by the attacks on the US of 11 September 2001, and its goal was to fight Al Qaeda and the Taliban Government which harboured Al Qaeda and its leadership. After 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. Thus, the capture of persons suspected of belonging to or being associated with the Al Qaeda leadership or with the Taliban in the neighbouring region of Pakistan or on the territory of other third States, undertaken in the context of or associated with the ongoing armed conflict in Afghanistan, and the later alleged mistreatment of such persons on the territory of a State Party, combine to provide the requisite nexus and jurisdictional base for the exercise of ICC jurisdiction. [...] It has also excluded persons detained and allegedly mistreated on the territory of a State Party, but with no clear nexus to the armed conflict in Afghanistan, such as the detention of persons allegedly linked to other "franchise" Al Qaeda groups or other terrorist organisations.

68. The Appeals Chamber notes that the nexus requirement for war crimes is recognised in the Elements of Crimes. 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].

69. It has been observed that the function of the nexus requirement is to differentiate 'war crimes, e.g. the killing or rape of a prisoner of war, from "ordinary" or "common" crimes under domestic law, such as the common crime of murder and rape'. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (the 'ICTY') has found in the *Kunarac* case:

What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment – the armed conflict – in which it is committed. It need not have been planned or supported by some form of policy. The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established [...] that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict. [...]

In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account, *inter alia*, the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties. [Footnote 98 reads: ICTY, Appeals Chamber, *Prosecutor v. Dragoljub Kunarac et al.*, Judgement, 12 June 2002, IT-96-23 & IT-96-23/1-A, paras 58-60.]

[...]

71. In the Impugned Decision, the Pre-Trial Chamber found that the alleged incidents which the Prosecutor attributed to the CIA fell outside the Court's jurisdiction 'since these are said to have occurred against persons captured elsewhere than Afghanistan'. The Pre-Trial Chamber considered that the acts in question lacked the nexus with an internal armed conflict required to trigger the application of international humanitarian law. The Pre-Trial Chamber noted that the 'two requirements "in the context of" and "associated with" are clearly not in the alternative but cumulative'. The Pre-Trial Chamber supported its view by reference to the *chapeau* of Common Article 3, stating that '[b]oth the wording and the spirit of common article 3 to the Geneva Conventions are univocal in confining its territorial scope within the borders of the State where the hostilities are actually occurring'.

72. For the reasons that follow, the Appeals Chamber considers that the Pre-Trial Chamber's approach was incorrect. [...]

73. While it is true that the *chapeau* of Common Article 3 refers to an 'armed conflict not of an international

character occurring in the territory of one of the High Contracting Parties', this phrase does not have the function ascribed to it by the Pre-Trial Chamber, namely to limit the applicability of the provision to the State on the territory of which the armed conflict occurs. Rather, in the view of the Appeals Chamber, it simply describes the circumstances under which Common Article 3 applies: there must be an armed conflict not of an international character in one of the States Parties to the Geneva Convention. [...] [T]his view finds support in the position of the International Committee of the Red Cross (the 'ICRC'), which suggests that this phrase does not have the effect of restricting the application of Common Article 3 to the territory of the State in which the armed conflict occurs, but rather was aimed at ensuring that the provision would bind only those States that had ratified the Geneva Conventions. [Footnote 104 reads: "[...] ICRC, Commentary of 2016, Article 3: Conflicts not of an International Character (hereinafter: 'Commentary of 2016, Article 3'), paras 466-470] [...]

74. The remaining text of Common Article 3 does not expressly limit the applicability of Common Article 3 to the territory of the State where the conflict occurs either. To the contrary, the minimum provisions set out in sub-paragraph (1) stipulate that those falling under its protection 'shall *in all circumstances* be treated humanely' and that certain acts against these persons 'shall remain prohibited at any time and *in any place whatsoever*' (emphases added). Therefore, contrary to the Pre-Trial Chamber's finding, the text of Common Article 3 read in its totality does not suggest that the requisite nexus with the armed conflict in Afghanistan cannot exist if the criminal conduct occurred outside Afghanistan and the victim was not captured in Afghanistan. Importantly, such a conclusion would also be contrary to the purpose of Common Article 3, which is to provide minimum guarantees in relation to armed conflicts.

75. The Appeals Chamber notes in this context that the ICRC has recognised 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 neighbouring State not party to the conflict'. [Footnote 107 reads: "Commentary of 2016, Article 3, para. 474."] [...]

76. Thus, in the view of the Appeals Chamber, it is incorrect to assume that, merely because the alleged capture of the victim did not take place in Afghanistan and the alleged criminal act also occurred outside Afghanistan, the conduct cannot possibly have taken place in the context of, and have been associated with, the armed conflict in that State. Rather, a careful analysis of the circumstances of each case will need to be carried out to establish whether there is a sufficient nexus. The place of capture of the alleged victim may be a relevant factor for this analysis, but it does not settle the matter.

77. In sum, the Appeals Chamber considers that the Pre-Trial Chamber's finding regarding the nexus requirement was incorrect. [...]

78. This is not to say that the Appeals Chamber has determined that any or all of the incidents listed in Annex 2C to the Request would necessarily have the requisite nexus to qualify as war crimes. [...]

C. Conclusion on appropriate relief

79. In sum, the Appeals Chamber considers it appropriate to amend the Impugned Decision to the effect that the Prosecutor is authorised to commence an investigation 'in relation to 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'.

[...]

Discussion

I. Classification of the situation and applicable Law

1. (Paras 65 - 67)

a. Based on the above case, how would you classify the conflict between the US and the Al Qaeda and Taliban in Afghanistan? How could the situation be classified between the initial US attack on Afghanistan and the fall of the Taliban Government? Did the situation change after the fall of the Government? (GC I-IV, Art. 3; P II, Art. 1; **see also** *Afghanistan, Operation "Enduring Freedom"*; and *United States, Status and Treatment of Detainees Held in Guantánamo Naval Base*)

b. Could territory put under US and allied control during the initial hostilities against the Taliban (when they were still the government) be considered occupied territory? What about after the fall of the Taliban Government? (See UN Security Council Resolution 1383 (2001))

II. Scope of Application of IHL

2. (Para. 67) What is the temporal scope of application of IHL? Is your answer different if the conflict is an international (IAC) or a non-international armed conflict (NIAC)? Does it matter if the type of conflict changed during the course of the war in Afghanistan (following the fall of the Taliban Government)? (GC I, Art. 5; GC III, Art. 5; GC IV, Art. 6; P I, Art. 3; P II, Art. 2(2); **see also**, *USA, Guantánamo, End of "Active Hostilities" in Afghanistan?*; ICTY, *The Prosecutor v Tadić*, A. *The Prosecutor v. Tadić*, Appeals Chamber, Interlocutory Appeal on Jurisdiction, para. 70)

3. To which territories does IHL apply during armed conflicts? Is your answer different based on whether the conflict is international or non-international? (GC I-IV, Art. 2; GC I-IV, Art. 3; P II, Art. 1); ICTY, *The Prosecutor v Tadić*, A. *The Prosecutor v. Tadić*, Appeals Chamber, Interlocutory Appeal on Jurisdiction, para.

70; B. *The Prosecutor v Tadić*, Trial Chamber, Judgment on Merits, paras 573 – 575).

a. (Para. 71) What interpretation does the ICC Pre-trial Chamber give to the reference to “territory of one of the High Contracting Parties” in Common Article 3 to the Geneva Conventions? Do you agree with this interpretation?

b.(Paras 73 - 76; 79) What does the Appeals Chamber think instead? Why does their interpretation differ from that of the Pre-Trial Chamber?

c.(Paras 75 - 76) What do you make of the ICRC’s interpretation of the reference to “territory” in Common Article 3? Is their interpretation the same as the Appeals Chamber? Is the reference to “territory”, nowadays, irrelevant in practice?

3.(Paras 58; 71; 79) What conclusion did the Appeals Chamber reach concerning the scope of the authorisation of the Prosecutor’s request for investigation? In what did it differ from that reached by the Pre-trial chamber?

III. The Notion of Nexus

4. Is the “nexus requirement” only an element of war crimes or is it also a condition for the applicability of IHL? Does the nexus requirement appear in IHL treaties? Does IHL regulate conduct that has no link to an armed conflict?

5. Is the nexus required for the applicability of IHL the same concept as the war crime nexus requirement?

6. Is the existence of a nexus with an ongoing armed conflict sufficient to establish the applicability of IHL to a certain conduct regardless of the location? Or is it also necessary to ascertain that the conduct falls within the geographical scope of application of IHL? In other words, is the nexus additional or alternative to considerations of the geographical applicability of IHL (and possibly of other considerations, such as personal applicability)? At the same time, does the nexus depend on material, temporal, personal and geographical factors?

7. Is the nexus a requirement for the applicability of all IHL rules, or only some rules? Is there one single definition of the nexus requirement or are there different definitions for different rules? (Compare for instance the wording of Art. 75 (1) AP I with Art. 6 (1) AP II)

8.

a. (Paras 58; 68; 71) Why was the nexus requirement relevant in the analysis of the ICC Pre-Trial Chamber? What is the purpose of the nexus requirement for war crimes? Does it equally apply in NIACs and IACs?

b. (*Paras 65 - 67*) How did the Prosecutor interpret the “nexus” requirement under Art. 8 of the Rome Statute? Do you agree with her interpretation concerning the alleged crimes committed by the CIA? Would you distinguish between the war crimes committed by US nationals against alleged members of the Taliban and the Al Qaeda cell in Afghanistan from those committed against other Al Qaeda members as the Prosecutor does? (Rome Statute of the ICC, Art 8.)

c. (*Para. 66*) Does IHL apply to people detained extraterritorially by the US who, according to the Prosecutor, do not have a “direct link to the conflict”? If IHL is not applicable, is there some other legal regime that does apply?

d. (*Paras 66 – 68*) The Prosecutor refers to the nexus between the individuals who were allegedly ill-treated (thought to be affiliates of Al-Qaeda or the Taliban) and the conflict, whereas the ICC Elements of Crimes (quoted by the Appeals Chamber) refer to the requisite link between the conduct and the conflict. How would you explain this discrepancy? Which version is correct? Can one type of nexus be an indicative factor for the existence of the other type of nexus?

e. (*Para. 58*) What criteria did the Pre-trial Chamber use when assessing the nexus requirement? Do you think these were correct? What role did they give “territory” in the determination of nexus to the armed conflict?

f. (*Para. 73 - 76*) What are the Pre-Trial Chamber and Appeals Chamber disagreeing on? Do they disagree on the nexus requirement or only on the geographical scope of application of IHL (and hence of Art. 8 of the Rome Statute)?

g. (*Para. 69; 73 - 76*) Do you think the Appeals Chamber correctly interpreted the criteria for nexus given by the ICTY in *Kunarac*?

10. Do you consider that the definition of the nexus requirement provided by the ICTY in *Kunarac* is satisfactory? Would you say that the same definition of nexus should apply in international as well as non-international armed conflicts?

IV. Prosecution of violations of IHL

11. What is the relationship between the Geneva Conventions and the Rome Statute of the ICC? Do all of the crimes listed as grave breaches of the Geneva Conventions and Additional Protocol I come within the jurisdiction of the Court? Does it matter that the United States is not a party to Additional Protocol I? What if the conflict is non-international? (Rome Statute of the ICC, Art. 8; GC I, Art. 50; GC II, Art. 51; GC III, Art. 130; GC IV, Art. 147; P I, Art. 85)

12. Do you think that the prosecution of war crimes is always in the interest of victims of such crimes? Even if the Prosecutor risks not to be able to identify the individuals who committed them and to bring them to court? Even if the accused risk being acquitted?

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