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ICC passages from its Preliminary Examinations Reports on Afghanistan 2011 to 2015

Prepared by Craig Scott, June 20, 2016; updated
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Introductory comments from Craig Scott:

The International Criminal Court (ICC) Prosecutor summarizes the fact of there still being a preliminary examination underway on Afghanistan at <https://www.icc-cpi.int/afghanistan>:

“Procedural history and focus of the preliminary examination

The preliminary examination of the **situation in Afghanistan** was made public in 2007. The OTP has received numerous communications under article 15 of the Rome Statute related to this situation. The preliminary examination focusses on crimes listed in the Rome Statute allegedly committed in the context of the armed conflict between pro-Government forces and anti-Government forces, including the **crimes against humanity** of murder, and imprisonment or other severe deprivation of physical liberty; and the **war crimes** of murder; cruel treatment; outrages upon personal dignity; the passing of sentences and carrying out of executions without proper judicial authority; intentional attacks against civilians, civilian objects and humanitarian assistance missions; and treacherously killing or wounding an enemy combatant. The preliminary examination also focusses on the existence and genuineness of national proceedings in relation to these crimes.”

Note that the ICC Prosecutor, in the 2014 and 2015 reports, started noting that the Prosecutor’s Office had moved into an admissibility assessment of a fairly wide variety of cases concerning Afghanistan. In 2015, the report sets out “complementarity” and “gravity” analyses for potential cases, which is one step beyond how the 2014 report had been framed.

Apart from cases being considered against the Taliban, two actors are singled out for mention by the Prosecutor with respect to torture of captives (the Afghan National Directorate of Security, or NDS, and the United States).

One gets the distinct sense from the 2015 report that the ICC is getting closer to requesting authority to start a formal investigation (keep in mind how this would be focused on identifying the most responsible actors and seeing what specific proof can tie them to the case situations), which is of course still shy of charging and prosecuting.

We can assume Canadian diplomats and lawyers may have made representations to the ICC Prosecutor’s Office in order to try to keep Canada out of the Prosecutor’s preliminary examination reports. Indeed, it will not be surprising, for purely juridical reasons, if Canada

continues not to be specifically mentioned if and when the ICC Prosecutor brings a motion to the ICC judges to open an investigation. This is because the hands-on torture, extrajudicial executions, etc that are the meat of the war crimes and possible crimes against humanity are crimes alleged to have been directly committed by the Taliban, Afghanistan and the US.

However (and this is a major “however”), although Canada is not mentioned so far in these five years of reports, nothing precludes the ICC Prosecutor taking a hard look at Canadian officials’ conduct once her office starts doing an actual investigation of alleged criminal practices within the over-all “Afghanistan situation”, notably authorities like the NDS and the US (apart from its investigation also of the Taliban, of course). In the ICC’s Rome Statute, what I am generally calling “complicity” is clearly covered as its own form of perpetration of war crimes and crimes against humanity.

That said, we can still refer in a loose sense to the hands-on torturers as principals the investigation of whom makes sense as the initial and primary focus of ICC Prosecutor efforts, before one then looks to see who may have facilitated, aided and abetted, and so on. Thus, once Afghanistan and the US are under formal investigation, all the evidence of Canada’s complicity that various Canadians have sent to the ICC Prosecutor since around 2005 becomes even harder for the ICC to ignore.

Apart from extending any “Afghanistan situation” investigation to Canadians’ possible complicity, the Prosecutor may also want to turn to Canadian records and sources for whatever light they may cast on evidence of torture by Afghanistan agencies’ propensity to torture (and kill extra-judicially) and actual torture practices (and actual extrajudicial executions). Once evidence from Canadian sources is examined, the extent of Canadian officials’ knowledge of torture could then start to emerge and, in turn, cause the Prosecutor’s investigators to start asking questions about complicity by Canadian officials.

Of course, we must keep one very important fact in mind, related to the possibility that the ICC Prosecutor ends up choosing not to charge any Canadians in the years to come: not being charged at the ICC in no way means that a person is not guilty of war crime and in no way means that a person could not still be charged and prosecuted nationally under Canada’s own criminal law statutes dealing with torture and war crimes. A decision not to exercise ICC jurisdiction is in no way a decision that there were no crimes, because the Prosecutor makes decisions based on criteria that include comparative gravity and investigative/prosecutorial resources available. No doubt any future failure to charge any Canadians for complicity would be invoked in Canada and by government-side lawyers as a de facto assessment that Canadians bear no criminal responsibility and thus a vindication; nothing can prevent such inaccurate misrepresentations, and, so, if and when that time were to come, they would need to be exposed for their inaccuracy.

The following is Craig Scott's digested selection of extracts from the Prosecutor's annual reports from 2011 to 2015:

2011

Torture: There have been allegations of acts of torture or other cruel, inhuman or degrading treatment against detainees by various parties to the conflict. The Office has received and will continue seeking further information on steps taken by the Afghan Government and pro-government forces to thoroughly examine such allegations and ensure accountability for those possibly involved in the mistreatment of prisoners.

2012

28. Torture and other forms of ill-treatment: Persons in the custody of the Afghan authorities and/or international military forces have allegedly been subject to possibly abusive interrogation techniques. In March 2012, the Afghanistan Independent Human Rights Commission documented instances of abuse in nine National Directorate of Security (NDS) facilities.

29. The Government of Afghanistan informed the Office that it has undertaken a comprehensive review and investigation of alleged incidents of mistreatment in Afghan prisons, and has taken steps to ensure the promotion and protection of human rights in NDS facilities, including by providing access to various national

2013

Situations under Phase 2 (Subject-Matter Jurisdiction) Afghanistan

27. Afghan government forces and/or international military forces reportedly conducted military operations, including aerial attacks, force protection incidents and night raid operations which resulted in civilian deaths. The number of civilian deaths caused by members of Afghan government forces and/or international military forces has gradually decreased over time reaching an all-time low in the first half of 2013. However, several air strikes conducted in the first half of 2013 resulted in a disproportionate loss of civilian lives according to UNAMA.

28. *Torture and other forms of ill-treatment*: Persons in the custody of Afghan authorities and international forces have reportedly been subject to abusive techniques such as beatings, electric shocks, sleep deprivation, forced nudity and other forms of ill-treatment. In March 2012, the Afghanistan Independent Human Rights Commission (AIHRC) documented cases of abuses in nine National Directorate of Security facilities while in January 2013, UNAMA reported on 326 alleged cases of torture and other forms of ill-treatment based on visits to 89 detention facilities under the control of Afghan forces in the period between October 2011 and October 2012.

29. The Afghan government informed the Office of the measures it has taken to address allegations related to torture and other forms of ill-treatment, including granting the international organizations access to detention facilities across the country. The government also informed the Office about an internal investigation carried out by National Directorate for Security into allegations of torture and other forms of ill-treatment towards detainees in various provinces, including Kandahar, Laghman, Kunduz, Faryab, Nangarhar, Takhar, Jowzjan, Paktika and Khwost.

2014

Subject-Matter Jurisdiction

79. The situation in Afghanistan is usually considered as an armed conflict of a non-international character between the Afghan Government, supported by the ISAF and US forces on the one hand (pro-government forces), and non-state armed groups, particularly the Taliban, on the other (anti-government groups). The participation of international forces does not change the non-international character of the conflict since these forces became involved in support of the Afghan Transitional Administration established on 19 June 2002.

80. As detailed in previous reporting,²⁰ the Office has found that the information available provides a reasonable basis to believe that crimes under articles 7 and 8 of the Statute have been committed in the situation in Afghanistan, including crimes against humanity of murder under article 7(1)(a), and imprisonment or other severe deprivation of physical liberty under article 7(1)(e); murder under article 8(2)(c)(i); cruel treatment under article 8(2)(c)(i); outrages upon personal dignity under article 8(2)(c)(ii); the passing of sentences and carrying out of executions without previous judgement pronounced by a regularly constituted court under article 8(2)(c)(iv); intentionally directing attacks against the civilian population or against individual civilians under article 8(2)(e)(i); intentionally directing attacks against personnel, material, units or vehicles involved in a humanitarian assistance under article 8(2)(e)(iii); intentionally directing attacks against buildings dedicated to education, cultural objects, places of worship and similar institutions under article 8(2)(e)(iv); and treacherously killing or wounding a combatant adversary under article 8(2)(e)(ix).

81. The Office has continued to gather and receive information on alleged crimes committed during the reporting period, including alleged killings, abductions, torture and other forms of ill-treatment, attacks on civilian objects, the use of human shields, the imposition of punishments by parallel judicial structures, and the recruitment and use of children to participate actively in hostilities.

82. According to the United Nations Assistance Mission in Afghanistan (UNAMA), over 17,500 civilians have been killed in the conflict in Afghanistan in the period between January 2007 and June 2014. Members of anti-government armed groups were responsible for at least 12,100 civilian deaths, while pro-government forces were responsible for at least 3,552 civilian deaths. A number of reported killings remain unattributed.

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Admissibility Assessment

84. Following a thorough legal assessment of the information available, the Office identified potential cases in the situation in Afghanistan falling within the jurisdiction of the Court, on the basis of which the Office is analysing admissibility. The selection of potential cases identified below is without prejudice to any further findings on subject-matter jurisdiction to be made pursuant to additional information that the Office could receive at a later stage of analysis. In addition, the legal characterisation of these cases and any alleged crimes may be revisited at a later stage of analysis.

...

91. As noted in previous reporting,²¹ there is information available that the war crimes of torture, and outrages upon personal dignity, in particular humiliating and degrading treatment, have allegedly been committed by members of pro-government forces.

92. The practice of torturing conflict-related detainees in order to obtain information or confessions appears to be a common practice, particularly in Afghanistan's principal intelligence agency, the National Directorate for Security (NDS), and therefore forms a potential case identified by the Office. Other alleged incidents of torture or ill-treatment have also been attributed to members of the Afghan National Police (ANP), the Afghan Local Police (ALP), and the Afghan National Army (ANA). The vast majority of documented cases have been attributed to the NDS and the ANP as detaining authorities.

93. The pattern of use of interrogation techniques includes beatings (with kicks, punches, electrical cables, etc.), suspension by the wrists or ankles, electric shocks, twisting and wrenching of the genitals, stress positions, and burning with cigarettes. Victims were captured in the context of the armed conflict suspected of being Taliban fighters, suicide attack

facilitators, producers of IEDs and others implicated in crimes associated with the armed conflict in Afghanistan.

94. The Office has been assessing available information relating to the alleged abuse of detainees by international forces within the temporal jurisdiction of the Court. In particular, the alleged torture or ill-treatment of conflict-related detainees by US armed forces in Afghanistan in the period 2003-2008 forms another potential case identified by the Office. In accordance with the Presidential Directive of 7 February 2002, Taliban detainees were denied the status of prisoner of war under article 4 of the Third Geneva Convention but were required to be treated humanely. In this context, the information available suggests that between May 2003 and June 2004, members of the US military in Afghanistan used so-called “enhanced interrogation techniques” against conflict-related detainees in an effort to improve the level of actionable intelligence obtained from interrogations. The development and implementation of such techniques is documented *inter alia* in declassified US Government documents released to the public, including Department of Defense reports as well as the US Senate Armed Services Committee’s inquiry. These reports describe interrogation techniques approved for use as including food deprivation, deprivation of clothing, environmental manipulation, sleep adjustment, use of individual fears, use of stress positions, sensory deprivation (deprivation of light and sound), and sensory overstimulation.

95. Certain of the enhanced interrogation techniques apparently approved by US senior commanders in Afghanistan in the period from February 2003 through June 2004, could, depending on the severity and duration of their use, amount to cruel treatment, torture or outrages upon personal dignity as defined under international jurisprudence. In addition, there is information available that interrogators allegedly committed abuses that were outside the scope of any approved techniques, such as severe beating, especially beating on the soles of the feet, suspension by the wrists, and threats to shoot or kill.

96. While continuing to assess the seriousness and reliability of such allegations, the Office is analysing the relevance and genuineness of national proceedings by the competent national authorities for the alleged conduct described above as well as the gravity of the alleged crimes.

97. Having analysed the information available on civilian casualties caused by air strikes, “night raids” and escalation-of-force incidents attributed to pro-government forces, the Office assesses that the information available does not provide a reasonable basis to believe that the war crime of intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities pursuant to article 8(2)(e)(i) has been committed. In relation to allegations over proportionality, the Office recalls that the Rome Statute does not contain a provision for the war crime of intentionally launching a disproportionate attack in the context of a non-international armed conflict. Similarly, while the Office has received allegations regarding the recruitment and use of children by Afghan government forces to participate actively in hostilities, the Office has been unable to verify the seriousness of the information received; these allegations remain insufficiently substantiated to provide a reasonable basis to believe that war crimes have been committed.

OTP Activities

98. From 15-19 November 2013, the Office conducted a mission to Kabul and participated in an international seminar on peace, reconciliation and transitional justice held at Kabul University. During the mission, the Office held a number of meetings with representatives of Afghan civil society and international non-governmental organizations in order to discuss possible solutions to challenges raised by the situation in Afghanistan such as security concerns, limited or reluctant cooperation, and verification of information.

99. During the reporting period, the Office has continued to gather and verify information on alleged crimes committed in the situation in Afghanistan, and to refine its legal analysis of potential cases for the purposes of assessing admissibility. In particular, the Office has taken successful steps to verify information received on incidents in relation to the above potential cases, in order to overcome information gaps in relation to *inter alia* the attribution of incidents, the military or civilian character of a target, or the number of civilian and/or military casualties resulting from a given incident. The Office also gathered further information in order to enable a more thorough evaluation of the reliability of sources of information on alleged crimes.

100. The Office further engaged with relevant States and cooperation partners with a view to assess alleged crimes and national proceedings. The Office gathered and received information on national proceedings in relation to the above types of conduct.

101. Pursuant to the Office's policy on sexual and gender-based crimes, the Office examined, in particular, whether there is a reasonable basis to believe that the crime against humanity of persecution on gender grounds has been or is being committed in the situation in Afghanistan. The results of the Office's analysis are summarised above in the legal assessment.

Conclusion and Next Steps

102. The Office will continue to analyse allegations of crimes committed in Afghanistan, and to assess the admissibility of the potential cases identified above in order to reach a decision on whether to seek authorization from the Pre-Trial Chamber to open an investigation of the situation in Afghanistan pursuant to article 15(3) of the Statute.

2015

Admissibility Assessment

121. Following a thorough legal assessment of the information available, the Office is analysing the admissibility of potential cases arising from the conduct of three separate groups of alleged

perpetrators: members of the Taliban and their affiliates (anti-government groups); members of Afghan government forces; and members of international forces. Further information on the alleged conduct related to each potential case is detailed in previous reporting.³⁰ The selection of potential cases identified herein is without prejudice to any further findings on subject-matter jurisdiction to be made pursuant to additional information that the Office could receive in the future. In addition, the legal characterisation of these cases and any alleged crimes may be revisited at a later stage.

122. A brief summary of information relevant to the admissibility analysis of each potential case is included below.

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Afghan Government Forces

126. *Complementarity*: The Government has instituted only a limited number of proceedings against alleged perpetrators. Despite the scale of alleged ill-treatment in NDS and ANP detention facilities (an estimated 35-51% of conflict-related detainees according to the findings of UNAMA's detention monitoring program), information provided by the Government of Afghanistan to UNAMA indicates that to date the Government has prosecuted only two NDS officials (in relation to one incident), and no ANP officials, for this conduct. The Government has not provided any information on national proceedings to the Office, despite multiple requests for such information from the Office since 2008, including two requests submitted during the reporting period.

127. *Gravity*: There are an estimated 5,000 conflict-related detainees in Afghan government custody. The manner in which the crimes are alleged to have been committed appears particularly gruesome and was seemingly calculated to inflict maximum pain. The alleged crimes had severe short-term and long-term impacts on detainees' physical and mental health, including permanent physical injuries.

International Forces

128. *Complementarity*: US civilian and military courts can exercise their jurisdiction over conduct that would constitute a crime within ICC subject-matter jurisdiction (i.e. war crimes, crimes against humanity, and genocide), when committed abroad by US nationals. The Department of Justice conducted a two-year preliminary review (from August 2009 to June 2011) of allegations related to the abuse of detainees in the custody of the Central Intelligence Agency ("CIA"), which reviewed allegations regarding the ill-treatment of 101 detainees. As a result of the review, the Attorney-General conducted full criminal investigations into the cases of two detainees who had died in CIA custody. Both investigations were completed in August

2012 and did not result in any indictments or prosecutions. The Attorney-General explained that “the Department declined prosecution because the admissible evidence would not be sufficient to obtain and sustain a conviction beyond a reasonable doubt.”

129. The United States Government indicated to the Committee against Torture that the Department of Defense has conducted “thousands of investigations since 2001, and prosecuted or disciplined hundreds of service members for mistreatment of detainees and other misconduct.” At least 13 senior-level investigations have been conducted by the Department of Defense in response to allegations of detainee abuse.³¹ These investigations were administrative enquiries rather than criminal proceedings, although some of them had the power to make recommendations relating to individual accountability within their mandates. Some of these reports concluded that abuses resulted from unclear policy guidance, insufficient training, and command failures, but disciplinary measures recommended for commanders did not go higher than the brigade commander level.

130. *Gravity*: The Office is assessing information relevant to determine the scale of the alleged abuse, as well as whether the identified war crimes were committed as part of a plan or policy. The information available suggests that victims were deliberately subjected to physical and psychological violence, and that crimes were allegedly committed with particular cruelty and in a manner that debased the basic human dignity of the victims. The infliction of “enhanced interrogation techniques,” applied cumulatively and in combination with each other over a prolonged period of time, would have caused serious physical and psychological injury to the victims. Some victims reportedly exhibited psychological and behavioural issues, including hallucinations, paranoia, insomnia, and attempts at self-harm and self-mutilation.

OTP Activities

131. During the reporting period, the Office continued to gather and verify information on alleged crimes committed in the situation in Afghanistan, and to refine its identification of potential cases for the purposes of assessing admissibility. The Office also continued to gather information needed to enable a more thorough evaluation of the reliability of sources of information on alleged crimes. The Office gathered and analysed information relevant to reach determinations on the admissibility of potential cases likely to arise from an investigation of the situation.

132. The Office further engaged with relevant States and other information providers with a view to assess alleged crimes and national proceedings, and took steps to address information gaps in relation to *inter alia* the attribution of incidents, the military or civilian character of a target, the number of civilian and/or military casualties resulting from a given incident, and the existence of national proceedings.

133. In October 2015, the Office carried out a security assessment mission to Kabul. To date, however, the Office's planned mission for admissibility assessment purposes has been frustrated by the non-permissive situation in the country.

Conclusion and Next Steps

134. While continuing to analyse allegations of crimes committed in Afghanistan, the Office will finalise its analysis of admissibility issues, including by gathering outstanding information on the existence and genuineness of relevant national proceedings, taking into consideration the Office's policy to focus on those most responsible for the most serious crimes.

135. The Office will also continue to gather information relevant to the assessment of whether there are substantial reasons to believe that an investigation would not serve the interests of justice prior to making a decision on whether to seek authorisation from the Pre-Trial Chamber to open such an investigation of the situation in Afghanistan.