

AMNESTY INTERNATIONAL PUBLIC STATEMENT

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AFGHANISTAN: ICC PROSECUTOR'S STATEMENT ON AFGHANISTAN JEOPARDISES HIS OFFICE'S LEGITIMACY AND FUTURE

Amnesty International urges International Criminal Court (ICC) Prosecutor Karim Khan to conduct a full investigation in Afghanistan into all parties to the conflict and to urgently reconsider his decision to 'deprioritise' investigations into Article 5 crimes allegedly committed by Afghan National Security Forces (ANSF) and the armed forces of the United States of America and its Central Intelligence Agency (CIA). Failure to do so would present grave questions on the ICC-OTP's future legitimacy and purpose.

On 27th September 2021, Prosecutor Karim Khan announced that he had filed an application seeking authorisation for the Office of the Prosecutor (OTP) to resume its investigation in the Situation in Afghanistan. The statement provided that he had 'decided to focus my Office's investigations in Afghanistan on crimes allegedly committed by the Taliban and the Islamic State – Khorasan Province (IS-K) and to deprioritise other aspects of this investigation.'

Amnesty International is gravely concerned by the Prosecutor's approach and urges the OTP to proceed with a *full* investigation in Afghanistan, a situation which has been subject to OTP preliminary examination and investigation for 14 years, during which victims of crimes committed by *all parties* to the conflict have ceaselessly demanded justice from the ICC.

In his stated approach, Prosecutor Khan appears willing to bow to political as well as resource pressure, applied by powerful states, whose actions would restrict the activities of a 'universal' ICC which may investigate situations where their nationals and interests are affected.

We recall that, until April this year, US government sanctions were applied on Former Prosecutor Fatou Bensouda and other OTP staff with the overt intention of halting investigations into US nationals - despite the Court having clear territorial jurisdiction to do so. Having faced-down the US government's egregious attacks, that the Prosecutor would take a decision which aligns with the objectives of those who had sought to infringe his Office's hard-fought independence, is almost unfathomable.

Of course, the Prosecutor's announcement that - if authorisation is granted - he will seek to resume investigations into crimes allegedly committed by the Taliban and the Islamic State – Khorasan Province ("IS-K") is welcome. However, the Prosecutor's decision to deprioritise certain investigations fails to respect the rights of victims and has the discriminatory effect of denying justice to certain victims of crimes that fall under the Court's jurisdiction.

In recalling the limited resources available to his Office, the Prosecutor appears to fatally accept arbitrary financial restrictions which have, for many years, been imposed by states parties based on political considerations rather than the requirements of the OTP to conduct its work. The Prosecutor could have used the opportunity of the statement or authorisation request to demonstrate why a significant increase of resources is required to pursue a comprehensive justice strategy for Afghanistan. Instead, the Prosecutor has adopted weak resource justifications to pursue one-sided investigations.

Similarly, the Prosecutor's statement that 'there is no longer the prospect of genuine and effective domestic investigations into Article 5 crimes within Afghanistan' does not logically lead to the conclusion that only investigations into the Taliban or IS-K should be pursued by the OTP at the present time. The implication that, at present, there may be a more likely prospect of successful cooperation and investigations of the Taliban outside of Afghanistan than into the ANSF or US nationals is unconvincing.

At present, the Court will likely face significant cooperation challenges in Afghanistan, as well as from non-states parties, which may require creative solutions, including investigative activities outside of Afghanistan. This is not a new development, and the OTP has already been creative in situations where cooperation is not readily forthcoming from a State, or if it cannot access a State's territory.

It should be recalled that all states parties to the Rome Statute have an obligation to cooperate with the Court in relation to the Afghanistan investigation. Therefore, while securing cooperation in Afghanistan may be challenging, the OTP could actively (and perhaps in a less resource intensive manner) pursue investigations in relation to certain parties and allegations, including those concerning well-documented cases of torture in CIA 'black-sites', on the territory of states parties other than Afghanistan. In this instance, cases concerning a number of men apprehended in the aftermath of the 9/11 attacks, who were held by the US in a secret prison in Afghanistan and subsequently transferred to secret detention sites in Lithuania, Poland and Romania. Indeed, as the OTP has provided, 'with regard to States Parties, in addition to Afghanistan, the available information suggests that the cooperation of Lithuania, Poland, and Romania may also be desirable in some respects.'

While the OTP may be called to prioritise its activities and cases, the Prosecutor's decision to exclude certain conflict actors from a situation before it has commenced a thorough active investigation seems - at best - premature. As Amnesty International has reported, thousands of Afghan civilians have been killed in the conflict by international forces, and thousands more have been injured. The Prosecutor's approach would continue to leave victims 'in the dark' and compound failures of accountability for civilian casualties caused by international military operations in Afghanistan.

Crucially, of course, prioritisation should never be based, or appear to be, on whether certain perpetrators are more powerful, or whether investigating them would be more challenging or resource intensive to the Court. The OTP must also be acutely aware when its prioritisation decisions will lead to almost certain impunity for perpetrators who have not been genuinely investigated or prosecuted, and who - without the ICC's intervention - are likely to enjoy perpetual impunity.

The CIA's use of 'black-sites' for its rendition program of enforced disappearance, arbitrary detention and torture was designed to evade scrutiny and accountability, and it is particularly galling that the Prosecutor's decision appears to reward such illegality and helps entrench impunity. In its own words, the OTP's information (at the preliminary examination phase) related to CIA black-sites was limited by 'the clandestine nature of the detention and interrogation programme; efforts to conceal the number and identity of victims [and]; the denial of access to national and international reporting mechanisms mandated to monitor and report on the conditions of detention.' That the Prosecutor is not willing to prioritise the active investigation of these 'clandestine' sites of torture, despite finding 'the treatment of CIA detainees appears to have been particularly *grave* on a *qualitative* assessment', calls into serious question the ICC's credibility as a 'universal' court and its purpose to end impunity for all persons without any distinction.

Ultimately, and we do not say this lightly, the Prosecutor appears willing to pursue a selective justice strategy in Afghanistan couched in the language of prioritisation, and justifying what amount to 'double standards' as 'pragmatism.' The dangerous message this is sending is that the most powerful human rights abusers are able to avoid ICC investigation and prosecution, and that their victims cannot even look to 'the Court of last resort' for truth, justice, and reparations.

Amnesty International strongly urges Prosecutor Karim Khan to urgently reconsider his decision.