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Fatou Bensouda requests judicial authorisation to commence an investigation into the Situation in the Islamic Republic of Afghanistan

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Fokus

The ICC has been requested to allow investigations in the situation in Afghanistan. The potential trial would for the first time not only concern the criminal responsibility of nationals of Member States of the Rome Statute but equally the responsibility of U.S. Americans despite the United States' lack of membership.

Sources:

Statement of ICC Prosecutor, https://www.icc-cpi.int/legalAidConsultations?name=171103_OTP_Statement

Alex Whiting, "An ICC Investigation of the U.S. in Afghanistan: What does it Mean?", <https://www.justsecurity.org/46687/icc-investigation-u-s-afghanistan-mean/>

On 3rd November 2017, the International Criminal Court's (ICC) Chief Prosecutor Fatou Bensouda announced that she had requested judicial authorization to commence an investigation into the situation in the Islamic Republic of Afghanistan. She intends to investigate "war crimes and crimes against humanity allegedly committed since 1 May 2003 on the territory of Afghanistan as well as war crimes closely linked to the situation in Afghanistan allegedly committed since 1 July 2002 on the territory of other States Parties to the Rome Statute." The long awaited request followed a decade of what Bensouda referred to as "meticulous" preliminary examinations during which the Office of the Prosecutor (OTP) ensured "that all legal criteria required under the Rome Statute to commence an investigation have been met." The Prosecutor commenced examining the politically delicate situation in Afghanistan in 2007. In 2016, the OTP finally concluded its assessment. In last year's report on Preliminary Examination Activities, the Prosecutor declared that there is "a reasonable basis to believe that, in the course of interrogating [...] detainees, and in conduct supporting those interrogations, members of the US armed forces and the US Central Intelligence Agency ("CIA") resorted to techniques amounting to the commission of the war crimes of torture, cruel treatment, outrages upon personal dignity, and rape." A potential case before the ICC could therefore not only involve alleged crimes against humanity of murder, imprisonment or other severe deprivation of physical liberty committed by the Taliban and Afghan authorities but equally by US nationals.

The United States until today have, however, neither ratified the Rome Statute nor accepted the ICC's jurisdiction. Former President George W. Bush renounced President Clinton's signature under the treaty apprehending unfair prosecution. The US therefore remains a non-party to the Court. The lack of membership generally precludes the ICC's personal jurisdiction over the alleged war crimes conducted by U.S. forces. These alleged crimes were, however, conducted on Afghan soil. The Islamic Republic of Afghanistan has been a member to the Rome Statute since 2003, thereby providing the ICC with jurisdiction over its territory and the crimes committed there, regardless of the perpetrator's nationality. The territorial link therefore opens the Court's jurisdiction even for non-Member States. Yet, the United States are likely to openly protest or even obstruct the commencement of the trial through withholding evidence or refusing to extradite their nationals to The Hague as the United States consider a potential trial without their express consent to be an interference with their sovereignty.

Following Bensouda's request, the situation has now been assigned to a Pre-Trial Chamber of the ICC. Article 15 (4) of the Rome Statute requires the OTP to seek authorization prior to the commencement of formal investigations by three judges of the Court. The provision was included into the Statute as a precautionary measure by those States, which feared an overambitious or politically motivated Prosecutor. The Pre-Trial Chamber functions as a supervisory authority, which may control and even prevent the instigation of proceedings. It is consequently now for the Pre-Trial Chamber to decide whether "there is a reasonable basis to proceed with an investigation" and whether "the case appears to fall within the jurisdiction of the Court". The political ball is therefore in the court of the three judges. It is their chance to allow the first investigation against a Western country and a non-Member State of the Statute. Their affirmative decision would signal the ICC's willingness to end impunity globally and not only in Africa - a frequent criticism towards the ICC which culminated in Burundi's withdrawal from the Statute last year.

Verantwortung

Die BOFAXE werden vom Institut für Friedenssicherungsrecht und Humanitäres Völkerrecht der Ruhr-Universität Bochum herausgegeben: IFHV, Massenbergrasse 9b, 44787 Bochum, Tel.: +49 (0)234/32-27366, Fax: +49 (0)234/32-14208, Web: <http://www.ruhr-uni-bochum.de/ifhv/>. Die BOFAXE werden vom Deutschen Roten Kreuz unterstützt. Bei Interesse am Bezug der BOFAXE wenden Sie sich bitte an: ifhv-publications@rub.de.

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