

Nr. 492E

17.11.2016

BOFAXE



## US-American and Russian Reactions to the Prosecutor's Release of the Annual Report on Preliminary Examinations 2016

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### Fokus

The first potential ICC trial involving US-American citizens has come significantly closer with this year's annual Report on Preliminary Examination. The Office of the Prosecutor announced an imminent decision on the question whether to commence an investigation into the situation in the Islamic Republic of Afghanistan.

Sources:  
Report on Preliminary Examination Activities 2016,  
[https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE\\_ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf)

"US army and CIA may be guilty of war crimes in Afghanistan, says ICC"  
<https://www.theguardian.com/law/2016/nov/15/us-army-and-cia-may-be-guilty-of-war-crimes-afghanistan-says-icc>

On 14th November 2016, the Office of the Prosecutor (OTP) under the lead of Fatou Bensouda released its annual Report on Preliminary Examinations. The report suggests 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." The Prosecutor now concluded its assessment on the situation in Afghanistan, which had been launched almost ten years ago, in 2007.

In order to determine whether a situation meets the legal criteria to warrant investigations by the Criminal Court, the Office of the Prosecutor examines all situations coming to its attention potentially qualifying as international core crimes under Art. 5 Rome Statute. This preliminary examination includes three phases, in which the Prosecutor considers the Court's jurisdiction, matters of admissibility and finally the interests of justice.

The USA until today 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. This generally precludes the ICC's personal jurisdiction over the alleged war crimes conducted by US forces. The alleged crimes were however conducted on Afghan soil. The Islamic Republic of Afghanistan signed and ratified the Rome Statute in 2003, thereby providing the ICC with jurisdiction over its territory and the crimes committed there, regardless of the perpetrator's nationality. This broad territorial jurisdiction has ever since the adoption of the Rome Statute been criticized as an inadmissible means of circumventing the principle of consent. It was therefore not entirely unexpected that US officials iterated that the US "is deeply committed to complying with the law of war [and has] a robust national system of investigation and accountability that more than meets international standard." An ICC investigation was accordingly not considered "warranted or appropriate".

Russia criticized the Court even more openly when labelling it "one-sided and inefficient". The reason for this statement were the findings of the Prosecution regarding the situation in Ukraine. The report qualifies the situation within the territory of Crimea and Sevastopol as factually amounting "to an on-going state of occupation". Two days after the release of the report, President Putin ordered the withdrawal of Russia's signature from the Rome Statute. The country signed the treaty in 2000 but never actually ratified it. The withdrawal therefore constitutes merely a political gesture.

All eyes are on the Prosecutor now, who announced an "imminent" final decision on whether to request the Pre-Trial Chamber's authorization to commence full investigation into the situation of Afghanistan. An affirmative decision would constitute the first step towards a trial against a Western State shifting the focus away from the African continent. So far, all cases before the Court were concerned with African citizens. Many African States therefore reproached the ICC with an unfair bias towards the continent. The surprising withdrawal of South Africa, Gambia and Burundi from the Rome Statute furthered this development. A trial against a major Western power, like the USA, could slowly rebuild the African trust and strengthen the international criminal system.

### Verantwortung

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