

I.C.C. Allows Afghanistan War Crimes Inquiry to Proceed, Angering U.S.

The decision by the International Criminal Court is the first time the prosecutor has been authorized to investigate U.S. forces.

By Elian Peltier and Fatima Faizi

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LONDON — The International Criminal Court ruled on Thursday that its chief prosecutor could open an investigation into allegations of war crimes in Afghanistan including any that may have been committed by Americans, a step that infuriated the Trump administration.

The ruling by an appeals chamber of the court in The Hague reversed a lower chamber's decision that had halted an inquiry into the behavior of forces from the United States, which does not recognize the court's jurisdiction. Washington revoked the visa of the court's chief prosecutor, Fatou Bensouda, last year after she had signaled her intentions to pursue the case.

The reversal of the lower chamber's decision was widely viewed as a vindication of complaints by rights activists and legal scholars, who said that the lower chamber had buckled to intimidation by the Trump administration and had raised doubts about the court's independence.

"The ICC Appeals Chamber's decision to greenlight an investigation of brutal crimes in Afghanistan despite extreme pressure reaffirms the court's essential role for victims when all other doors to justice are closed," said Param-Preet Singh, the associate international justice director at Human Rights Watch.

The decision was the first by the I.C.C. that could make American forces defendants in a war-crimes prosecution by the court. The I.C.C. was established more than 15 years ago to seek justice for victims of war crimes, crimes against humanity and genocide.

Secretary of State Mike Pompeo, speaking to reporters in Washington, called the ruling a "truly breathtaking action by an unaccountable, political institution masquerading as a legal body."

He reiterated that the United States was not a party to the treaty that created the I.C.C., and that "we will take all necessary measures to protect our citizens from this renegade, unlawful, so-called court."

Having spent years collecting information on the Afghanistan war, Ms. Bensouda requested permission to open an investigation into claims of war crimes and crimes against humanity attributed to United States military and intelligence personnel, the Taliban and Afghan forces.

The prosecutor has said that the court had enough information to prove that U.S. forces had "committed acts of torture, cruel treatment, outrages upon personal dignity, rape and sexual violence" in Afghanistan in 2003 and 2004, and later in clandestine C.I.A. facilities in Poland, Romania and Lithuania.

The wide-ranging investigation would also look into allegations against the Afghan government forces, which are accused of torturing prisoners; as well as those against the Taliban and antigovernment forces.

The United Nations' mission in Afghanistan has documented the killings of more than 17,000 civilians by the Taliban since 2009, including nearly 7,000 targeted killings. Yet, last April, a U.N. report found that U.S. and Afghan forces had killed more civilians in the first three months of 2019 than the Taliban did.

A pretrial chamber at the court rejected Ms. Bensouda's request in April, arguing that a successful prosecution was unlikely because the United States and the Afghan government, which has set up its own investigation unit, were unlikely to cooperate. An investigation, it ruled at the time, "would not serve the interests of justice."

Prosecutors appealed the ruling, and the appeals judges at the court ruled on Thursday that the pretrial chamber had erred.

"The prosecutor is authorized to commence an investigation into alleged crimes committed on the territory of Afghanistan since May 1, 2003, as well as other alleged crimes that have a nexus to the armed conflict in Afghanistan," said Piotr Hofmanski, the presiding judge of the appeals panel.

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The ruling came days after the United States signed a deal with the Taliban to withdraw U.S. troops from Afghanistan after nearly two decades of conflict.

American officials have long sought to pressure the court not to prosecute United States citizens, arguing that doing so would threaten American sovereignty and national security interests. In 2018, John R. Bolton, then the national security adviser, denounced the court as “illegitimate.”

He said: “We won’t cooperate with the I.C.C. We will provide no assistance to the I.C.C. And we certainly will not join the I.C.C. We will let the I.C.C. die on its own.” He added, “If the court comes after us, we will not sit quietly.”

Mr. Pompeo vowed last year to revoke visas for anyone involved in an investigation against American citizens.

Human rights organizations called the court’s ruling a sign of its willingness to press ahead despite the Trump administration’s efforts to squelch the inquiry.

“This decision vindicates the rule of law and gives hope to the thousands of victims seeking accountability when domestic courts and authorities have failed them,” said Jamil Dakwar, director of the American Civil Liberties Union’s Human Rights Project.

He added, “Countries must fully cooperate with this investigation and not submit to any authoritarian tactics by the Trump administration to sabotage it.”

Understand the Taliban Takeover in Afghanistan

Who are the Taliban? The Taliban arose in 1994 amid the turmoil that came after the withdrawal of Soviet forces from Afghanistan in 1989. They used brutal public punishments, including floggings, amputations and mass executions, to enforce their rules. Here’s more on their origin story and their record as rulers.

The A.C.L.U. represents three detainees who said they were tortured in Afghanistan between 2003 and 2008: Khaled El Masri, Suleiman Salim and Mohamed Ben Soud.

Shaharзад Akbar, the head of the Afghanistan Independent Human Rights Commission, said the court had made the right decision. “We will advocate for victims regardless of the group affiliation of the perpetrator — whether U.S. actors, Taliban or Afghan forces,” Ms. Akbar said.

It remained unclear how prosecutors would further investigate the allegations without the cooperation of the Trump administration or the Afghan government. Afghan officials have objected to the inquiry, arguing that they had set up their own special unit to look into possible war crimes.

Although the United States is not a state party to Rome Statute, the treaty that created the court, American citizens can be subject to its jurisdiction if the court is investigating crimes in countries that have joined. Those countries include Afghanistan, Lithuania, Poland and Romania.

Katherine Gallagher, a senior staff attorney at the Center for Constitutional Rights, a New York-based legal advocacy group, said the crimes had been documented for the prosecutors to move quickly. “In the case of U.S. torture, who bears responsibility has been well-documented,” said Ms. Gallagher, who attended the overruling at The Hague on Thursday.

For some Afghan civilians, the ruling brought hope that a court with international jurisdiction could bring them justice.

Masih Ur-Rahman Mubarez, whose wife, seven children and four other relatives were killed in an American airstrike targeting members of the Taliban in Wardak Province in September, said he felt some relief after knocking “every single door for justice.”

“I will never find peace of mind,” Mr. Mubarez said. “But if the I.C.C. punishes Americans who killed my children, I will be happy.”

Yet experts said that even if American officials, military or intelligence personnel were to be charged, they were unlikely to be arrested or face a trial, as the I.C.C. has no enforcement mechanism for making arrests.

“The U.S. has been very clear that it will not cooperate,” Thomas Dannenbaum, an assistant professor of international law at the Fletcher School of Law & Diplomacy at Tufts University, wrote in an email. “As a nonparty to the I.C.C. Statute, it has no legal obligation to do so.”

Elian Peltier reported from London, and Fatima Faizi from Kabul, Afghanistan. Marlise Simons contributed reporting from Paris.