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# 7.2.1. Article 12(2)(a) and Article 17(1)(a) QD

COMMON ANALYSIS
Last update: May 2024

Article 12(2)(a) QD | Article 17(1)(a) QD

It can be noted that the ground ‘crime against peace’ is not found to be of particular relevance in the cases of applicants from Afghanistan.

According to COI, insurgent groups, former ANDSF and pro-government militias, as well as civilians in Afghanistan, can be implicated in acts that would qualify as war crimes or crimes against humanity. Reported violations of international humanitarian law by parties in the conflicts in Afghanistan could amount to war crimes.

It can be noted that, in November 2017, the Prosecutor of the ICC requested authorisation from Pre-Trial Chamber III to initiate an investigation into alleged war crimes and crimes against humanity in relation to the armed conflict in Afghanistan since 1 May 2003. The preliminary examination focuses on crimes listed in the Rome Statute allegedly committed in the context of the armed conflict between pro-government forces and anti-government forces. It includes 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 of an enemy combatant. The preliminary examination also focuses on the existence and genuineness of national proceedings in relation to these crimes. On 31 October 2022, Pre-Trial Chamber II of the International Criminal Court (ICC) authorised the Prosecution to resume investigation, following a previous request for deferral by the (former) government of Afghanistan13 .

In terms of qualifying the relevant acts as war crimes, armed conflicts14 in Afghanistan can be characterised as follows:

- armed conflict between PDPA government and armed opponents from the summer of 1979 until the Soviet invasion on 24 December 1979: non-international;
- Soviet-Afghan War from December 1979 until February 1989: international;

- armed conflict between ‘mujahideen’ forces and the government (1989-1996): non-international;
- armed conflict between the Taliban and the United Front (1996-2001): non-international;
- armed conflict of coalition led by the USA against the Taliban regime between October 2001 and June 2002: international;
- Taliban-led insurgency against the (former) Afghan government (June 2002 – August 2021): non-international;
- armed conflict between the Taliban and ISKP (2015 – ongoing): non-international;
- armed conflict between the Taliban and NRF (2021 – ongoing): non-international[15].

The amnesty envisaged under the National Stability and Reconciliation Law of Afghanistan and the amnesty provisions in the agreement with Hezb-e Islami / Gulbuddin Hekmatyar (HIG) from September 2016 would likely not prevent the exclusion of the applicant where individual responsibility for relevant excludable acts is established, as they would fail to meet the necessary requirements, i.e. being the expression of the democratic will of the citizens of Afghanistan and the individual having been held accountable in other ways.

- [13]

  For further information, see https://www.icc-cpi.int/afghanistan.

- [14]Note that the assessment under Article 12(2)(a) QD and Article 17(1)(a) QD refers to the relevant international instruments defining the terms. Therefore, the assessment of whether or not an armed conflict takes place, as well as its nature, is based on international humanitarian law and may differ from the assessment in the context of Article 15(c) QD as defined in the *Diakité* judgment of the CJEU.
- [15]For non-international armed conflicts in Afghanistan, see https://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-afghanistan.

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