

## A Critical Analysis of the Rome Statute Implementation in Afghanistan

Abdul Mahir Hazim

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A CRITICAL ANALYSIS OF THE ROME STATUTE  
IMPLEMENTATION IN AFGHANISTAN

*Abdul Mahir Hazim*\*

Abstract

Afghanistan has been a war-torn country for the past forty years. Over this time, countless atrocities have been committed and the lives of thousands of innocents have been taken. For example, according to the most recent report by the UN Assistance Mission in Afghanistan (UNAMA), in 2018 alone 10,993 civilians were killed or injured in the country, one of the highest number of casualties since UNAMA started recording such numbers in 2007. Yet no one has been held accountable for the atrocities, neither in national nor in international courts, and an entrenched culture of impunity continues to flourish to the present day. This lack of accountability is particularly vexing given that Afghanistan has been a state party to the Rome Statute since 2003, and the International Criminal Court (ICC) has jurisdictions over crimes against humanity, war crimes, and genocide committed within the country after May 1, 2003.

The purpose of this Article is to critically examine the situation in Afghanistan after 2003 with regard to international crimes and preliminary ICC investigations, with a close eye on the latest efforts of the ICC and the government of Afghanistan. This Article argues that Afghanistan has not yet fulfilled its basic obligations under the Rome Statute to prosecute grave crimes and cooperate with the ICC; and the ICC has not duly accomplished its mandate in the country by exercising its jurisdiction and prosecuting pertinent crimes. Furthermore, this Article will deconstruct the recent Afghan government's argument against the applicability of the complementarity principle of the Rome Statute, and instead contend that the two-pronged test of unwillingness and inability on the part of the Afghan government has been met and thus ICC intervention is not only legally justified but mandated. Furthermore, this Article problematizes the recent decision and reasoning of the Pre-Trial Chamber to not allow the Prosecutor to proceed with an actual investigation in Afghanistan. Finally, the Article explores potential impacts of an ICC intervention and benefits of opening an actual investigation in the country.

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INTRODUCTION

Afghanistan has been suffering from war and conflict for the last four decades. While countless international crimes have been committed in the country, not a single individual has yet been brought to justice. After the establishment of a new government in 2001, Afghanistan acceded to the Rome Statute, giving the ICC jurisdiction over any crimes against humanity, war crimes, and genocide committed within the country after May 1, 2003. Although, regrettably, massive atrocities have continued to take place in the country after 2003, neither the government of Afghanistan nor the ICC has taken any effective and meaningful action to address the crimes and hold the perpetrators accountable.

The purpose of this Article is to critically analyze the Rome Statute implementation in Afghanistan after 2003, with a close eye on the ICC and Afghanistan’s recent actions to address international crimes. This Article argues

that Afghanistan has not yet fulfilled its basic obligations under the Rome Statute to prosecute grave crimes and cooperate with the ICC; and the ICC has not duly accomplished its mandate in the country by exercising its jurisdiction to investigate and prosecute pertinent crimes. Furthermore, this Article problematizes the recent decision and reasoning of the Pre-Trial Chamber to not allow the Prosecutor to proceed with an actual investigation in Afghanistan. Finally, the Article explores potential impacts of an ICC intervention and benefits of opening an actual investigation in the country.

This Article is comprised of eight parts including this introduction. Part I gives a brief background on international crimes that occurred after 2003 with some specific data on civilian casualties resulting from those crimes. Part II identifies Afghanistan's major obligations under the Rome Statute and examines the extent to which the country has fulfilled its obligations. Part III examines the ICC mandate under the Rome Statute and explores whether the Court has taken meaningful steps towards accomplishing its mandate. Part IV discusses the principle of complementarity and critiques the government of Afghanistan's claims regarding its application. Part V problematizes the recent Pre-Trial Chamber decision and reasoning for not authorizing the Prosecutor to proceed with a formal investigation. Part VI identifies some potential impacts if a full investigation were conducted by the Prosecutor. Finally, the last part is devoted to the conclusion.

## I. INTERNATIONAL CRIMES AND THE ICC IN AFGHANISTAN: A BRIEF BACKGROUND

For four decades, Afghanistan has been plagued by endless war and conflict. Over this long period, horrific atrocities have been committed by various state and non-state actors. Before the establishment of a new government in 2001, diverse reports asserted that most all parties to the conflict had committed war crimes and crimes against humanity, including the People's Democratic Party of Afghanistan, the Soviet Union troops (1979–1992),<sup>1</sup> various *Mujahideen* factions during the civil war (1992–1996),<sup>2</sup> and the Taliban (1996–2001).<sup>3</sup> During each conflict, it is estimated that thousands of civilians were summarily executed, killed, or disappeared, and millions of people have been displaced or forced to flee their home country and take refuge in neighboring countries and around the globe.<sup>4</sup> Unfortunately, no one has been held accountable for the

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1. See Ashley Jackson, *The Cost of War: Afghan Experiences of Conflict, 1978–2009*, OXFAM INT'L 7–9 (Nov. 2009), [https://www-cdn.oxfam.org/s3fs-public/file\\_attachments/afghanistan-the-cost-of-war\\_14.pdf](https://www-cdn.oxfam.org/s3fs-public/file_attachments/afghanistan-the-cost-of-war_14.pdf) [hereinafter OXFAM REPORT].

2. See *id.* at 9–10.

3. See *id.* at 11–12.

4. See *id.* at 7–12.

commission of such heinous crimes and violations of human rights and humanitarian law.<sup>5</sup>

After the fall of the Taliban in 2001 and the establishment of a new government, Afghanistan acceded to the Rome Statute on February 10, 2003,<sup>6</sup> becoming a state party to the Rome Statute of the International Criminal Court (the Rome Statute).<sup>7</sup> As such, the ICC can exercise its jurisdiction over three categories of crimes: crimes against humanity, war crimes, and genocide<sup>8</sup> that occurred or may occur within the territory of Afghanistan or crimes that were committed or may be committed by Afghan nationals after May 1, 2003.<sup>9</sup> Any atrocities committed before that date do not fall under ICC jurisdiction.<sup>10</sup>

According to the UN and other organization reports, thousands of civilians have been killed or injured since May 1, 2003, the causative crimes potentially subject to ICC jurisdiction. In 2007, the UN Assistance Mission in Afghanistan (UNAMA) started recording and publishing quarterly and annual reports on the situation of civilians in armed conflict, particularly civilian casualties in Afghanistan.<sup>11</sup> In the past eleven years, the number of civilian casualties recorded were as follows: 1,523 (2007),<sup>12</sup> 2,118 (2008),<sup>13</sup> 2,412 (2009),<sup>14</sup> 2,777

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5. See, e.g., *id*; Patricia Grossman, *Casting Shadows: War Crimes and Crimes against Humanity: 1978-2001*, OPEN SOCIETY FOUNDATION 4-131 (July 2005), <https://www.opensocietyfoundations.org/publications/casting-shadows-war-crimes-and-crimes-against-humanity-1978-2001> [hereinafter THE AJP REPORT]; Emily Winterbotham, *The State of Transitional Justice in Afghanistan Actors, Approaches and Challenges*, AFG. RESEARCH EVALUATION UNIT 4 (Apr. 2010), <http://www.refworld.org/pdfid/4bc6ccb42.pdf>; Abdul Mahir Hazim, *Toward Cooperation between Afghanistan and the International Criminal Court*, 49 GEO. WASH. INT'L L. REV. 615, 615-24, 642, 666 (2017).

6. *Preliminary Examination: Afghanistan*, INT'L CRIM. CT., <https://www.icc-cpi.int/afghanistan> (last visited Aug. 15, 2019) [hereinafter THE ICC WEBSITE].

7. *The State Parties to the Rome Statute*, INT'L CRIM. CT., [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) (last visited Aug. 15, 2019).

8. Rome Statute of the International Criminal Court, art. 5 (1) & 11, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter The Rome Statute].

9. *Id.*

10. See generally *The State Parties to the Rome Statute*, INT'L CRIM. CT., [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) (last visited Aug. 15, 2019).

11. *Reports on the Protections of Civilians in Armed Conflict*, U.N. ASSISTANCE MISSION IN AFG., <https://unama.unmissions.org/protection-of-civilians-reports> (last visited Sept. 10, 2019).

12. *Civilian Casualties during 2007*, U.N. ASSISTANCE MISSION IN AFG. 1 (2007), <https://unama.unmissions.org/sites/default/files/poc-civilian-casualties-report-2007.pdf>.

13. *Afghanistan Annual Report on Protection of Civilians in Armed Conflict, 2008*, U.N. ASSISTANCE MISSION IN AFG. 7 (Jan. 2009), [https://unama.unmissions.org/sites/default/files/unama\\_09february-annual20report\\_poc202008\\_final\\_11feb09.pdf](https://unama.unmissions.org/sites/default/files/unama_09february-annual20report_poc202008_final_11feb09.pdf).

14. *Afghanistan Annual Report on Protection of Civilians in Armed Conflict, 2009*, U.N. ASSISTANCE MISSION IN AFG. 1 (Jan. 2010), [https://unama.unmissions.org/sites/default/files/protection\\_of\\_civilian\\_2009\\_report\\_english\\_1.pdf](https://unama.unmissions.org/sites/default/files/protection_of_civilian_2009_report_english_1.pdf).

(2010),<sup>15</sup> 3,021 (2011),<sup>16</sup> 7,559 (2012),<sup>17</sup> 8,615 (2013),<sup>18</sup> 10,548 (2014),<sup>19</sup> 11,002 (2015),<sup>20</sup> 11,418 (2016),<sup>21</sup> 10,453 (2017),<sup>22</sup> 10,993 (2018),<sup>23</sup> and 3,812 (mid 2019).<sup>24</sup> These numbers show a steady increase in civilian casualties until 2016 when it reached a peak, followed by a very slow and somewhat fluctuating decline toward the middle of 2019.<sup>25</sup>

Below is a detailed chart of casualties provided by UNAMA for the last ten years.

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15. *Afghanistan Annual Report on Protection of Civilians in Armed Conflict, 2010*, U.N. ASSISTANCE MISSION IN AFG. i (Mar. 2011), [https://unama.unmissions.org/sites/default/files/engi\\_version\\_of\\_poc\\_annual\\_report\\_2011.pdf](https://unama.unmissions.org/sites/default/files/engi_version_of_poc_annual_report_2011.pdf).

16. *Afghanistan Annual Report on Protection of Civilians in Armed Conflict, 2011*, U.N. ASSISTANCE MISSION IN AFG. 1 (Feb. 2012), [https://unama.unmissions.org/sites/default/files/unama\\_poc\\_report\\_final\\_feb\\_2012.pdf](https://unama.unmissions.org/sites/default/files/unama_poc_report_final_feb_2012.pdf).

17. *Afghanistan Annual Report on Protection of Civilians in Armed Conflict, 2012*, U.N. ASSISTANCE MISSION IN AFG. 1 (Feb. 2013), [https://unama.unmissions.org/sites/default/files/2012\\_annual\\_report\\_eng\\_0.pdf](https://unama.unmissions.org/sites/default/files/2012_annual_report_eng_0.pdf).

18. *Afghanistan Annual Report on Protection of Civilians in Armed Conflict, 2013*, U.N. ASSISTANCE MISSION IN AFG. 1 (Feb. 2014), [https://unama.unmissions.org/sites/default/files/feb\\_8\\_2014\\_poc-report\\_2013-full-report-eng.pdf](https://unama.unmissions.org/sites/default/files/feb_8_2014_poc-report_2013-full-report-eng.pdf).

19. *Afghanistan Annual Report on Protection of Civilians in Armed Conflict, 2014*, U.N. ASSISTANCE MISSION IN AFG. 1 (Feb. 2015), <https://unama.unmissions.org/sites/default/files/2014-annual-report-on-protection-of-civilians-final.pdf>.

20. *Afghanistan Annual Report on Protection of Civilians in Armed Conflict, 2015*, U.N. ASSISTANCE MISSION IN AFG. 1 (Feb. 2016), [https://unama.unmissions.org/sites/default/files/poc\\_annual\\_report\\_2015\\_final\\_14\\_feb\\_2016.pdf](https://unama.unmissions.org/sites/default/files/poc_annual_report_2015_final_14_feb_2016.pdf) [hereinafter 2016 ANNUAL REPORT].

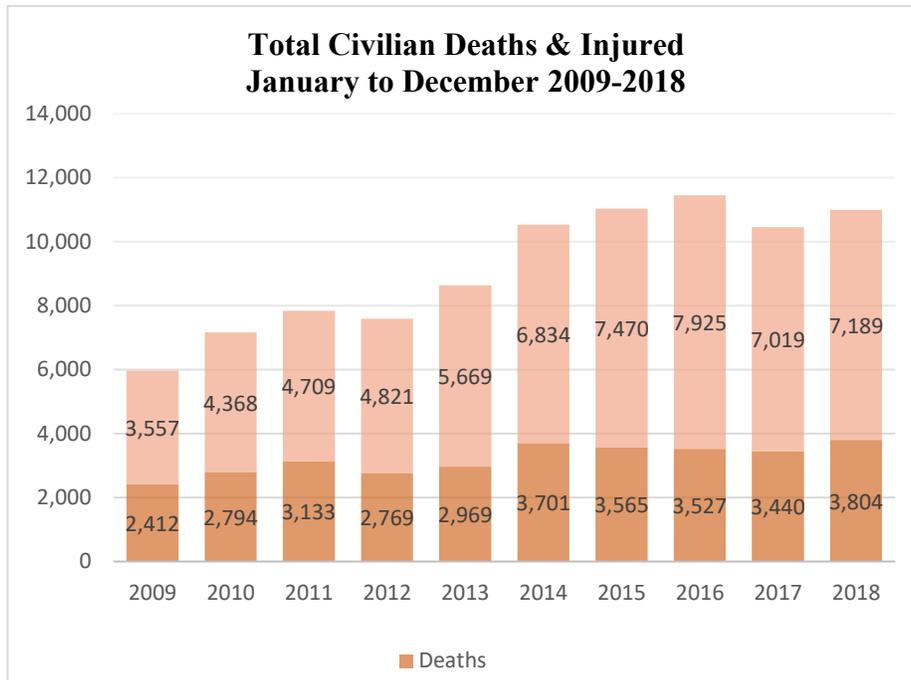
21. *Afghanistan Annual Report on Protection of Civilians in Armed Conflict, 2016*, U.N. ASSISTANCE MISSION IN AFG. 1 (Feb. 2017), [https://unama.unmissions.org/sites/default/files/protection\\_of\\_civilians\\_in\\_armed\\_conflict\\_annual\\_report\\_2016\\_final280317.pdf](https://unama.unmissions.org/sites/default/files/protection_of_civilians_in_armed_conflict_annual_report_2016_final280317.pdf).

22. *Afghanistan Protection of Civilians in Armed Conflict Annual Report, 2017*, U.N. ASSISTANCE MISSION IN AFG. 1, [https://unama.unmissions.org/sites/default/files/afghanistan\\_protection\\_of\\_civilians\\_annual\\_report\\_2017\\_final\\_6\\_march.pdf](https://unama.unmissions.org/sites/default/files/afghanistan_protection_of_civilians_annual_report_2017_final_6_march.pdf).

23. *Afghanistan Annual Report on Protection of Civilians in Armed Conflict Annual Report, 2018*, U.N. ASSISTANCE MISSION IN AFG. 1 (Feb. 2019), [https://unama.unmissions.org/sites/default/files/unama\\_annual\\_protection\\_of\\_civilians\\_report\\_2018\\_-\\_23\\_feb\\_2019\\_-\\_english.pdf](https://unama.unmissions.org/sites/default/files/unama_annual_protection_of_civilians_report_2018_-_23_feb_2019_-_english.pdf) [hereinafter 2018 ANNUAL REPORT].

24. *Midyear Update on the Protection of Civilians in Armed Conflict: 1 January to 30 June 2019*, U.N. ASSISTANCE MISSION IN AFG., 1 (July 30, 2019), [https://unama.unmissions.org/sites/default/files/unama\\_poc\\_midyear\\_update\\_2019\\_-\\_30\\_july\\_2019\\_english.pdf](https://unama.unmissions.org/sites/default/files/unama_poc_midyear_update_2019_-_30_july_2019_english.pdf).

25. See, e.g., 2016 ANNUAL REPORT, *supra* note 20, at 1; 2018 ANNUAL REPORT, *supra* note 23, at 1.



The 2019 midyear report demonstrated a 27% decrease in civilian casualties compared to the same period of 2018.<sup>26</sup> However, as the security situation has worsened and Taliban attacks have intensified recently, it is highly likely that casualties will increase dramatically during the second half of 2019. A recent BBC report found that the number of war casualties in Afghanistan exceeded the combined number of casualties in Syria and Yemen over the month of August 2019.<sup>27</sup> The BBC indicated that at least 74 people were killed daily in Afghanistan in August.<sup>28</sup>

UNAMA also provided data on the causes of casualties which could help determine the presence and nature of potential war crimes committed by various parties to the conflict. According to its 2018 annual report, combined improvised explosive devices and ground engagements were the primary factors, causing 73% of civilian casualties in the country that year.<sup>29</sup>

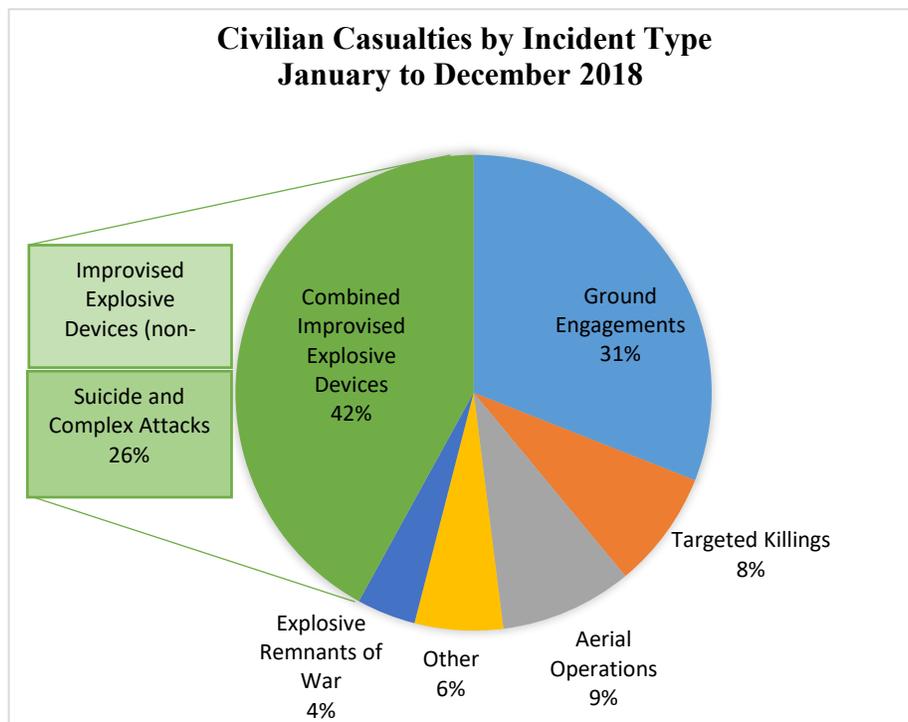
This is a detailed diagram on the causes of civilian casualties in 2018 provided by UNAMA.

26. *Id.*

27. *Talafat Jang Afghanistan Dar Muqayesa Ba Dargirihai Syria Wa Yemen* [War Casualties in Afghanistan Compared with Syria and Yemen Wars], BBC PERSIAN, <https://www.bbc.com/persian/afghanistan-49720076> (last visited Sept. 16, 2019).

28. *Id.*

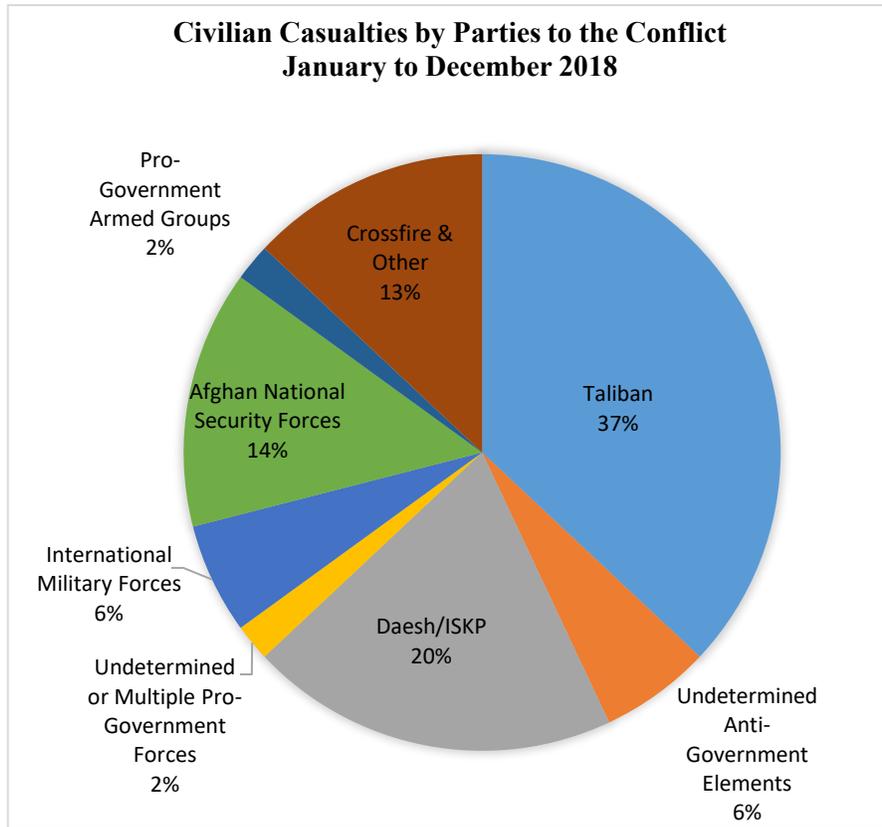
29. 2018 ANNUAL REPORT, *supra* note 23, at 2.



UNAMA attributes civilian casualties to two categories of actors: anti-government elements and pro-government forces.<sup>30</sup> For instance, in 2018, anti-government elements were responsible for 63% of civilian casualties.<sup>31</sup> Below is another diagram provided by UNAMA on parties to the conflict.

30. See, e.g., *id.* 2018 ANNUAL REPORT, *supra* note 23, at 4.

31. *Id.*



Furthermore, in a separate series of publications, UNAMA has provided biennial reports on the treatment of conflict-related detainees in Afghanistan

since 2011.<sup>32</sup> All the biennial reports (2011,<sup>33</sup> 2013,<sup>34</sup> 2015,<sup>35</sup> 2017,<sup>36</sup> & 2019<sup>37</sup>) found “credible and reliable”<sup>38</sup> information that detainees have “experienced torture and other forms of inhuman or degrading treatment whilst in custody.”<sup>39</sup> According to the reports, such torture and degrading treatment has been perpetrated by the National Directorate of Security, the Afghan National Police, the Afghan National Army, and the Afghan Local Police.<sup>40</sup> The reports also assert that some of the detainees experienced “systematic use of torture” and “interrogation techniques that met the international definition of torture or cruel, inhuman or degrading treatment.”<sup>41</sup>

After the Office of the Prosecutor (OTP) of the ICC made public its preliminary examination of the situation in Afghanistan in 2007,<sup>42</sup> it has provided annual reporting on the progress of the preliminary examination in Afghanistan. In its 2016 report, the OTP concluded that two categories of crimes—crimes against humanity and war crimes—have been allegedly committed by the Taliban and the Haqqani Network,<sup>43</sup> Afghan government

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32. See *Treatment of Conflict-Related Detainees in Afghan Custody*, U.N. ASSISTANCE MISSION IN AFG., <https://unama.unmissions.org/treatment-conflict-related-detainees-afghan-custody> (last visited Sept. 12, 2019).

33. See *Treatment of Conflict-Related Detainees in Afghan Custody*, U.N. ASSISTANCE MISSION IN AFG. 2–11 (Oct. 2011), [https://unama.unmissions.org/sites/default/files/october10\\_2011\\_unama\\_detention\\_full-report\\_eng.pdf](https://unama.unmissions.org/sites/default/files/october10_2011_unama_detention_full-report_eng.pdf).

34. See *Treatment of Conflict-Related Detainees in Afghan Custody*, U.N. ASSISTANCE MISSION IN AFG. 28–61 (Jan. 2013), [https://unama.unmissions.org/sites/default/files/master\\_unama\\_detention\\_report\\_20\\_jan\\_2013\\_final.pdf](https://unama.unmissions.org/sites/default/files/master_unama_detention_report_20_jan_2013_final.pdf).

35. See *Update on the Treatment of Conflict-Related Detainees in Afghan Custody: Accountability and Implementation of Presidential Decree 129*, U.N. ASSISTANCE MISSION IN AFG. 15–68 (Feb. 2015), [https://unama.unmissions.org/sites/default/files/unama\\_detention\\_report\\_2015\\_revised.pdf](https://unama.unmissions.org/sites/default/files/unama_detention_report_2015_revised.pdf) [hereinafter *Treatment of Conflict-Related Detainees 2015*].

36. See *Treatment of Conflict-Related Detainees: Implementation of Afghanistan’s National Plan on the Elimination of Torture*, U.N. ASSISTANCE MISSION IN AFG. 20–38 (Apr. 2017), [https://unama.unmissions.org/sites/default/files/treatment\\_of\\_conflict-related\\_detainees\\_24\\_april\\_2017.pdf](https://unama.unmissions.org/sites/default/files/treatment_of_conflict-related_detainees_24_april_2017.pdf).

37. See *Treatment of Conflict-Related Detainees in Afghanistan: Preventing Torture and Ill-treatment under the Anti-Torture Law*, U.N. ASSISTANCE MISSION IN AFG. 12 (Apr. 2019), [https://unama.unmissions.org/sites/default/files/afghanistan\\_-\\_report\\_on\\_the\\_treatment\\_of\\_conflict-related\\_detainees\\_-\\_17\\_april\\_2019.pdf](https://unama.unmissions.org/sites/default/files/afghanistan_-_report_on_the_treatment_of_conflict-related_detainees_-_17_april_2019.pdf).

38. See, e.g., *id.*

39. *Id.*

40. See, e.g., *id.*

41. See, e.g., *Treatment of Conflict-Related Detainees 2015*, *supra* note 35, at vi.

42. THE ICC WEBSITE, *supra* note 6.

43. “The Haqqani Network (HN) is an insurgent group that operates in the Southeastern region of Afghanistan and the Northwestern of Federally Administered Tribal Areas of Pakistan.” STAN. UNIV., <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/363> (last visited Sept. 11, 2019).

forces, and US military forces.<sup>44</sup> Some of the crimes against humanity that were identified included “murder,” “imprisonment or other severe deprivation of physical liberty,”<sup>45</sup> and “persecution against any identifiable group or collectivity on political grounds and on gender grounds.”<sup>46</sup> Some of the alleged war crimes encompassed willful killing, torture and inhuman treatment, sexual violence, rape, intentionally attacking civilians, intentionally attacking protected objects, and using children in hostilities.<sup>47</sup>

## II. AFGHANISTAN’S OBLIGATIONS UNDER THE ROME STATUTE: THE EXTENT TO WHICH THEY HAVE BEEN FULFILLED

To determine the extent to which the government of Afghanistan has fulfilled its obligations under the Rome Statute, two items must be examined. First, which specific obligations Afghanistan has under the Rome Statute; second, whether Afghanistan has complied with those enumerated obligations.

### A. *Afghanistan’s Major Obligations Under the Rome Statute*

As a state party to the Rome Statute, Afghanistan bears at least three major interconnected obligations, specifically, an obligation to prosecute international crimes, to cooperate fully with the ICC, and to implement legislation to bring its national law in conformity with Rome Statute standards. All these obligations are grounded in the Rome Statute.

First, Afghanistan has an obligation to investigate and prosecute the three categories of international crimes.<sup>48</sup> The Rome Statute has vested the primary responsibility for investigating and prosecuting such crimes in the national courts of State Parties.<sup>49</sup> As a Party to the Rome Statute, it is the responsibility of Afghanistan to prosecute those international crimes that occur within its territory or are committed by its nationals.

The second obligation of Afghanistan is to fully cooperate with the ICC. Article 86 of the Statute provides that, “States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.”<sup>50</sup> Part IX of the Rome Statute is devoted to international cooperation and judicial assistance and provides details on how State Parties fulfill their cooperation obligation. For

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44. *Report on Preliminary Examination Activities 2016*, INT’L CRIM. CT. para. 198 (Nov. 14, 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) [hereinafter *OTP Report 2016*].

45. *See id.* at para. 206.

46. *See id.*

47. *See id.* at para. 207 & 209.

48. *See* The Rome Statute, *supra* note 8, at art. 17. *See also* *Implementing Legislation on the Rome Statute*, PARLIAMENTARIANS FOR GLOB. ACTION, <http://www.pgaction.org/campaigns/icc/implementing-legislation.html> (last visited Sept. 11, 2019).

49. *Implementing Legislation on the Rome Statute*, *supra* note 48.

50. The Rome Statute, *supra* note 8, at art. 86.

instance, State Parties should comply with the ICC's requests for cooperation on the arrest and surrender of suspects, collecting evidence and documents during investigation and prosecution, and enforcement of sentences, forfeitures, and fines.<sup>51</sup>

Finally, the third major obligation of Afghanistan is to implement legislation and adjust its domestic law to accord with the standards of the Rome Statute. This adjustment includes both substantive and procedural laws. Adjustment in substantive law means incorporating the definition of three categories of international crimes (crimes against humanity, war crimes, genocide) into domestic legislation.<sup>52</sup> Although the Rome Statute does not explicitly require State Parties to implement new legislation with regard to substantive laws, it has been argued that without recognizing these international crimes within national law, it would be difficult even for a "monist" state to fulfill its primary obligation of prosecuting the crimes.<sup>53</sup>

There are two well-known approaches to international law: monist and dualist approaches.<sup>54</sup> In the monist approach, there is no difference between international law and domestic law and thus a State will directly apply international law in its domestic courts.<sup>55</sup> However, in the dualist approach, domestic courts will not directly apply international law unless the relevant international law is incorporated into domestic law.<sup>56</sup> Although it is not perfectly clear what approach Afghanistan is following in applying international law,<sup>57</sup> the country practice suggests that it is more of a dualist state than a monist. For example, instead of directly applying the Convention on the Elimination of All Forms of Discrimination against Women, Afghanistan has enacted a specific law<sup>58</sup> on the elimination of violence against women in order to comply with its obligations under that convention. As a presumptive dualist state, Afghanistan has an obligation under the Rome Statute to modify its national law and incorporate the core international crimes into its domestic legislation.

The Rome Statute, however, is very clear about the requirement to ensure procedural legislation. Article 88 of the Statute explicitly states that, "States Parties shall ensure that there are procedures available under their national law

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51. *See id.* at art. 89–93, 103, 104. *See also* Hazim, *supra* note 5, at 631–35.

52. *See Implementing Legislation on the Rome Statute, supra* note 48.

53. *Id.*

54. *How Does International Law Apply in a Domestic Legal System*, THE PEACE AND JUSTICE INITIATIVE, <https://www.peaceandjusticeinitiative.org/implementation-resources/dualist-and-monist> (last visited Sept. 28, 2019).

55. *Id.*

56. *Id.*

57. Morgan Galland et al., *An Introduction to International Law for Afghanistan*, AFG. LEGAL EDUC. PROJECT 47, <https://www-cdn.law.stanford.edu/wp-content/uploads/2015/12/Intro-to-International-Law-for-Afg.pdf> (last visited Sept. 15, 2019).

58. QANOONI MANE KHOSHONAT ALAIHE ZANAN [LAW ON ELIMINATION OF VIOLENCE AGAINST WOMEN], Official Gazette, August 2009, No. 989.

for all of the forms of cooperation which are specified under this Part.”<sup>59</sup> Accordingly, Afghanistan has an obligation to make procedures available in its domestic law, define the relationship between the ICC and its national courts, and identify the responsibilities of its domestic authorities in implementing ICC requests.<sup>60</sup>

### B. *Has Afghanistan Fulfilled Its Basic Obligations?*

Having detailed Afghanistan’s three major obligations under the Rome Statute, this Article now examines whether Afghanistan has fulfilled those obligations. Regarding the first obligation to prosecute the three international crimes, there is no evidence that Afghanistan has taken genuine and substantial steps towards fulfillment of this obligation over the past fifteen years.<sup>61</sup> According to an OTP report in 2016, only two high-ranking members of the Haqqani Network were ever tried in a Kabul Primary Court in 2016.<sup>62</sup> Although the government of Afghanistan has not yet provided specific information about the trial of those individuals to the OTP,<sup>63</sup> given the absence of the new Penal Code at that time, it can be surmised that the two were either prosecuted and tried under the old Penal Code or under the Law on Crimes against Internal and External Security.<sup>64</sup> Despite the apparent trial of the two members of the Haqqani Network, in her request to the Pre-Trial Chamber II, the ICC prosecutor admitted that Afghanistan has not conducted any domestic investigations or prosecutions of those individuals who bear the greatest responsibility for the relevant international crimes.<sup>65</sup>

Along these lines, the Attorney General’s Office in Afghanistan established a new department called the International Crimes Department last year. However, according to one official in the department, no international crimes have been prosecuted by the department yet.<sup>66</sup> While the establishment of the department could be a positive step, it cannot be considered part of the fulfillment of the prosecution obligation unless it actually starts to prosecute such crimes. Based on the author’s conversation with the official, prosecution of international crimes by the department seems remote, at least in the near future.

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59. The Rome Statute, *supra* note 8, at art. 88.

60. See Hazim, *supra* note 5, at 653–62.

61. See *OTP Report 2016*, *supra* note 44, at para. 215.

62. *Id.*

63. *Id.*

64. See Situation in the Islamic Republic of Afghanistan, Case No. ICC-02/17, Request for Authorisation of an Investigation Pursuant to article 15 para. 270 (Nov. 20, 2017) [hereinafter *The OTP Request*].

65. See *id.* at para. 269.

66. The author conducted an interview with a responsible person (who did not give permission to disclose his name or position) of the International Crime Department last summer in Kabul.

With regard to the second obligation, Afghanistan has been in a state of non-cooperation with the ICC since 2008,<sup>67</sup> the time the ICC started to examine the situation in Afghanistan. As the OTP's reports and the ICC's reports to the United Nations' General Assembly indicate, the government of Afghanistan has consistently failed to respond to ICC requests and has not provided the required information needed for the ICC's preliminary examination.<sup>68</sup> For instance, the OTP report in 2016 expressed that "[t]he Government [of Afghanistan] has not provided any information on national proceedings to the Office, despite multiple requests for such information from the Office since 2008, including two requests submitted during the reporting period."<sup>69</sup> All the reports show that Afghanistan has not complied with its obligation to fully cooperate with the ICC.

Over the past fourteen years, Afghanistan has done little to fulfill its third major obligation. The country has only recently incorporated a handful of substantive matters and general principles from the Rome Statute into national law, such as the four categories of international crimes which were inserted in the country's new Penal Code.<sup>70</sup> The new Penal Code was adopted and published by the government of Afghanistan in the Official Gazette in 2017 and entered into force in February of 2018.<sup>71</sup> As stated above, there is no indication that the relevant provisions of the code are currently being implemented. Furthermore, the government of Afghanistan has not yet adjusted its domestic procedures to comply with the requirements of the Rome Statute.<sup>72</sup> It has been posited that one of the main reasons Afghanistan has not been able to fully cooperate with the ICC is the lack of appropriate domestic procedures.<sup>73</sup> Without the necessary coordination mechanisms, Afghanistan will continue to fail to provide coherent responses to ICC requests.<sup>74</sup>

Not only has Afghanistan not fulfilled its obligations, but it also occasionally has attempted to stop the ICC from exercising its jurisdiction. According to some reports, the government of Afghanistan has requested the ICC to delay its investigation for one more year.<sup>75</sup> The government of Afghanistan has suggested

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67. See, e.g., *OTP Report 2016*, *supra* note 44, at para. 215; *Report on Preliminary Examination Activities* (2015), INT'L CRIM. CT. para. 126 (Nov. 12, 2015), <https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf>; *Report on Preliminary Examination Activities 2012*, INT'L CRIM. CT. para. 37 (Nov. 2012), <https://www.icc-cpi.int/NR/rdonlyres/C433C462-7C4E-4358-8A72-8D99FD00E8CD/285209/OTP2012ReportonPreliminaryExaminations22Nov2012.pdf>; *Report of the International Criminal Court to the United Nations for 2008/09*, INT'L CRIM. CT. para. 46 (Sept. 17, 2009), [http://iccnow.org/documents/A\\_64\\_356\\_ENG2.pdf](http://iccnow.org/documents/A_64_356_ENG2.pdf).

68. *OTP Report 2016*, *supra* note 44, at para. 217.

69. *Id.*

70. QANOONE JAZA [PENAL CODE], art. 332–43, Official Gazette, May 2017, No. 1260.

71. See *id.* at art. 17, 916.

72. See Hazim, *supra* note 5, at 639.

73. See *id.*

74. Hazim, *supra* note 5, at 639.

75. Ehsan Qaane, *Investigating Post-2003 War Crimes: Afghan Government Wants "One More Year" from the ICC*, AFG. ANALYSTS NETWORK (June 27, 2017), <https://www.afghanistan->

that ICC intervention may disrupt the peace deal with the warlord Hekmatyar who joined the Afghan peace process in 2016.<sup>76</sup>

### III. THE ICC MANDATE: HAS THE ICC DONE ENOUGH TOWARD ACCOMPLISHING ITS MANDATE IN AFGHANISTAN?

This Article next describes the mandate of the ICC under the Rome Statute and delineates the extent of ICC efforts to accomplish its mandate in Afghanistan.

#### A. *The ICC Mandate*

The ICC core mandate is very clear and simple in the Rome Statute—to ensure effective prosecution of “the most serious crimes of concern to the international community”<sup>77</sup> “by taking measures at the national level and by enhancing international cooperation.”<sup>78</sup> In addition, the ICC Mandate is to create deterrence by ending the culture of impunity for perpetrators of the most heinous crimes: crimes against humanity, war crimes, and genocide.<sup>79</sup> Accomplishing the ICC mandate should help “the fight against impunity and the establishment of the rule of law by ensuring that the most serious crimes do not go unpunished and by promoting respect for international law.”<sup>80</sup> Therefore, the main mandate of the ICC is punishing perpetrators of international crimes and, in so doing, deterring future such crimes.

#### B. *Has the ICC Accomplished Its Mandate in Afghanistan?*

An examination of all the ICC’s actions with regard to the situation in Afghanistan shows that the ICC has done very little toward carrying out its mandate in Afghanistan. Nor has the ICC had any effect on the situation in Afghanistan thus far. The ICC’s hesitance to address the situation in Afghanistan is clearly demonstrated by the fact it took approximately 14 years for the OTP to finally seek authorization from the Pre-Trial Chamber II to start an investigation in Afghanistan in 2017. As further evidence of the ICC’s reluctance to fulfill its mandate in Afghanistan, the chamber rejected the OTP request on April 12, 2019. As explained above, various parties to the conflict have continued to commit crimes that amount to international crimes under the Rome Statute.<sup>81</sup> This indicates that the core mandate of the ICC, which is to

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[analysts.org/investigating-post-2003-war-crimes-afghan-government-wants-one-more-year-from-the-icc/](https://analysts.org/investigating-post-2003-war-crimes-afghan-government-wants-one-more-year-from-the-icc/).

76. *Id.*

77. The Rome Statute, *supra* note 8, at pmbl. para. (4).

78. *Id.*

79. The Rome Statute, *supra* note 8, at pmbl. para. (5) & art. (5).

80. Sang-Hyun Song, *The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law*, U.N. CHRONICLE (Dec. 2012), <https://unchronicle.un.org/article/role-international-criminal-court-ending-impunity-and-establishing-rule-law>.

81. *See* Hazim, *supra* note 48.

prosecute the most heinous international crimes and deter future such crimes, remains merely words. Below, this article briefly examines all the actions that the ICC has taken with respect to Afghanistan.

The ICC initiated a preliminary examination of the situation in Afghanistan in 2006 based on Article 13 (c)<sup>82</sup> and made it public in 2017.<sup>83</sup> Based on the ICC reports to the UN General Assembly, it appears Afghanistan has the privilege of being under preliminary examination longer than any other country (nine years).<sup>84</sup> As the ICC reports indicate, for three years (2009–2011) the ICC primarily monitored the situation in Afghanistan from the outside without taking serious steps to effectively engage with the situation.<sup>85</sup> During the next six years (2012–2017), the ICC gathered and verified information and assessed the admissibility of evidence on the alleged crimes.<sup>86</sup> The ICC has reported on the non-cooperation of the government of Afghanistan in nearly all its reports, yet it never took action to address the problem.<sup>87</sup> In accordance with the Rome Statute, the ICC could at least have referred the issue of Afghanistan's non-cooperation to the Assembly of State Parties. According to Article 87 (7) of the Rome Statute, if a State Party fails to cooperate with the ICC, the court may refer the case to the Assembly of State Parties to address the problem.<sup>88</sup>

Finally, on November 2017, the chief prosecutor of the ICC, Fatou Bensouda, announced that she had requested, “the Court’s Judges to initiate an

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82. The Rome Statute, *supra* note 8, at art. 13 (c).

83. Statement, *The Prosecutor of the International Criminal Court, Fatou Bensouda, Requests Judicial Authorization to Commence an Investigation into the Situation in the Islamic Republic of Afghanistan*, INT’L CRIM. CT. (Nov. 20, 2017), <https://www.icc-cpi.int/Pages/item.aspx?name=171120-otp-stat-afgh> [hereinafter *The Prosecutor Announcement*].

84. See Hazim, *supra* note 5, at 641.

85. See, e.g., *Report of the International Criminal Court to the United Nations for 2008/09*, INT’L CRIM. CT. 13 (2009), [http://iccnw.org/documents/A\\_64\\_356\\_ENG2.pdf](http://iccnw.org/documents/A_64_356_ENG2.pdf); *Report of the International Criminal Court to the United Nations for 2009/10*, INT’L CRIM. CT. 16 (2010), <https://www.icc-cpi.int/NR/rdonlyres/EA7DF985-4549-40EF-A0DC-814BE440655C/282599/ICC6RepEng.pdf>; *Report of the International Criminal Court to the United Nations for 2010/11*, INT’L CRIM. CT. 15 (2011), <https://www.icc-cpi.int/NR/rdonlyres/D207D618-D99D-49B6-A1FC-A1A221B43007/283906/ICC2011AnnualReporttoUNEnglish1.pdf>.

86. See *Report of the International Criminal Court to the United Nations for 2011/12*, INT’L CRIM. CT. 15 (2012), <https://www.icc-cpi.int/iccdocs/other/A67308EN.pdf>; *Report of the International Criminal Court to the United Nations for 2012/13*, INT’L CRIM. CT. 14 (2013), <https://www.icc-cpi.int/iccdocs/other/N1342653.pdf>; *Report of the International Criminal Court to the United Nations for 2013/14*, INT’L CRIM. CT. 5 (2014), <https://www.icc-cpi.int/iccdocs/presidency/ICC-Rep-UNGA-30-10-2014-Eng.pdf>; *Report of the International Criminal Court to the United Nations for 2014/15*, INT’L CRIM. CT. 4 (2015), [https://www.icc-cpi.int/iccdocs/other/UNGA\\_2015-Eng.pdf](https://www.icc-cpi.int/iccdocs/other/UNGA_2015-Eng.pdf); *Report of the International Criminal Court to the United Nations for 2015/16*, INT’L CRIM. CT. 4 (2016), [http://www.un.org/ga/search/view\\_doc.asp?symbol=a/71/342&referer=http://research.un.org/en/docs/law/courts&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=a/71/342&referer=http://research.un.org/en/docs/law/courts&Lang=E); *Report of the International Criminal Court to the United Nations for 2016/17*, INT’L CRIM. CT. 4 (2017), [https://www.icc-cpi.int/itemsDocuments/A72349/170817-rep-UNSC\\_ENG.pdf](https://www.icc-cpi.int/itemsDocuments/A72349/170817-rep-UNSC_ENG.pdf).

87. See, e.g., *id.*

88. See The Rome Statute, *supra* note 8, at art. 87 (7).

investigation into alleged war crimes and crimes against humanity, committed in the context of the ongoing armed conflict in the Islamic Republic of Afghanistan.”<sup>89</sup> This was viewed as a major development and serious step towards initiating an actual investigation. In her request, the prosecutor listed the following categories of crimes that have occurred in Afghanistan: (1) crimes against humanity and war crimes by the Taliban and the Haqqani Network; (2) war crimes by the Afghan National Security Forces (ANSF); and (3) war crimes by members of the United States armed forces and members of the U.S. Central Intelligence Agency (CIA), mostly between 2003–2004.<sup>90</sup>

After almost one and a half years, the Pre-Trial Chamber II delivered its decision and, unfortunately, denied the Prosecutor’s request to initiate a full investigation.<sup>91</sup> While the Chamber recognized that the court’s jurisdiction and admissibility requirements were satisfied,<sup>92</sup> it asserted that there were considerable “reasons to believe that an investigation would not serve the interests of justice.”<sup>93</sup> Fortunately, after the OTP appealed the case, on March 5, 2020, the Appeals Chamber of the ICC amended the decision of the Pre-Trial Chamber and authorized the Prosecutor to initiate an actual investigation.<sup>94</sup> This is the most significant and notable decision of the ICC with respect to the situation in Afghanistan so far. While the authorization of an investigation is a great step forward, the ICC is far away from fulfilling its mandate. Only an effective investigation and prosecution and holding the perpetrators of the crimes accountable could be a requisite for accomplishment of the mandate.

#### IV. COMPLEMENTARITY PRINCIPLE: AN EXAMINATION OF RECENT DEVELOPMENTS

The Afghan government had not taken a public stand concerning the ICC preliminary examination over the prior years. However, when the ICC Chief Prosecutor announced that she had requested that the Pre-Trial Chamber grant authorization to initiate an investigation, the government of Afghanistan made known its position through its permanent representative at the United Nations in 2017.<sup>95</sup> It appears that the government of Afghanistan means to argue that it is both willing and able to prosecute any international crimes purportedly

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89. *The Prosecutor Announcement*, *supra* note 83.

90. *Id.*

91. Situation in the Islamic Republic of Afghanistan, Case No. ICC-02/17, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation, ¶ 96 (Apr. 12, 2019) [hereinafter *The Chamber Decision*].

92. *Id.*

93. *Id.*

94. See Afghanistan: ICC Appeals Chamber Authorises the Opening of An Investigation, INT’L CRIM. CT. (Mar. 5, 2020), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1516>.

95. Afghan Mission, *Statement at the 16th Session of Assembly of States Parties to the Rome Statute of the ICC*, PERMANENT MISSION OF AFG. TO THE U.N. IN N.Y. (Dec. 7, 2017), <http://afghanistan-un.org/2017/12/statement-at-the-16th-session-of-assembly-of-states-parties-to-the-rome-statute-of-the-icc/>.

committed in the country.<sup>96</sup> This argument raises the question of the principle of complementarity and whether the ICC has jurisdiction over international crimes committed in Afghanistan. Although the OTP and the Pre-Trial Chamber II have already concluded that the threshold for application of the principle of complementarity has been met, it is worth briefly discussing the principle and analyzing whether the government of Afghanistan's argument holds.

ICC jurisdiction is complementary to the national criminal jurisdiction of State Parties.<sup>97</sup> The court was established to complement national courts,<sup>98</sup> and the Rome Statute gives priority to the national jurisdictions to investigate and prosecute the three categories of international crimes.<sup>99</sup> Although the word "complementarity" does not exist in the Rome Statute,<sup>100</sup> the idea of resolving conflicts of jurisdiction between the ICC and national courts over crimes is widely recognized among scholars and commentators as the principle of complementarity.<sup>101</sup> According to the Rome Statute, national courts have the primary duty to bring perpetrators of serious crimes to justice.<sup>102</sup> As such, if a case of international crime is under the investigation of a state that has jurisdiction over the case, or the state has already investigated and tried the case, the ICC will not exercise its jurisdiction in that case.<sup>103</sup> However, if a state fails to fulfill its obligations and is either unwilling and/or unable to investigate a case, the ICC is supposed to intervene and assert its jurisdiction over that case.<sup>104</sup> This way, national courts function as the first resort and the ICC as the last resort.<sup>105</sup> The purpose of the principle of complementarity goes to the heart of the ICC mandate which is making sure that all serious crimes of concern are prosecuted and punished.<sup>106</sup>

A complementarity analysis, therefore, rests on an examination of unwillingness and inability. To determine whether unwillingness is present, the ICC will consider three situations. First, a state would be viewed as unwilling if it is taking or has taken measures that aim to shield a person from criminal

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96. *Id.*

97. The Rome Statute, *supra* note 8, at pmb1., ¶ 10 & art. 1.

98. Julianne Kippenberg & Pascale Kambale, *The International Criminal Court: How Nongovernmental Organizations Can Contribute to the Prosecution of War Criminals*, HUMAN RIGHTS WATCH (Sept. 2004), <https://www.hrw.org/legacy/backgrounder/africa/icc0904/icc0904.pdf>.

99. *See* The Rome Statute, *supra* note 8, at art. 17, § 1 (a)–(c).

100. PAUL SEILS, HANDBOOK ON COMPLEMENTARITY: AN INTRODUCTION TO THE ROLE OF NATIONAL COURTS AND THE ICC IN PROSECUTING INTERNATIONAL CRIMES 29 (Meredith Barges ed., 2012).

101. *See, e.g.*, JANN K. KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTION 99 (2008); Ignaz Stegmiller, *Complementarity Thoughts*, 21 CRIM. L. F. 159, 160–61 (2010).

102. *See* The Rome Statute, *supra* note 8, at art. 17, § 1 (a)–(c).

103. *See id.*

104. *See id.*

105. *See* Hazim, *supra* note 5, at 628.

106. *See id.*

responsibility for any serious crimes he/she might have committed.<sup>107</sup> Second, a state would exhibit unwillingness if it permits an unreasonable delay in the proceedings that is not compatible with the intent of bringing a suspect of international crimes to justice.<sup>108</sup> Finally, a state would be considered unwilling if the impartiality and independence of the proceedings are under question.<sup>109</sup> In determining the inability of a state in a particular case, the ICC will take into account “whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”<sup>110</sup>

Unlike the Afghanistan Government’s argument, and in line with the ICC’s findings, this Article asserts that the two-prong test of unwillingness and inability are met in Afghanistan’s situation. First, the government of Afghanistan has not been willing to investigate and prosecute the grave crimes allegedly perpetrated within its territory. Although the unwillingness test could be applied in each individual case, overall there are numerous indications of a general unwillingness on the part of the government of Afghanistan. First, an Amnesty Law was adopted by the government of Afghanistan which grants unlimited impunity for all past and future perpetrators of international crimes.<sup>111</sup> This amounts to shielding the perpetrators of international crimes. Second, in the past fourteen years, while almost all parties to the conflict in Afghanistan have been accused of committing war crimes or crimes against humanity, the government of Afghanistan has not prosecuted a single such case.<sup>112</sup> Finally, the ICC consistently reported on the non-cooperation of Afghanistan with the ICC’s requests.<sup>113</sup> This indicates that the government of Afghanistan is in fact unwilling to engage in prosecution of these crimes.

Moreover, Afghanistan has not been able to prosecute international crimes. According to Transparency International reports, Afghanistan is one of the most corrupt countries in the world.<sup>114</sup> Afghanistan’s police, prosecution, and judiciary have all been identified as dysfunctional.<sup>115</sup> A dysfunctional judicial system cannot deliver justice to the people. In addition, “politicians, government officials, and other powerful figures” have significant influence on the judicial

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107. See The Rome Statute, *supra* note 8, at art. 17 (2)(a).

108. See *id.* at art. 17(2)(b).

109. See *id.* at art. 17(2)(c).

110. See *id.* at art. 17 (3).

111. See Hazim, *supra* note 5, at 625.

112. See Qaane, *supra* note 75.

113. *Id.*

114. *Asia Pacific: Fighting Corruption Is Side-lined*, TRANSPARENCY INT’L (Jan. 25, 2017), [https://www.transparency.org/news/feature/asia\\_pacific\\_fighting\\_corruption\\_is\\_side\\_lined](https://www.transparency.org/news/feature/asia_pacific_fighting_corruption_is_side_lined).

115. *Corruption in Afghanistan: What Needs to Change*, TRANSPARENCY INT’L (Feb. 16, 2016), [https://www.transparency.org/news/feature/corruption\\_in\\_afghanistan\\_what\\_needs\\_to\\_change](https://www.transparency.org/news/feature/corruption_in_afghanistan_what_needs_to_change).

processes.<sup>116</sup> Furthermore, the government of Afghanistan has been struggling to establish appropriate institutions with good human capital and resources to tackle international crimes. Given this situation, the government of Afghanistan will not be able to prosecute such international crimes in the foreseeable future.

The OTP and Pre-Trial Chamber have reached the same conclusion that, based on available information, the principle of complementarity applies in Afghanistan's situation. In the public redacted version of her request for authorization of an investigation, the chief prosecutor of the ICC assessed the admissibility of the cases before her (those categories of crimes committed by the Taliban or Afghan forces) based on the fact that no genuine domestic investigations have been conducted to hold those people who bear the greatest responsibility in Afghanistan accountable.<sup>117</sup> Apparently, the prosecutor provided a list of all the cases that had not been prosecuted by the government of Afghanistan to the Pre-Trial Chamber.<sup>118</sup> In explaining why the present cases were admissible before the court, the prosecutor relied on the absence of national investigation or prosecution of the cases as well as the adoption of the Amnesty Law.<sup>119</sup> For instance, in her argument, the prosecutor claimed that "the information available indicates that at this stage no national investigations or prosecutions have been conducted or are ongoing against those who appear most responsible for the crimes allegedly committed by members of the Taliban and affiliated armed groups as set out in this Request...."<sup>120</sup> The Pre-Trial Chamber II accepted the Prosecutor's assertion and considered the cases admissible. The Chamber note that "the available information clearly indicates that the proceedings conducted so far in Afghanistan are limited in scope and did not target those who may bear the main responsibility for the incidents reflected in the annexes to the Request."<sup>121</sup>

With respect to the war crimes that were allegedly committed by U.S. forces, the prosecutor made a cautious assessment. The prosecutor admitted that the U.S. may challenge her complementarity assessment on the ground that those cases had already been prosecuted and tried in U.S. courts.<sup>122</sup> However, due to her inability to obtain sufficient information on whether domestic proceedings had been undertaken in the cases,<sup>123</sup> the prosecutor concluded that the cases were currently admissible, her assessment remaining provisional until she could obtain concrete and valid information during the investigation.<sup>124</sup> The Pre-Trial Chamber confirmed the Prosecutor's assessment and granted the admissibility

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116. *Id.*

117. *See The OTP Request, supra* note 64, at ¶¶ 269, 271, & 272.

118. *See id.* at ¶ 275.

119. *See id.*

120. *Id.* at ¶ 269.

121. *The Chamber Decision, supra* note 91, at para. 77.

122. *See The OTP Request, supra* note 64, at para. 295 & 296.

123. *Id.* at para. 296.

124. *Id.*

of the potential cases involving U.S. forces in Afghanistan.<sup>125</sup> Referring to the available information, the Chamber maintained that the available information did not indicate that the U.S. had carried out national criminal investigations or prosecutions.<sup>126</sup> It also stressed that “non-judicial and administrative measures rather than criminal prosecutions do not result in inadmissibility under article 17.”<sup>127</sup>

After the Chief Prosecutor announced her request to the Pre-Trial Chamber in 2017, the government of Afghanistan reacted to the prosecutor’s decision and adopted a contrary stance. It appears that Afghanistan, like Kenya,<sup>128</sup> prefers to argue against ICC intervention and desires more time for its national processes.<sup>129</sup> Afghanistan contends that the principle of complementarity is not yet applicable because Afghanistan is not unwilling or unable to investigate and prosecute the relevant international crimes.<sup>130</sup> At the 16th Session of Assembly of State Parties to the Rome Statute (held at the UN headquarters from December 4–14, 2017), the Permanent Representative of Afghanistan to the UN explained to the Assembly of State Parties that Afghanistan had made significant progress on reforming its judicial system and was willing to prosecute the allegedly committed crimes.<sup>131</sup> The representative of Afghanistan to the UN purported that “various measures have been taken by our criminal justice system in the investigation and prosecution of crimes under the Rome Statute, including those for which the Office of the Prosecutor has requested information.”<sup>132</sup> However, he did not give further details about what those measures were, and it is not clear what kinds of measures he was referring to. Furthermore, he asked the ICC to give Afghanistan more time to investigate and prosecute the crimes. He noted that “it is imperative to ensure ample time for a clear, thorough and accurate observation of judicial measures taken by our relevant institutions on related incidents.”<sup>133</sup>

On December 2, 2019, Afghanistan’s government rendered a written submission to the Appeal Chamber of the ICC, supporting the Pre-Trial’ Chamber’s decision and arguing, in part, against applicability of the principle of complementarity.<sup>134</sup> There is nothing new in the submission. Afghanistan

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125. *The Chamber Decision*, *supra* note 91, at para. 79.

126. *Id.*

127. *Id.*

128. Kenya also argued that its national processes should be given more time to work before the ICC indicted anyone. *See* JEFFREY L. DUNOFF ET AL., *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS* 532 (2015).

129. *Cf.* Saikal, *supra* note 95.

130. *See id.*

131. *See id.*

132. *Id.*

133. *Id.*

134. *See* Situation in the Islamic Republic of Afghanistan, Case No. ICC-02/17, Written Submissions of the Government of the Islamic Republic of Afghanistan, para. 7 & 13 (Dec. 2, 2019) [hereinafter *Afghanistan’s Submission*].

basically reemphasizes on its previous argument that it is willing and able to prosecute international crimes committed within the territory of the country.<sup>135</sup> The government asserts that Afghanistan has taken serious steps toward fulfilling its obligations such as institutional reforms in judiciary, building the capacity of judges and prosecutors, incorporating international crimes in the new Penal Code, and establishing an International Crimes Office.<sup>136</sup> Furthermore, it vaguely refers to prosecution of nearly 1,500 cases related to international and terrorism crimes.<sup>137</sup> However, the government does not provide any specific evidence to show that it has prosecuted any of the crimes that are the subject of the ICC investigation.<sup>138</sup> It appears that Afghanistan is solely trying to further delay the ICC intervention in the country. For instance, in the submission, the government of Afghanistan requests the Appeal Chamber to either dismiss the Prosecutor's appeal or return the case back to the Pre-Trial Chamber for further consideration.<sup>139</sup> The submission provides:

Finally, if the Appeals Chamber concludes that the issues now raised by Afghanistan in relation to its national investigations and prosecutions are not to be decided in this appeal, and that the Pre-Trial Chamber erred in its approach, Afghanistan would respectfully invite the Appeal Chamber not to authorise an investigation itself but to remit this matter back to the Pre-Trial Chamber to reconsider its decision with the benefit of the Appeals Chamber's guidance on the meaning of the "interests of justice" and to take into account all the evidence including these submissions about national investigations.<sup>140</sup>

In a recent development, in reaction to the authorization of investigation by the Appeals Chamber, the Afghan National Security Council held a meeting chaired by the Afghan President on March 19, 2020.<sup>141</sup> Once again, that meeting concluded that Afghanistan is willing and able to prosecute the international crimes which are under consideration of the OTP.<sup>142</sup>

The argument of the Afghan government is not convincing. One should ask the government, is fifteen years not enough time? Furthermore, it is insufficient to argue that Afghanistan has taken measures to prosecute the crimes in question simply because, as previously explained, the government of Afghanistan has recently incorporated those international crimes into the new penal code. This argument fails as there are no indications that a single case is under investigation

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135. *See id.* at para. 1–32.

136. *See id.* at para. 16–18.

137. *Id.* at para. 23.

138. Katherine Gallagher & Nikki Reisch, *ICC Holds Historic Hearings on U.S. Torture and Other Grave Crimes in Afghanistan*, JUSTICE SECURITY (Dec. 23, 2019), <https://www.justsecurity.org/67843/icc-holds-historic-hearing-on-u-s-torture-and-other-grave-crimes-in-afghanistan/>.

139. *Afghanistan's Submission*, *supra* note 134, at para. 65 & 66.

140. *Id.* at para. 11.

141. *See* ISLAMIC REPUBLIC OF AFGHANISTAN, MEETING OF THE NATIONAL SECURITY COUNCIL WAS HELD UNDER THE CHAIRMANSHIP OF MOHAMMAD ASHRAF GHANI, THE PRESIDENT OF AFGHANISTAN (Mar. 19, 2020), <https://president.gov.af/da/?p=24570>.

142. *See id.*

under the relevant provisions of the new code. Indeed, the ICC has already rejected a similar argument in connection with a Kenyan case, laying out clear reasoning that is instructive here. In the case *Prosecutor v. Ruto & Sang*, Kenya contended the case was under domestic investigation and thus not admissible before the ICC.<sup>143</sup> The Court rejected Kenya's argument and maintained that the "case is only inadmissible before the Court if the same suspects are being investigated by Kenya for substantially the same conduct."<sup>144</sup> Further, the ICC interpreted Article 17(1)(a), especially the words "is being investigated" as meaning that an actual investigation should be ongoing, such as "interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses."<sup>145</sup> According to the ICC ruling, "the mere preparedness" of a state for an investigation is insufficient to render a case inadmissible.<sup>146</sup> Given the ICC's interpretation of Article 17(1) and its application to the facts presented above, Afghanistan's argument must yield; the complementarity principle and the intervention of the ICC are legally justifiable. Countless atrocities have been perpetrated in the country and each case could be considered independently by the ICC. Even if Afghanistan were to prosecute one or even a handful of cases, the ICC's jurisdiction would pertain to the remaining cases.

#### V. A CRITICAL ANALYSIS OF THE PRE-TRIAL CHAMBER'S DECISION: THE INTERESTS OF JUSTICE

Almost 17 months after receiving the OTP request, on April 12, 2019, the Pre-Trial Chamber II delivered its decision on Afghanistan. The situation in Afghanistan was not referred to the OTP by the State of Afghanistan or the Security Council; rather, the OTP started its preliminary examination in 2006 on its own initiative in accordance with Article 15 of the Rome Statute. Article 15 (1) allows the OTP to initiate an examination based on the information it receives about the commission of crimes that fall under the jurisdiction of the ICC.<sup>147</sup> If the OTP finds a reasonable ground to start a full investigation, it needs to obtain the approval of the Pre-Trial Chamber.<sup>148</sup> Article 15 (3) proclaims that "[i]f the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected."<sup>149</sup> Then, in accordance with the Article, if the Pre-Trial Chamber concludes there are reasonable grounds to open an investigation and "the case appears to fall within the jurisdiction of the Court, it shall authorize the

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143. See generally *Prosecutor v. Ruto*, ICC-01/09-01/11 OA, para. 20 Judgment ¶ (Aug. 30, 2011).

144. *Id.* at para. 41.

145. *Id.*

146. *Id.*

147. The Rome Statute, *supra* note 8, at art. 15 (1).

148. *Id.* at art. 15(3).

149. *Id.*

commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.”<sup>150</sup> The Article also grants authority to the Pre-Trial Chamber to refuse to authorize an investigation if it does not find a reasonable basis for launching an investigation.<sup>151</sup>

In the case of Afghanistan, the Pre-Trial Chamber refused to authorize the OTP to proceed with an investigation. The Prosecutor appealed the decision and the Pre-Trial Chamber partially granted this appeal request on September 17, 2019. After that, as noted before, the Appeals Chamber authorized an investigation. Despite the authorization of the investigation, it is worth it to analyze and problematize the decision of the Pre-Trial Chamber, to reject the Prosecutor’s request solely on the basis of “interests of justice,” and then briefly discuss the Prosecutor’s reasoning on appeal.

Based on the information and materials presented by the Prosecutor, to determine whether a reasonable basis exists to proceed with an investigation, the Pre-Trial Chamber examine a number of issues including subject-matter and territorial jurisdiction of the Court,<sup>152</sup> admissibility issues such as complementarity and gravity,<sup>153</sup> and issues related to the interests of justice.<sup>154</sup> With respect to jurisdiction and admissibility, the Pre-Trial Chamber rightly determined that the Court has jurisdiction over the crimes in question and the presented cases are potentially admissible in the Court (given the requirements for complementarity and gravity were met).

However, the Chamber unanimously rejected the Prosecutor’s request, solely on the basis of the interests of justice, claiming that “an investigation into the situation in Afghanistan at this stage would not serve the interests of justice.”<sup>155</sup> Since it appears that this was the first time the Pre-Trial Chamber has made a determination based on the interests of justice, it raises many questions and concerns with respect to the statutory meaning of the concept and reasoning of the Chamber. First and foremost, the Rome Statute does not define the terms “interests of justice.” It seems a very abstract and subjective concept within the text of the Statute. The OTP claims that it “represents one of the most complex aspects of the Treaty. It is the point where many of the philosophical and operational challenges in the pursuit of international criminal justice coincide (albeit implicitly), but there is no clear guidance on what the content of the idea is.”<sup>156</sup> The Pre-Trial Chamber also admits there is no definition or

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150. *Id.* at art. 15(4).

151. *See id.* at art. 15(5).

152. *See The Chamber Decision, supra* note 91, at para. 45–66.

153. *See id.* at para. 70–86.

154. *See id.* at para. 87–96.

155. *See id.* at para. 96.

156. *Policy Paper on the Interests of Justice*, OTP 2 (Sept. 2007), <https://www.legal-tools.org/doc/bb02e5/pdf/>.

guidance concerning the meaning of the “interests of justice” within the relevant statutory texts.<sup>157</sup>

To infer meaning for the concept of the interests of justice and determine some measurable factors, the Chamber attempted to interpret the Statute by referring to the main mandate of the ICC and the reasons why the Court exists in the first place. The Chamber stated:

[T]he meaning of the interests of justice as a factor potentially precluding the exercise of the prosecutorial discretion must be found in the overarching objectives underlying the Statute: the effective prosecution of the most serious international crimes, the fight against impunity and the prevention of mass atrocities. All of these elements concur in suggesting that, at the very minimum, an investigation would only be in the interests of justice if prospectively it appears suitable to result in the effective investigation and subsequent prosecution of cases within a reasonable time frame.<sup>158</sup>

Based on the Chamber’s interpretation above, the effectiveness of a potential investigation, successful prosecution, and a “reasonable time frame” are the determining factors to be considered in assessing the interests of justice. Later in its decision, the Chamber examined whether the above factors were applicable to Afghanistan. The Chamber noted three elements on the ground that could help determine whether an investigation would be for the interests of justice in Afghanistan. The elements include “the significant time elapsed between the alleged crimes and the Request,”<sup>159</sup> the minimal cooperation secured by the Prosecutor throughout the preliminary examination,<sup>160</sup> and the unavailability of the relevant evidence and suspects for the Prosecutor.<sup>161</sup>

The Chamber concluded that the preliminary examination lasted so long (almost 11 years) and the challenges that impeded the preliminary examination are still present or have worsened.<sup>162</sup> The Chamber asserted that “some of the circumstances at the origin of the difficulties having marred the preliminary examination, and of its length, either remain unchanged or have rather changed for the worse; as such, they are also likely to impact any forthcoming investigation which might be authorised.”<sup>163</sup> According to the Court, since most of the incidents presented in the cases date back to the early stages of the preliminary examination, the Prosecutor has not been able to take meaningful actions to preserve the relevant evidence and protect witnesses.<sup>164</sup> The Chamber continued, asserting that not a single request has been made by the Prosecutor vis-a-vis preserving evidence over the eleven years of the preliminary

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157. See *The Chamber Decision*, *supra* note 91, at para. 89.

158. *Id.*

159. *Id.* at para. 91.

160. *Id.*

161. *Id.*

162. See *The Chamber Decision*, *supra* note 91, at para. 92.

163. *Id.*

164. *Id.* at para. 93.

examination.<sup>165</sup> The Chamber, therefore, concluded that it was highly unlikely that the relevant evidence would still be available.<sup>166</sup>

Furthermore, the Chamber asserted that the political landscape in the key States and the instability in Afghanistan “make it extremely difficult to gauge the prospects of securing meaningful cooperation from relevant authorities for the future, whether in respect of investigations or of surrender of suspects.”<sup>167</sup> The Chamber referred to the Prosecutor’s own assertion regarding the difficulties faced in securing cooperation, the scarcity of which made the duration of the preliminary examination unusually long.<sup>168</sup> According to the Chamber, “it seems reasonable to assume that these difficulties will prove even trickier in the context of an investigation.”<sup>169</sup>

Finally, the Chamber raised the issue of the Court’s budget and limited resources. The Chamber maintained that “pursuing an investigation would inevitably require a significant amount of resources.”<sup>170</sup> According to the Chamber, the lack of additional resources would require the Prosecutor to significantly reallocate its budget.<sup>171</sup> The reallocation could severely impact other investigations (in other countries) “which appear to have more realistic prospects to lead to trials and thus effectively foster the interests of justice.”<sup>172</sup> Ultimately, the Chamber concluded that “the current circumstances of the situation in Afghanistan are such as to make the prospects for a successful investigation and prosecution extremely limited.”<sup>173</sup> In the final paragraph of its reasoning, the Chamber concluded that “it is unlikely that pursuing an investigation would result in meeting the objectives listed by the victims favouring the investigation”<sup>174</sup> and this “would result in creating frustration and possibly hostility vis-a-vis the Court and therefore negatively impact its very ability to pursue credibly the objectives it was created to serve.”<sup>175</sup> To summarize the Chamber decision, an actual investigation should not be opened because it may not be effective and successful.

The reasoning of the Chamber is problematic and inconsistent. The reasoning is not only unconvincing, it would appear the Chamber is trying to evade its core responsibility. In other words, the Chamber’s position goes against the very *raison d’être* of the Court. We should remember that the OTP and the Chamber’s decisions are based on preliminary information and reports produced by the UN and NGOs. Essentially, the Chamber has based its decision

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165. *Id.*

166. *Id.*

167. *The Chamber Decision, supra* note 91, at para. 94.

168. *Id.*

169. *Id.*

170. *Id.* at para. 95.

171. *Id.*

172. *Id.*

173. *The Chamber Decision, supra* note 91, at para. 96.

174. *Id.*

175. *Id.*

upon assumptions tied to the reports and information in hand. Making a decision based on assumptions about mass atrocities perpetrated in Afghanistan is dangerous, potentially erroneous, and misleading.

In addition to the broad interpretation of “the interests of justice” which the Prosecutor discusses in length in the appeal request, this Article highlights some of the other problems and inconsistencies the Chamber’s reasoning entails. First, the Chamber recalled the core mandate and objectives of the ICC to investigate the most serious crimes, end the culture of impunity, and prevent mass atrocities. Yet it does not take responsibility to achieve those objectives by authorizing an investigation. The Chamber’s justifications for not authorizing the investigation directly oppose those very objectives and corrode the essence of the ICC. The question is whether merely adopting an observational stance while mass atrocities are being committed in Afghanistan is the proper step towards achieving the ICC’s objectives OR whether initiating an investigation is mandated. Clearly, only an actual investigation will help achieve the ICC’s goals.

Second, the Chamber indirectly blames the OTP for the unusual longevity of the preliminary examination and non-preservation of evidence. The OTP might indeed share some of the blame, but the Chamber should not forget that the ICC as a whole bears the responsibility, not only the OTP. Most importantly, the Chamber acknowledged that much time had elapsed, which could contribute to the disappearance of evidence, yet fails to recognize the difficulty in preserving evidence given the ICC’s reputation for time-consuming processes. As one commentator observed, this is “the very problem an actual investigation—with wide range of cooperation obligations it triggers for ICC states parties—is meant to address.”<sup>176</sup> Unfortunately, the Chamber does not provide an alternative nor exhibit concern regarding the preservation of evidence related to the more recent atrocities.

Third, the Chamber depicts the prospect of receiving cooperation as very unlikely. It is true that securing cooperation is very challenging, and most states do not usually provide the level of cooperation the Court needs. However, the ICC is also not an ordinary court. It was established to address the most serious crimes and it is expected to face and deal with very serious challenges over the course of performing its job. In her appeal request, the Prosecutor presented a similar argument. The Prosecutor acknowledged the challenges she faces to secure cooperation, but she stressed that these “challenges are part of its statutory responsibility.”<sup>177</sup> The more serious and grave a crime is, the more

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176. Christian De Vos, *No ICC Investigation in Afghanistan: A Bad Decision with Big Implications*, INT’L JUST MONITOR (2019), <https://www.ijmonitor.org/2019/04/no-icc-investigation-in-afghanistan-a-bad-decision-with-big-implications/>.

177. Situation in the Islamic Republic of Afghanistan, Case No. ICC-02/17, Request for Leave to Appeal the “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan” ¶ para. 35 (June 7, 2019) [hereinafter Request for Leave].

difficult it may be to address. Giving up before even starting an investigation on the assumption that securing meaningful cooperation is not feasible would set a very dangerous precedent. It would also provide incentives to other states to resist and avoid cooperation so the ICC could not investigate potential international crimes within their territories.

Fourth, it is well-known to international law practitioners that the ICC occasionally suffers from lack of resources. However, the reasoning of the Chamber suggests a danger to international rule of law—that the Court only has the will to go after those crimes that are easily accessible and economical to pursue. Investigating more serious crimes of larger scale is logically more costly. No other state party might face war crimes so great in number and large in scale as Afghanistan has over the past fifteen years. Yet the reasoning of the Chamber suggests that it selectively investigates only the crimes with which the Court is comfortable, not the most heinous crimes. If the ICC was created to investigate the most serious crimes and end impunity, no place is more in need of it than Afghanistan. As one commentator noted, “citing limited resources as justification for declining an investigation effectively rewards states parties (many of whom have been all too eager to see this issue go away) for consistently underfunding the ICC.”<sup>178</sup>

Lastly, the Chamber’s assertion that a potentially ineffective investigation would only create frustration and hostility towards the Court does not make sense. Many victims (who know about the ICC jurisdiction) and human rights activists are already frustrated with the lack of action and indifference demonstrated by the Court. If the Court truly takes frustration seriously, it should be aware that a lack of investigation would create more backlash and frustration than a potentially ineffective investigation.

In addition to the problems noted above, the Prosecutor has also raised some pertinent legal questions about the Pre-Trial Chamber’s decision and the way the Chamber interpreted the “interests of justice.” On June 7, 2019, the Prosecutor appealed the Pre-Trial Chamber’s Decision and raised three important issues with respect to the interpretation of Article 15(4) and 53(1)(c) concerning the interests of justice, the exercise of discretion by the Chamber, and the scope of any investigation that might be authorized by the Chamber.<sup>179</sup> The three issues include: (1) “[w]hether articles 15(4) and 53(1)(c) require or even permit a Pre-Trial Chamber to make a positive determination to the effect that investigations would be in the interests of justice”;<sup>180</sup> (2) “[w]hether the Pre-Trial Chamber properly exercised its discretion in the factors it took into account in assessing the interests of justice, and whether it properly appreciated those factors”;<sup>181</sup> and (3) “[w]hether article 15, or any other material provision of the Statute, limits the scope of any investigation that the Pre-Trial Chamber may

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178. Vos, *supra* note 176.

179. Request for Leave, *supra* note 177, at para. 3.

180. *Id.* at para. 15.

181. *Id.* at para. 19.

authorise to the particular incidents identified by the Prosecutor in her application under article 15(3), and incidents closely linked to those incidents.”<sup>182</sup>

According to the Prosecutor’s request, all three issues bear constitutional significance to all situations<sup>183</sup> and impact the outcome of any trial<sup>184</sup> and “the fair and expeditious conduct of the proceedings.”<sup>185</sup> On September 17, 2019, the Pre-Trial Chamber granted the Prosecutor leave to appeal the first and second issues but rejected the third issue.<sup>186</sup> With respect to why the third issue was rejected, the Chamber reasoned that the issue was not an essential part of the Chamber’s decision.<sup>187</sup>

After receiving the grant of appeal, the Prosecutor submitted an appeal brief to the Appeals Chamber of the ICC on September 30, 2019.<sup>188</sup> In the brief, the Prosecutor presents two grounds upon which it requests the Appeals Chamber to authorize an investigation itself or “otherwise remand the matter back to the Pre-Trial Chamber with a direction for it to promptly authorise an investigation.”<sup>189</sup> According to the brief, the two grounds include “erred in law” and “abuse of discretion” by the Pre-Trial Chamber.<sup>190</sup> The Prosecutor asserts that “the Pre-Trial Chamber erred in law by conditioning its determination under article 15(4) on reaching a positive assessment of the interests of justice under article 53(1)(c).”<sup>191</sup> The Prosecutor also argues that “the Pre-Trial Chamber abused its discretion when it assessed the interests of justice in this situation and concluded that there are substantial reasons to believe that opening an investigation would be contrary to these interests.”<sup>192</sup> She extensively analyzes the law and facts of the case and provides detailed reasonings on how the Pre-Trial Chamber erroneously understood and interpreted the law and abused its discretion in assessing the interests of justice.<sup>193</sup>

In addition to the government of Afghanistan’s submission and the Prosecutor’s brief, the Appeals Chamber received nearly 15 *amici curiae* from individuals and various national and international organizations.<sup>194</sup> The

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182. *Id.* at para. 24.

183. *Id.* at para.18, 22, & 38.

184. *See* Request for Leave, *supra* note 177, at para. 36.

185. *Id.* at para. 31.

186. Situation in the Islamic Republic of Afghanistan, Case No. ICC-02/17, Decision on the Prosecutor and Victims’ Requests for Leave to Appeal the ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan,’ para. 38, 39, 41 (Sept. 17, 2019).

187. *Id.* at para. 41.

188. Situation in the Islamic Republic of Afghanistan, Case No. ICC-02/17, Prosecution Appeal Brief, para. 169 (Sept. 30, 2019).

189. *Id.*

190. *Id.* at para. 6 & 7.

191. *Id.* at para. 6.

192. *Id.* at para. 7.

193. *See id.* at para. 12–166.

194. Gallagher & Reisch, *supra* note 138.

Chamber held an oral hearing on Afghanistan situation for three days between December 4-6, 2019.<sup>195</sup> After three months, on March 5, 2020, the Chamber delivered its judgment, amended the Pre-Trial Chamber's decision, and authorized the Prosecutor to open an actual investigation into situation in Afghanistan.<sup>196</sup> In its ruling, the Chamber authorizes the Prosecutor to not only investigate the crimes in question that have allegedly been perpetrated in Afghanistan since May 1, 2003 but also to investigate "other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation and were committed on the territory of other States Parties in the period since 1 July 2002."<sup>197</sup>

#### VI. THE POTENTIAL IMPACTS OF PROCEEDING WITH AN ACTUAL INVESTIGATION

Although long overdue, the authorization of the investigation has been the most notable and boldest decision of the ICC regarding the situation in Afghanistan over the last two decades. Now it is the responsibility of the OTP to ensure justice and conduct an impartial, independent and thorough investigation into the situation in Afghanistan without being intimidated by threats or political pressures from any side. It should be noted that an actual investigation in Afghanistan would not necessarily be as perfect and effective as the Pre-Trial Chamber was trying to portray in its reasoning. Everyone is aware of the challenges and limits of the Court. The investigation will have many impacts with respect to understanding the scale of the crimes and identifying potential criminals, discovering and preserving the relevant evidence, interviewing victims and witnesses, pressuring the government of Afghanistan to take responsibility, ensuring justice after any potential peace agreement with Taliban, and helping to achieve the Court's main objectives.

First, an actual investigation will help the ICC understand the scale of crimes that have taken place in the country over the years. Currently, almost all the available information has been collected by the UN and international/national NGOs. Those organizations may not have the skills and expertise of for a formal investigation, nor the subpoena and other powers vested in the courts. Therefore, while such information may be useful for conducting a preliminary examination, it is insufficient for the actual investigation and trial. An ICC investigation will also help determine the actual perpetrators of these crimes. Currently, most reports only provide indications concerning the commission of crimes by different parties to the conflict but fail to name the specific individuals who bear the greatest responsibility.

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195. *Id.*

196. Situation in the Islamic Republic of Afghanistan, ICC-02/17-138 05-03-2020 OA4, Judgment on the Appeal against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ¶ 79 (Mar. 5, 2020).

197. *Id.*

Second, despite what the Pre-Trial Chamber asserted regarding the failure to preserve evidence during the long preliminary examination, during an actual investigation evidence can be properly preserved. During the preliminary examination, the OTP would not have the tools nor power to discover and preserve the necessary evidence. The OTP only received and analyzed reports from UN agencies, NGOs and some communications from victims (approximately 794)<sup>198</sup> but nothing from witnesses. That is insufficient to determine the depth and breadth of atrocities that have been perpetrated or are being perpetrated across the country. In fact, most people in Afghanistan, including victims and witnesses, have not even heard about the ICC. Apparently, the representation of a limited number of victims was facilitated by some NGOs and international lawyers. If victims and witnesses learned more about the ICC's jurisdiction and activities, and understood they would be heard and protected, no doubt thousands would come forward to seek justice. Again, an actual investigation will allow the OTP to establish a close connection with victims and witnesses and take testimony that was not heard before.

Third, initiating an investigation will put more pressure on the government of Afghanistan to do more to implement its new Penal Code and cooperate with the ICC. In fact, one of the main reasons these serious international crimes were incorporated into the new Penal Code was the pressure the government felt from the ICC. One of the immediate impacts of an investigation on the government of Afghanistan would be the decrease or cessation of torture and other war crimes and crimes against humanity that allegedly have been committed by Afghan forces. Furthermore, an investigation will force the government to take more serious actions to address international crimes within its territory.

Fourth, for several year there have been ongoing peace negotiations between the United States, Taliban, and the government of Afghanistan.<sup>199</sup> A peace deal was signed between the United States and Taliban on February 29, 2020.<sup>200</sup> As the result of the negotiations, a hundred of the most notorious terrorists and Taliban members who are accused of atrocities have already been released from prison.<sup>201</sup> Many more terrorists and Taliban members are expected to be released

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198. See The Chamber Decision, *supra* note 91, at para. 27 & 64.

199. See Vanda Felbab-Brown, *What's in Store after the US-Taliban Deal*, THE BROOKINGS INSTITUTE (Mar. 4, 2020), <https://www.brookings.edu/blog/order-from-chaos/2020/03/04/whats-in-store-after-the-us-taliban-deal/>.

200. See U.S. DEP'T. OF STATE, AGREEMENT FOR BRINGING PEACE TO AFGHANISTAN BETWEEN THE ISLAMIC EMIRATE OF AFGHANISTAN WHICH IS NOT RECOGNIZED BY THE UNITED STATES AS A STATE AND IS KNOWN AS THE TALIBAN AND THE UNITED STATES OF AMERICA (Feb. 29, 2020), <https://www.state.gov/wp-content/uploads/2020/02/Agreement-For-Bringing-Peace-to-Afghanistan-02.29.20.pdf>.

201. See Sharif Hassan & Susannah George, *Afghan Government Releases 100 Taliban Prisoners after Collapse of Prisoner Swap Talks*, THE WASH. POST (Apr. 8, 2020), [https://www.washingtonpost.com/world/asia\\_pacific/afghan-government-releases-100-taliban-prisoners-after-collapse-of-prisoner-swap-talks/2020/04/08/bfba7794-7982-11ea-a311-adb1344719a9\\_story.html](https://www.washingtonpost.com/world/asia_pacific/afghan-government-releases-100-taliban-prisoners-after-collapse-of-prisoner-swap-talks/2020/04/08/bfba7794-7982-11ea-a311-adb1344719a9_story.html).

without being held accountable for their heinous actions.<sup>202</sup> After a potential peace agreement between the government of Afghanistan and the Taliban, the role of ICC engagement in the post-peace period is becoming increasingly crucial. The Taliban have consistently and atrociously targeted civilians. They are one of the main causes of civilian casualties in Afghanistan. As such, in the period relevant to the ICC, the Taliban bear the greatest responsibility for the commission of international crimes in the country. After any potential peace agreement, there is little hope that Taliban leaders would be prosecuted by the government of Afghanistan for their past atrocities; indeed, they might become part of the government. In such a situation, as a neutral court, the ICC bears the responsibility to intervene and hold Taliban leaders accountable. The ICC would be the only hope for the victims as well. Again, an actual investigation will prepare the ICC properly for the post-peace era, if such investigation enables them to gather sufficient evidence and documents to effectively prosecute and try the perpetrators.

Finally, an actual investigation will be an important step for the ICC to carry out its mandate and achieve its objectives. Given the current situation with respect to the release of the terrorists, the authorization of an investigation cannot be timelier. A full investigation will retain the credibility of the ICC and provide a window of hope and restitution for victims and innocent people who have suffered from heinous crimes for far too long.

### CONCLUSION

Despite a long history of war and the committing of mass atrocities in Afghanistan, the Afghan government, the ICC, and the international community as a whole have not made any significant progress to address these most heinous crimes nor to hold the perpetrators accountable. The ICC's extremely slow and insufficient actions and lack of accountability perpetuate a culture of impunity and result in the people of Afghanistan continuing to suffer from the reoccurrence of such grave crimes. The accession of Afghanistan to the Rome Statute has not yet had any tangible positive effects in the country. On the one hand, the government of Afghanistan has not fully complied with the expectations of the Rome Statute to investigate and prosecute the relevant crimes in the country. On the other hand, the ICC itself has failed to duly carry out its mandate. The ICC's objectives to prosecute the three categories of crimes, end the culture of impunity, and create a deterrent effect have not yet materialized. While the authorization of an investigation by the Appeals Chamber is unquestionably a positive step forward, the OTP has a long, rocky, and uneasy path for carrying out its activities and conducting an effective investigation and prosecution. Despite such challenges, nothing should wither the determination of the OTP and the entire institution of the ICC to take the necessary steps toward securing justice and accomplishing its mandate. The

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202. *See id.*

future success of the ICC largely depends on conducting a thorough investigation and addressing these serious crimes in Afghanistan. The ICC's actions are under scrutiny by the people of Afghanistan and the rest of the world; the ICC must duly carry out its mandate and deliver justice to the innocent victims of these heinous crimes in Afghanistan.