

The International Criminal Court's Afghanistan Investigation

Challenges and Constraints Assessment

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Abstract

This article embarks on a comprehensive analysis of the International Criminal Court's (ICC) investigation into the Afghanistan situation, marking a critical juncture in the global pursuit of justice for egregious international crimes. Amidst Afghanistan's decades-long conflict, characterised by widespread and systematic human rights abuses and a prevailing culture of impunity, the ICC's involvement signifies a beacon of hope for accountability and victim reparation. However, this investigation unfolds within a complex tapestry of jurisdictional, political, and operational challenges that are both emblematic of broader issues in international criminal justice and unique to Afghanistan's socio-political landscape.

This research dissects the ICC's strategic responses to these challenges, including case selection and prioritisation, against a backdrop of limited resources and geopolitical pressures. It reveals the inherent tensions between the lofty ideals of international law and the gritty realities of its implementation. Notably, the investigation's scope is constrained by the ICC's jurisdictional boundaries, which exclude numerous violations pivotal to Afghanistan's affected communities and underscore the need for a more inclusive approach to justice.

This article argues that despite the ICC's efforts, the path to fulfilling its foundational goals—combating impunity, preventing atrocities, and ensuring justice for survivors—is fraught with obstacles. It posits that the effectiveness of the ICC's mission in Afghanistan hinges on integrating complementary international and local accountability mechanisms. Such a holistic approach is vital for overcoming the ICC's operational limitations and achieving meaningful justice for Afghanistan's victims and survivors.

Keywords: International Criminal Court, Afghanistan, international crimes, impunity, accountability, international justice, victim rights, operational challenges.

Introduction

The ICC's investigation in Afghanistan has been seen as a beacon of hope to deliver justice for war survivors and to confront a longstanding culture of impunity in a nation scarred by over a half-century of conflict, starting in 1978. Afghanistan's tumultuous history, characterised by civil wars, suppressive regimes and foreign interventions, has led to widespread and systematic human rights abuses, some amounting to international crimes, leaving millions of victims and deep scars on its society. Perpetrators have enjoyed blanket amnesty, and survivors have been deprived of reparations and acknowledgement. The sole transitional justice programme failed to be implemented. A few cases have been investigated under the universal jurisdiction principle. The ICC's engagement in the Afghanistan situation was initiated after the country became a state party to the Rome Statute in 2003. Its investigation, which commenced in November 2022 after much back and forth, represents the first significant international attempt to address these abuses within the global justice framework.

The significance of the ICC's Afghanistan investigation underscores a pivotal shift towards recognising and addressing the long-overdue demands for justice by victims and survivors who have borne the brunt of the conflict's brutality. This investigation seeks to address the legacies of past and current mass atrocities, charting a course towards a more just and accountable order in Afghanistan. Moreover, its importance extends beyond the borders of Afghanistan, offering a litmus test for the efficacy of international legal mechanisms in conflict-affected regions and attempting to make the USA accountable for the allegations against its CIA personnel and military forces. It challenges the ICC to confront and overcome various obstacles, from jurisdictional complexities and the non-cooperation of critical actors to the logistical hurdles of conducting thorough investigations in volatile environments. The investigation's outcomes may redefine the parameters of international accountability and set precedents for future interventions, thereby reinforcing the ICC's role as an indispensable instrument of global justice.

The investigation confronts a constellation of formidable challenges and obstacles, symbolic of the intricate balance between pursuing international justice and navigating the multifaceted realities on the ground and around it. The Court grapples with jurisdictional limitations and the complicated dance of global diplomacy, notably the contentious US Bilateral Immunity Agreements (BIAs) and the need for a cohesive legal framework for cooperation within Afghanistan. The investigation is trapped in a web of international relations and the difficulties of state sovereignty, further complicated by the ambiguous legal status of the Taliban's de facto governance and its outright refusal to cooperate. Operationally, the ICC

faces logistical nightmares, from geographical and linguistic barriers to the inherent difficulties of conducting thorough investigations in Afghanistan, a society affected by conflict and driven by de facto governance. These challenges are exacerbated by resource and capacity constraints, with the ICC's ambitious mandate starkly contrasted with its operational bandwidth and financial limitations. Together, these hurdles test the ICC's operational capabilities and underscore the delicate balance required to effectively deliver justice in a context as complex as Afghanistan's.

A critical examination of existing literature reveals a significant research gap: a lack of comprehensive analysis of the challenges and restrictions the ICC encounters in its investigation in Afghanistan. This investigation is not merely a procedural undertaking but a profound quest to address the deep-seated impunity and deliver justice to the survivors of decades-long conflict. The intricacies of these challenges, spanning legal, operational, and geopolitical spheres, underscore a crucial realisation—the ambition to end impunity and secure justice in Afghanistan transcends the legal and operational confines of the ICC.

By scrutinising the ICC's investigative process, this research examines the complex legal, practical, and political challenges the ICC faces in investigating crimes within the Court's jurisdiction and reaching the Court's founding objectives. This article suggests further research to assess the potential of the ICC to effectuate meaningful justice and explore the broader implications for the global justice system. Furthermore, it posits that the ICC's success in the Afghanistan investigation depends on other complementary mechanisms and processes.

The article is structured around one central question and two sub-questions. The main question asks: Considering its legal, practical and political challenges, how effectively can the International Criminal Court uphold a victim/survivor-centred approach and combat impunity in Afghanistan? The sub-questions are:

1. What are the legal, practical and political challenges and constraints the ICC faces in investigating and prosecuting alleged international crimes in Afghanistan?
2. To what extent do these legal, practical, and political challenges and constraints impact the ICC's mission of combating impunity, preventing international crimes, and delivering justice to survivors?

This research employs a multidimensional theoretical framework comprising legal-critical theory, victim/survivor-centred justice, and international criminal law. Legal-critical theory enables a critical examination of the ICC's actions, addressing potential dissonance between its legal framework and practical application, including gaps in the victim/survivor-centred approach and the ICC's effectiveness in Afghanistan. The victim/survivor-centred approach

prioritises the well-being, participation, and rights of victims/survivors at all stages of proceedings. International criminal law is the basis for assessing the ICC's jurisdiction, mandate and operational challenges. By combining these elements, this study examines the tensions between legal principles, the real-world limitations the ICC encounters, and their impact on combating impunity and ensuring victims/survivors' rights in Afghanistan.

The research uses problem-based research, qualitative, documentary analysis, library and online methods for data sources, collection, and analysis. The author has worked on and researched the topic for years, and his account also contributes to the study.

Conflicts and Crimes Overview

The Context of Conflict

Afghanistan's recent history, characterised by prolonged and multifaceted armed conflicts over the past four decades, can be segmented into six epochs. The roots of the contemporary conflict trace back to April 1978, when the People's Democratic Party of Afghanistan (PDPA) seized power, overthrowing President Daud's republican regime, which had replaced the monarchy in 1973 (Rubin, 2002, p. 105).² Supported extensively by the Soviet Union, the PDPA era lasted until 1993, ending with the rise of Mujaheddin Islamic paramilitary factions called *tanzim-e jihadi*. These groups, emerging from the Soviet invasion and the fall of the communist government, received backing from the United States and various Muslim nations during the Cold War. However, their failure to establish cohesive governance led to a civil war fuelled by ethnic divisions, setting the stage for the Taliban's emergence in 1995 (Barfield, 2010, p. 171).³

Originating primarily from Pashtun militants in Kandahar, the Taliban aimed to end the civil war, but their advance into Kabul escalated hostilities. Former Mujaheddin factions, such as Jamiyyat-e Islami Afghanistan, Wahdat-e Islami Afghanistan, and Junbish-e Islami Afghanistan, dominated by Tajik, Hazara, and Uzbek ethnicities, respectively, formed the Northern Alliance in opposition (Altizer and Jilani, 2005, p. 6).⁴ Hizb-e Islami, led by Gulbuddin Hekmatyar, a Pashtun, was another *tanzim-e jihadi* involved in the civil war, and was defeated by the Taliban. It did not join the coalition against the Taliban (Johnson, DuPee,

² Rubin, B. R. (2002). "The Fragmentation of Afghanistan: State Formation and Collapse in the International System." Yale University Press.

³ Barfield, T. (2010). "Afghanistan: A Cultural and Political History." Princeton University Press.

⁴ Altizer, A. & Jilani, E. (2005). "Ghost Wars: The Secret History of the CIA, Afghanistan, and Bin Laden, from the Soviet Invasion to September 10, 2001." Journal of Homeland Security and Emergency Management, 2(4). Retrieved from <https://doi-org.ludwig.lub.lu.se/10.2202/1547-7355.1187>

& Shaaker, 2017, p. 196).⁵ The Taliban, increasingly dominant and supported by transnational extremist entities like Al-Qaeda, faced a new challenge following the 9/11 terrorist attacks (Cristol & Cristol, 2019, pp. 25-48).⁶

The Taliban's refusal to extradite Osama Bin Laden led to the United States, under President George W. Bush, intervening in December 2001 in partnership with the Northern Alliance. This intervention diminished the Taliban's de facto governance, which had control over 95 per cent of the Afghanistan territory. They were recognised as the Afghanistan government by Pakistan, Saudi Arabia and the United Arab Emirates (Laub, 2014, pp. 3-5).⁷ The intervention, dubbed the 'War on Terror,' has sparked debates among scholars over its classification as an international armed conflict (Chayes, 2006, p. 34).⁸ Following the fall of the Taliban, a coalition of Afghan factions, supported by the United Nations and the international community, particularly the US, established an interim administration, culminating in the formation of the Afghanistan Islamic Republic, or the Republic (Johnson, 2006, pp. 3-7),⁹ legitimised by the 2004 Constitution (Johnson, 2006, p. 9).¹⁰

The Taliban re-emerged in 2006, partly due to their political exclusion and US counterterrorism strategies resulting in civilian casualties. After 15 years of fighting, they regained power on 15 August 2021. The last international military force left Afghanistan by the end of the month. This era saw the Taliban and their affiliates in opposition to the Republic and its international allies, including US and NATO forces (Rashid, 2009¹¹; Clayton, 2021, p. 7).¹²

Post-2021, the nature of the conflict has evolved, being now characterised by urban terrorist activities, predominantly from the Islamic State of Khorasan Province (ISKP), an ISIL branch active in Afghanistan and Pakistan, established in 2014 (Osman, 2020, p. 8).¹³ Their primary target has been the Hazara Shia community and, recently, Taliban officials. The Taliban's public stance is against ISKP. By calling them *khawarej* (a group in rebellion against a just and legitimate Islamic government), the Taliban legitimised the killing of every ISKP member

5 Johnson, T. H., DuPee, M., & Shaaker, W. (2017). "Taliban narratives: The use and power of stories in the Afghanistan conflict." Oxford University Press.

6 Cristol, J., & Cristol, J. (2019). "The Taliban take Kabul and a new friend moves to Kandahar." *The United States and the Taliban before and after 9/11*, 25-48.

7 Laub, Z. (2014). "The Taliban in Afghanistan." *Council on Foreign Relations*, 4(7), 1-9.

8 Chayes, S. (2006). "The Punishment of Virtue: Inside Afghanistan After the Taliban." Penguin Press.

9 Johnson, T. H. (2006). "Afghanistan's post-Taliban transition: the state of state-building after war." *Central Asian Survey*, 25(1-2), 1-26.

10 Johnson, T. H. (2006). "Afghanistan's post-Taliban transition: the state of state-building after war." *Central Asian Survey*, 25(1-2), 1-26.

11 Rashid, A. (2009). "Descent into Chaos: The U.S. and the Disaster in Pakistan, Afghanistan, and Central Asia." Penguin Publishing Group.

12 Clayton, T. (2021). "Taliban Government in Afghanistan: Background and Issues for Congress." Congressional Research Service, 2, 1-41.

13 Osman, B. (2020). "Bourgeois Jihad: Why Young, Middle-Class Afghans Join the Islamic State." United States Institute of Peace.

((Azwar et al., 2023, p. 41¹⁴; Morisco, 2023, pp. 27-28).¹⁵ The term *khawarej* and the principle of destroying a *khawarej* group as a whole was first established by the fourth successor of Prophet Muhammad (fourth khalifa), Ali Ibne Abu Talib (Zubaidah, 2016, pp. 4247-4248).¹⁶ He killed members of one of his opposition groups by labelling them *khawarej* in the Nahrawan battle (Hoffman, 2012, pp. 10-11).¹⁷

Additionally, insurgent tactics by the National Resistance Front in regions like Panjshir, Baghlan, and Takhar have emerged following the fall of Kabul. The group is led by Ahmad Masoud, son of Ahmad Shah Masoud, the former commander of the Northern Alliance who was assassinated a few days before the 9/11, allegedly by two members of Al Qaeda (Murtazashvili, 2022, p. 51).¹⁸ National Freedom Front is the other armed group opposed to the Taliban. This group of 'commandos' served in the Afghanistan National Security Forces under the Republic regime, and uses guerrilla warfare tactics targeting Taliban checkpoints and vehicles in Kabul and its neighbouring provinces. Its commander is General Zia, who served the Republic in senior military positions, including as a defence minister (Almas, 2023, p. 445).¹⁹ The Taliban call these groups *baghi* (insurgent). In Sharia, the term is defined as a Muslim group taking up weapons against a legitimate Islamic government. The punishment for such a group could be the murdering of its members, including prisoners and wounded members, until the destruction of the command centre of the group (Alshabani, 2021, p.372).²⁰ The Taliban's return to power, contrary to their promises of peace, has neither ended violence nor achieved international recognition, highlighting Afghanistan's ongoing instability and fragmentation.

Pre-2003 Alleged Crimes

The conflicts in Afghanistan have been marked by allegations of widespread international crimes committed by various factions, both in governance and opposition. Comprehensive documentation of these crimes, detailing their full extent, nature, and consequences, remains notably scarce. The Afghanistan Independent Human Rights Commission (AIHRC) has recorded the number of pre-2001 war victims as over two million, in addition to millions who were forcibly displaced, including internally displaced persons and those who fled the

14 Azwar, M., Evarial, I. E., & Munzir, M. M. (2023). "Construction of Structural and Cultural Khawarij Understanding Through Prophetic Hadith." *International Journal of Transdisciplinary Knowledge*, 4(1), 35-50.

15 Morisco, V. (2023). "From Rebel Governance to Institutionalization? Prospects for the Taliban and Afghanistan." *Austrian Institute for International Affairs*. Retrieved from <https://www.oiiip.ac.at/publikation/from-rebel-governance-to-institutionalization-prospects-for-the-taliban-and-afghanistan/>

16 Zubaidah, S. (2016). "Doctrine and thought of Khawarij and the implication in the present context." *IJAER*, 11(6), 4247-4251.

17 Hoffman, V. J. (2012). "The Essentials of Ibadi Islam." Syracuse University Press.

18 Murtazashvili, J. B. (2022). "The collapse of Afghanistan." *Journal of Democracy*, 33(1), 40-54.

19 Almas, W., Irfan, A., & Khan, A. W. (2023). "Afghanistan's Ethnic Strife Following the Taliban's Resurgence." *Journal of Policy Research*, 9(1).

20 Alshabani, B. O. (2021). "THE PERFORMATIVE OF" JIHAD" IN ISLAMIC INTERNATIONAL LAW: DRAWING A LINE BETWEEN JIHAD AND TERRORISM." *PalArch's Journal of Archaeology of Egypt/Egyptology*, 18(12), 366-375.

country (AIHRC, 2005).²¹ Additionally, the “Afghanistan Justice Project”, one of a few authentic reports, provides crucial insights into the severity and scope of alleged crimes and the warring parties perpetrating these crimes (Afghanistan Justice Project, 2005).²² The United Nations Assistance Mission in Afghanistan (UNAMA) also published a similar report about crimes perpetrated before 2001 in Afghanistan. It was downloaded before UNAMA removed the report from its website on the day it was published (Clark, 2011, p. 15).²³

It is crucial to note that crimes and incidents before 2003 fall outside the temporal jurisdiction of the ICC and are not the primary focus of this paper. Therefore, the few incidents described here represent only a fraction of the numerous undocumented crimes committed before 2003 by warring parties in positions of governmental authority.

Communist Regime Backed by the Soviets: Dutch investigators, in a seminal disclosure in 2014, released a list detailing 5,000 victims who were forcibly disappeared by the Afghanistan communist regime in 1978 and 1979. This documentation emerged amid an investigation by the Dutch International Crimes Department against specific individuals involved in these crimes (Netherlands Public Prosecution Service, 2014).²⁴

Mujaheddin Government: The civil war era, especially in Kabul, was marked by pervasive violence; numerous fatalities and injuries were reported amidst widespread urban destruction. Civilians traversing territories controlled by rival factions faced egregious abuses. The Afshar massacre in 1993, primarily targeting ethnic Hazara civilians, resulted in mass arrests, forced labour, and disappearances, attributed to the Jamiat-e-Islami Afghanistan and its ally, Ittihad-e Islami Afghanistan—principal components of the Mujaheddin government (Human Rights Watch, 2005).²⁵

The First Taliban De Facto Governance: After capturing Kabul in 1995, the Taliban implemented policies discriminating against women, amounting to potential gender persecution. In Tajik-dominated northern Kabul, the population endured acts of violence, property destruction, and forced marriages. The 1998 Mazar-e Sharif massacre, targeting the Hazara community based on ethnic and religious identity, resulted in estimated casualties of

21 Afghanistan Independent Human Rights Commission (AIHRC). (2005). "A Call for Justice: A National Consultation on Past Human Rights Violations in Afghanistan." Retrieved from <https://www.refworld.org/reference/confdoc/aihrc/2005/en/58500>

22 The Afghanistan Justice Project. (2005). "Casting Shadows: War Crimes and Crimes Against Humanity: 1978-2001." Retrieved from https://www.opensocietyfoundations.org/uploads/291156cd-c8e3-4620-a5e1-d3117ed7fb93/ajpreport_20050718.pdf

23 Clark, K. (2011). "The Takhar attack: Targeted Killings and the Parallel Worlds of US Intelligence and Afghanistan." Afghanistan Analysts Network. Retrieved from <https://www.afghanistan-analysts.org/en/special-reports/the-takhar-attack-targeted-killings-and-the-parallel-worlds-of-us-intelligence-and-afghanistan/>

24 Netherlands Public Prosecution Service. (2014). "Afghanistan Death Lists." Retrieved from <https://www.prosecutionservice.nl/topics/international-crimes/afghanistan-death-lists>

25 Human Rights Watch. (2005). "Blood-Stained Hands." retrieved from <https://www.hrw.org/report/2005/07/06/blood-stained-hands/past-atrocities-kabul-and-afghanistans-legacy-impunity>

between two and six thousand (Human Rights Watch, 1998).²⁶ The Taliban's demolition of the UNESCO-protected Bamiyan Buddha statues in 2001 represents a significant act of cultural destruction (UNESCO, 2001).²⁷

The US Invasion: The US-led “War on Terror”, in concert with the Northern Alliance, as retribution for the 9/11 attacks, resulted in crimes that included civilian casualties, torture and mistreatment, unlawful killings and destruction of civilian property (Human Rights Watch, 2004).²⁸

Post-2003 Alleged Crimes

Following Afghanistan’s accession to the ICC in 2003, the landscape of alleged international crimes continued to evolve. The UNAMA began systematically recording civilian casualties in 2008, documenting at least 118,443 people killed or wounded from 2008 to August 15, 2021 (UNAMA, 2021).²⁹ These figures, however, do not fully encapsulate the broader spectrum of harm suffered, including non-physical injuries. The preliminary findings of the ICC Office of the Prosecutor (OTP) from 2006 to 2016, detailed in six annual reports starting in 2011, indicate that groups including the Taliban, Haqqani Network, US CIA, US military personnel, and Afghanistan national security forces have each been implicated in crimes under the ICC’s jurisdiction (International Criminal Court, 2016).³⁰

The Taliban and Haqqani Network have been accused of war crimes and crimes against humanity. The OTP has identified several war crimes attributed to these groups, including:

Murder and Attacks Against Civilians, Violating Article 8(2)(c)(i) and Article 8(2)(e)(i) of the Rome Statute, which prohibits murder and directing attacks against the civilian population in non-international armed conflicts; Attacks Against Humanitarian Personnel and Protected Objects, Breaching Article 8(2)(e)(iii) and Article 8(2)(e)(iv), involving deliberate attacks against humanitarian personnel and protected objects; Conscription of Children for Hostilities and Treachery in Wounding or Killing Combatants, Infringing Article 8(2)(e)(vii) and Article 8(2)(e)(ix), which prohibit the recruitment of children under 15 for hostilities and treacherously wounding or killing combatants (International Criminal Court, 2016).³¹

26 Human Rights Watch. (1998). "The Massacre in Mazar-I Sharif." Retrieved from <https://www.hrw.org/legacy/reports98/afghan/Afrepor0.htm>

27 UNESCO. (2020). "The Future of the Bamiyan Buddha Statues." Retrieved from <https://unesdoc.unesco.org/ark:/48223/pf0000375108>

28 Human Rights Watch. (2004). "Enduring Freedom." Retrieved from "Enduring Freedom": Abuses by U.S. Forces in Afghanistan | HRW

29 UNAMA. (2021). "Afghanistan: Protection of Civilians in Armed Conflict Annual Report." Retrieved from <https://reliefweb.int/report/afghanistan/afghanistan-protection-civilians-armed-conflict-annual-report-2020>

30 International Criminal Court. (2016). "Report on Preliminary Examination Activities." Retrieved from https://www.icc-cpi.int/sites/default/files/iccdocs/otp/161114-otp-rep-PE_ENG.pdf

31 International Criminal Court. (2016). "Report on Preliminary Examination Activities." Retrieved from https://www.icc-cpi.int/sites/default/files/iccdocs/otp/161114-otp-rep-PE_ENG.pdf

Crimes against humanity allegedly committed by the Taliban include murder and imprisonment as defined under Article 7(1)(a) and Article 7(1)(e) of the Rome Statute and persecution on political and gender grounds violating Article 7(1)(h) regarding persecution against identifiable groups based on political or gender grounds (International Criminal Court, 2016).³²

Gender persecution, ethnic persecution, collective punishment, torture, and summary execution have reportedly been perpetrated by the Taliban since their return to power, potentially amounting to crimes against humanity and war crimes within the scope of the OTP's Afghanistan investigation (Human Rights Watch, 2021).³³

The US CIA and its military personnel have been implicated in war crimes, including torture and cruel treatment (Article 8(2)(c)(i)), outrages upon personal dignity (Article 8(2)(c)(ii)), and sexual violence (Article 8(2)(e)(vi)). The same allegations of war crimes have also been attributed to Afghanistan's national security forces, including the NDS, National Police, Local Police, and Army. The ICC's preliminary findings revealed the systematic nature of the allegations against US military personnel and the CIA, as well as the widespread nature of the allegations against the national security forces of the Afghanistan Republic regime (International Criminal Court, 2016).³⁴

Additionally, the OTP's 2017 request for authorisation of the commencement of the Afghanistan investigation mentioned Hizb-e Islami Hekmatyar (HIH), which re-emerged after 2001 in opposition to the Republic, and ISKP as potential suspects. HIH has been accused of indiscriminate attacks on civilians and civilian objects (International Criminal Court, 2017).³⁵ A notable incident was a supermarket attack in Kabul in January 2011, resulting in civilian casualties, including AIHRC commissioner Hamida Barmaki and her family (The New York Times, 2011).³⁶

ISKP, known for its anti-Shia stance, has claimed responsibility for numerous attacks, mainly targeting the Shia Hazara community. Genocide Watch has classified the Hazara community

32 International Criminal Court. (2016). "Report on Preliminary Examination Activities." Retrieved from https://www.icc-cpi.int/sites/default/files/iccdocs/otp/161114-otp-rep-PE_ENG.pdf

33 Human Rights Watch. (2022). "Afghanistan: Taliban Executing, 'Disappeared' Alleged Militants." Retrieved from <https://www.hrw.org/news/2022/07/07/afghanistan-taliban-execute-disappear-alleged-militants>

34 International Criminal Court. (2016). "Report on Preliminary Examination Activities." Retrieved from https://www.icc-cpi.int/sites/default/files/iccdocs/otp/161114-otp-rep-PE_ENG.pdf

35 International Criminal Court. (2017). "Request for authorisation of an investigation pursuant to article 15." Retrieved from <https://www.icc-cpi.int/court-record/icc-02/17-7-red>

36 The New York Times. (2011). "Afghan Family Dies in Attack on Market." Retrieved from Afghanistan Analysts Network. (2011). "The Kabul Supermarket Attack."

as being at risk of genocide (Genocide Watch, 2020).³⁷ Karim Khan, the ICC Prosecutor, in September 2021, announced the prioritisation of investigating crimes by ISKP and the Taliban (International Criminal Court, 2021).³⁸

Amnesty and Accountability

Alleged human rights abusers and perpetrators of mass atrocities throughout the Afghan conflict have operated in a context of pervasive impunity and widespread amnesties. In the Bonn Conference in 2001, when the establishment of a republic regime for the post-Taliban era was discussed, the issue of accountability for past abuses was raised. However, the participants, including the UN special envoy for Afghanistan, Lakhtar Brahimi, suggested that peace and stability in Afghanistan were the priority, not justice. The participants agreed on establishing a national human rights institute that should have the power to deal with past atrocities (Rubin, 2003, p. 571).³⁹ Afghanistan's 2004 constitution envisioned the Afghanistan AIHRC as the national human rights institute without stipulating power to look into past atrocities (Afghanistan Constitution, 2004).⁴⁰

The newly established commission held a national consultation. The result was published in 2004 as a report called "Call for Justice." Five thousand Afghans participated in the consultation and asked for justice (AIHRC, 2005).⁴¹ Afghanistan's transitional justice action plan, known as "Peace, Reconciliation and Justice", was developed based on the Call for Justice report's findings. The action plan had five key actions, including the acknowledgement of the suffering of the Afghan people, credible and accountable state institutions, truth-seeking, reconciliation and the establishment of accountability mechanisms. It was supposed to be implemented by the end of 2008, but this has never happened. The reason is mainly a lack of political willingness in the Afghanistan government (Gossman & Kouvo, 2013, pp. 31-33).⁴² The main suspects were in senior positions. Afghanistan President Hamid Karzai used transitional justice as a political card to control his warlord opponents and keep his supporters happy, many of whom were also among the main suspects. In 2012, Karzai declined its publication when the AIHRC presented its report, which was prepared based on the transitional justice action plan and contained information and evidence

37 Paulose and Franklin. (2024). "Broken Frame, Shattered Glass: Recognizing Crimes Perpetrated Against The Hazaras of Afghanistan." American Bar Association. Retrieved from https://www.americanbar.org/content/dam/aba/administrative/international_law/policy/report-broken-frame-shattered-glass-recognizing-crimes-against-hazaras-of-afghanistan.pdf

38 International Criminal Court. (2021). "Statement by Prosecutor Karim AA Khan QC." Retrieved from <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-following-application>

39 Rubin, Barnett R. (2003). "Transitional Justice and Human Rights in Afghanistan." Royal Institute of International Affairs.

40 Afghanistan Constitution. (2004). Article 54.

41 Afghanistan Independent Human Rights Commission. (2005). "A Call for Justice." Retrieved from <https://www.refworld.org/reference/confdoc/aihrc/2005/en/58500>

42 Gossman, P, Kouvo, S. (2013). "Tell Us How This Ends." Afghanistan Analysts Network.

of past atrocities. The report, “The Conflict Mapping Report,” is preserved by a human rights organisation in Switzerland (Echavez et al., 2016, pp. 6-7).⁴³

In 2005, accountability for past atrocities suddenly turned into a discourse that did not last long. A high-level committee was established to draft the transitional justice action plan; Human Rights Watch published its “Blood-Stained Hands” report, which highlighted a fraction of past atrocities; and the Afghanistan Justice Project report and the UNAMA report, both covering a more significant part of past abuses, were published (Mallinder, n.d., 2010).⁴⁴ On the other hand, Afghanistan’s first parliament after 2001 was inaugurated, and many power brokers were elected as members. They reacted to these reports and accountability initiatives by passing an amnesty bill called “Afghanistan’s National Reconciliation, General Amnesty and National Stability Law”. The bill provided full amnesty for atrocities perpetrated before 2001 and conditional amnesty for atrocities committed after 2001 or which would be perpetrated in the future. The conditions included accepting the 2004 constitution and leaving the insurgency. The aim was to encourage Taliban members to join the peace and reintegration process (Fleschenberg, 2009, pp. 52-55).⁴⁵ The OTP report underscores the reality with a stark observation: “Near-total impunity has prevailed rather than been the exception.”

The amnesty announced by the Taliban following their ascension in August 2021 ostensibly applied to affiliates of the former government, including civilian and military personnel, as well as international forces. However, the UNAMA has reported credible allegations of extrajudicial killings, enforced disappearances, and rights violations targeting former government and security officials and those connected with international military entities (Clark, 2022).⁴⁶

Amidst sustained conflict and lacking an effective domestic justice mechanism, Afghanistan has not provided a viable path for prosecuting the alleged heinous crimes committed within its borders. To date, Asadullah Sarwari remains the sole individual convicted of war crimes in the country. As the intelligence agency chief during the April 1978 to December 1979

43 Echavez, C. R., Pilongo, W. L., Jayakoody, A., Noorzai, H. S. A., Markova, M., & Narasimhaiah, S. (2016). “Transitional Justice: Views from the Ground on How Afghanistan Fares.” Afghanistan Research and Evaluation Unit.

44 Mallinder, L. (2010). “Law, Politics and Fact-Finding: Assessing the Impact of Human Rights Reports: Human Rights Watch, Probable Cause: Evidence Implicating Fujimori (December 2005); Human Rights Watch, Blood-Stained Hands: Past Atrocities in Kabul and Afghanistan’s Legacy of Impunity (July 2005); Human Rights Watch, Waiting for Justice: Unpunished Crimes from Nepal’s Armed Conflict (September 2008).” *Journal of Human Rights Practice*, 2(1), 166-176.

45 Fleschenberg, A. (2009). “Afghanistan’s parliament in the making.” Heinrich-Böll-Foundation/UNIFEM. Retrieved from <https://www.boell.de/en/publications/publications-7075.html>

46 Clark, K. (2022). “Arbitrary Power and a Loss of Fundamental Freedoms: A look at UNAMA’s first major human rights report since the Taliban takeover.” Afghanistan Analysts Network. Retrieved from <https://www.afghanistan-analysts.org/en/reports/rights-freedom/arbitrary-power-and-a-loss-of-fundamental-freedoms-a-look-at-unamas-first-major-human-rights-report-since-the-taliban-takeover/>

communist-backed regime, Sarwari oversaw what have been described as among the most egregious violations of the entire conflict (Qaane & Kouvo, 2017).⁴⁷

Outside Afghanistan's borders, there have been limited accountability measures for international forces' grave crimes pursued under either universal or national jurisdictions. Although some cases have been adjudicated, the list is not exhaustive and does not account for ongoing state-commissioned inquiries following the foreign withdrawal from Afghanistan:

In Australia, legal proceedings continue against Australian soldiers deployed with the Australian Defence Force in the Uruzgan province of Afghanistan. The allegation is a commission of a war crime against a protected person under IHL (Flint, 2023).⁴⁸

A Dutch primary court decided that its country must pay reparation to survivors and the families of victims of war crimes committed by Dutch soldiers in Uruzgan (de Hoon, 2023).⁴⁹

The US Congress released a detailed report of the US CIA interrogation tactics, including torture policy, the number of incidents and victims and the black sites where the victims were detained unlawfully and tortured. This report became one of the primary sources of the ICC preliminary examination findings about the allegations against the US CIA and military personnel (Phythian, 2016).⁵⁰

The United Kingdom has seen the prosecution and conviction of Faryadi Sarwar Zardad, a notorious warlord with links to Hezb-e-Islami, by London's Central Criminal Court. Under universal jurisdiction, Zardad was found guilty of kidnapping and torturing Afghan civilians between 1991 and 1996 (Soler, 2019).⁵¹

In the Netherlands, at least six Afghan-Dutch nationals have faced prosecution and conviction for war crimes and torture related to actions in Afghanistan. These individuals were predominantly high-ranking members of KHaD, the intelligence service of the PDPA regime. Through universal jurisdiction proceedings, Hesamuddin Hesam, Habibullah Jalalzoy, and Abdula Razaq Aref were convicted of war crimes involving torture. Conversely, Abdullah Faqirzada and Sedeq Alemyar were acquitted due to insufficient

47 Qaane, E., & Kouvo, S. (2017). "Assadullah Sarwari Freed from Prison: What Chances of War Crimes Trials in Afghanistan." Afghanistan Analysts Network. Retrieved from <https://www.afghanistan-analysts.org/en/reports/rights-freedom/assadullah-sarwari-freed-from-prison-what-chances-of-war-crimes-trials-in-afghanistan/>

48 Flint, J. (2023). "Australia's Investigation of Alleged ADF War Crimes in Afghanistan." *Journal of International Criminal Justice*, 21(3), 633-658.

49 de Hoon, M. (2023). "Dutch Court, Applying IHL, Delivers Civil Judgment for Victims of 2007 Afghanistan Attack." *Just Security*. Retrieved from <https://www.justsecurity.org/85223/dutch-court-applying-ihl-delivers-civil-judgment-for-victims-of-2007-afghanistan-attack/>

50 Phythian, M. (2016). "An INS special forum: The US senate select committee report on the CIA's detention and interrogation program." *Intelligence and National Security*, 31(1), 8-27. Retrieved from <https://eprints.whiterose.ac.uk/98931/>

51 Clark, Kate. (2016). "Afghan War Criminal Zardad Freed: No protection for witnesses." Afghanistan Analysts Network. Retrieved from <https://www.afghanistan-analysts.org/en/reports/rights-freedom/afghan-war-criminal-zardad-freed-no-protection-for-witnesses/>

evidence, and Amanullah Osman passed away in 2012 during the investigation (Bolhuis & van Wijk, 2023).⁵²

A former officer of Afghanistan's national military was charged and convicted in Germany for war crimes related to prisoner abuse and received a two-year prison sentence (Hänel, 2019).⁵³

The European Court of Human Rights was approached by Abdul Hanan, an Afghan who lost two young sons in an airstrike ordered by a German colonel. Although 90 civilians were killed, the court ruled that German authorities had not violated the European Convention on Human Rights, Article 2, the right to life (Jurgenssen, 2022).⁵⁴

The ICC and Afghanistan at a Glance

Engagement and Accession

Afghanistan's initial engagement with the ICC dates to the Rome Conference in 1998. Represented by a delegation of four, Afghanistan advocated including the crime of aggression within the ICC's jurisdiction. "His country would have suffered fewer" if the ICC had existed 20 years ago, an Afghan delegate said at the conference (The United Nations, 2003).⁵⁵ This stance was heavily influenced by Afghanistan's recent history, emerging from 14 years of conflict against the Soviet and Soviet-backed communist regimes.

Afghanistan's ratification of the Rome Statute on 1 May 2003 marked a significant commitment to the ICC's jurisdiction and principles. However, most Afghan officials did not know what they had signed at that point. The motivation for signing and how Afghanistan signed the Rome Statute were poorly documented. Reports suggest that three ministries, including the Ministry of Culture and Information, the Ministry of Justice and the Ministry of Foreign Affairs, reviewed the Statute and presented it for approval to the Afghanistan cabinet. The Ministry of Foreign Affairs led the process (Victims and Justice, 2004, p.9).⁵⁶ Abdullah Abdullah, who chaired the Afghanistan delegation at the Rome Conference 1998,

52 Bolhuis, M. P., & van Wijk, J. (2023). "The Aftermath of Dutch International Crimes Cases: Post-prosecution Scenarios for Nationals and Non-nationals." *Journal of International Criminal Justice*, 21(1), 137-165.

53 Hänel, L. (2019). "Why is Germany charging an Afghan man with war crimes?" Deutsche Welle. Retrieved from <https://www.dw.com/en/why-is-germany-putting-an-afghan-man-on-trial-for-war-crimes/a-49493262>

54 Jurgenssen, T. E. (2022). "Protecting Human Rights While Conducting Military Operations Abroad: A Critical Analysis of the European Court of Human Rights' Recent Judgment in Hanan v Germany." *Anuario Español de Derecho Internacional*, 38, 487.

55 United Nations. (1998). "Rome Statute of the International Criminal Court: Proceedings of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Volume II." Retrieved from https://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf

56 Afghan Professional Alliance for Minority Rights. (2004). "Victims and Justice."

was the Minister of Foreign Affairs then. He was also a senior member of Hizb-e Jamyat-e Islami, one of the warring parties before 2001 and one of the leading partners of the Republic regime after 2001.

The cabinet signed the Rome Statute and tasked the Ministry of Foreign Affairs with submitting it to the ICC. Only the Afghanistan Supreme Court, which was not consulted about joining the ICC, opposed the ICC's membership. In conferences, Fazal Ahmad Manawi, a deputy to the Chief Justice, dated after the Afghanistan membership date of presentation to the ICC, argued that Afghanistan had to wait for the Constitution to be approved and the Parliament to be opened (Victims and Justice, 2004, pp.8-9).⁵⁷ The Constitution was adopted in 2004 (Ayobi, 2018).⁵⁸ The parliament commenced in 2006 after an election was held in 2005 (Wilder, 2005).⁵⁹ According to the Constitution, membership in international treaties required Afghanistan's approval (Constitution, 2004⁶⁰; Rubin, 2004).⁶¹ No scholarly opinion has argued that this constitutional provision had to apply to Afghanistan's membership in the ICC. The 2004 Constitution was abolished by the Taliban in 2021 (Kadir & Nurhaliza, 2023, p. 3).⁶²

Preliminary Examination Phase (2006–2016)

The OTP initiated a preliminary examination of the situation in Afghanistan in 2006, continuing until 2016. The extended duration of this initial phase raised concerns about the ICC's efficiency and capacity to respond to international crimes (Schabas, 2010, p. 95).⁶³ The OTP's findings pointed to the perpetration of war crimes and crimes against humanity by the Taliban, Afghan National Security Forces (ANSF), and members of the United States Central Intelligence Agency (CIA). Despite the OTP's requests for information on the domestic handling of these allegations, the Afghan government's response remained limited until 2016 (Darehshori, 2009, pp. 35-37).⁶⁴

In 2016, Afghanistan formed a high-level committee led by the second vice president, proposing a strategy of engagement with the ICC, reiterating commitment without supporting direct ICC intervention in Afghanistan. This strategy included translating the Rome Statute

⁵⁷ Afghan Professional Alliance for Minority Rights. (2004). "Victims and Justice."

⁵⁸ Ayobi, M., & Rahimi, H. (2018). "A Study of Afghanistan's Organization and Structure of Public Administration under the 2004 Constitution." Afghanistan Research and Evaluation Unit. Retrieved from https://areu.org.af/wp-content/areu_publications/2021/05/1818E-A-Study-of-Afghanistans-Organization.pdf

⁵⁹ Wilder, A. R. (2005). "A house divided?: Analysing the 2005 Afghan elections." Afghanistan Research and Evaluation Unit. Retrieved from <https://areu.org.af/publication/531/>

⁶⁰ Constitution of the Islamic Republic of Afghanistan. (2004). Retrieved from https://www.diplomatic.gouv.fr/IMG/pdf/The_Constitution_of_the_Islamic_Republic_of_Afghanistan.pdf

⁶¹ Rubin, B. R. (2004). "Crafting a constitution for Afghanistan." *Journal of Democracy*, 15, 5.

⁶² Kadir, M. Y. A., & Nurhaliza, S. (2023). "State Responsibility of Afghanistan Under Taliban Regime." *Jurnal Media Hukum*, 30(1), 1-20.

⁶³ Schabas, W. A. (2010). "The International Criminal Court: A Commentary on the Rome Statute." Oxford University Press.

⁶⁴ Darehshori, S. (2009). "Selling justice short: why accountability matters for peace." Human Rights Watch.

into local languages, incorporating international crimes into the national criminal code, and establishing a special investigatory directorate within the General Office of Prosecution (International Criminal Court, 2016⁶⁵; Hazim, 2016, p. 640).⁶⁶ Communication channels between the ICC and Afghanistan were established, culminating in meetings at various levels, including between the Afghan president and the ICC Prosecutor (International Criminal Court, 2016⁶⁷; Hazim, 2016, p. 641).⁶⁸

Timeline 2017–2023

Despite ongoing efforts, the former ICC prosecutor, Fatou Bensouda, requested authorisation in November 2017 to begin a full investigation into the situation in Afghanistan. The Pre-Trial Chamber (PTC) II initially rejected this request in April 2019, citing concerns about the investigation's alignment with the interests of justice and its potential to meet victims' expectations (International Criminal Court, 2019).⁶⁹ The Office of the Prosecutor (OTP) appealed this decision in June 2019, leading to the Appeals Chamber overturning the decision and authorising the investigation in March 2020 (International Criminal Court, 2020⁷⁰; Weerdesteijn & Holá, 2020, p. 407).⁷¹

In response, the Afghanistan Republic government, invoking Article 18(2) of the Rome Statute, filed a deferral request in March 2020, claiming its capability and willingness to investigate the allegations domestically. The Afghan government provided extensive documentation to support its claim, but the collapse of the Republic government in August 2021 significantly changed the situation (Hakimi, 2022, pp. 318-320).⁷²

In September 2021, ICC prosecutor Karim Khan requested the investigation be resumed, arguing that the collapse of the Republic had undermined Afghanistan's legal and institutional framework, which was necessary for investigating the alleged crimes (Leisner, 2022, p. 93).⁷³ Following requests from PTC II judges, Khan also argued that the documents

65 International Criminal Court. (2016). "Report on Preliminary Examination Activities." Retrieved from https://www.icc-cpi.int/sites/default/files/iccdocs/otp/161114-otp-rep-PE_ENG.pdf

66 Hazim, A. M. (2016). "Toward Cooperation between Afghanistan and the International Criminal Court." *George Washington International Law Review.*, 49, 615.

67 International Criminal Court. (2016). "Report on Preliminary Examination Activities." Retrieved from https://www.icc-cpi.int/sites/default/files/iccdocs/otp/161114-otp-rep-PE_ENG.pdf

68 Hazim, A. M. (2016). "Toward Cooperation between Afghanistan and the International Criminal Court." *George Washington International Law Review.*, 49, 615.

69 International Criminal Court. (2019). "Decision on Request for Authorization of an Investigation into the Situation in Afghanistan." Retrieved from <https://www.icc-cpi.int/court-record/icc-02/17-62>

70 International Criminal Court. (2020). "Appeals Chamber's Judgement in the Situation in Afghanistan." Retrieved from <https://www.icc-cpi.int/court-record/icc-02/17-138>

71 Weerdesteijn, M., & Holá, B. (2020, September). "Tool in the R2P Toolbox"? Analysing the Role of the International Criminal Court in the Three Pillars of the Responsibility to Protect. In *Criminal Law Forum* (Vol. 31, pp. 377-414). Springer Netherlands.

72 Hakimi, M. J. (2022). "The International Criminal Court's Afghan Dilemma: Complementarity and the Quest for Justice in Afghanistan." *Columbia Journal of Transnational Law.*, 60.

73 Leisner, K. (2022). "Prioritizing the Taliban at the ICC: Is the Court Able to Curb Political Prosecutions?." *Maryland Journal International Law.*, 37, 93-121.

provided by the former Republic regime were insufficient to demonstrate its capability and willingness (International Criminal Court, 2021⁷⁴; Leisner, 2022, p. 100).

It was not until October 2022, thirteen months after Khan's request, that PTC II authorised the investigation. The delay was partly due to determining the representation of Afghanistan, considering Article 18 of the Rome Statute. The ICC Assembly of States Parties (ASP) and the United Nations Secretary-General were consulted but could not resolve the representation dilemma (International Criminal Court, 2022⁷⁵; Hakimi, 2021, p. 355).⁷⁶ Despite invitations for representation, the Taliban, as the de facto government, did not respond. The Afghan ambassador in The Hague, appointed by the Republic regime, replied, implicitly supporting Khan's request for resumption of the investigation.

In November 2022, the OTP appealed against specific determinations by the PTC. While the PTC authorised the OTP to recommence its investigation, it limited its scope. Specifically, the PTC confined the inquiry to the incidents and perpetrators outlined in the original 2017 investigation request, extending only to the Appeals Chamber's judgement in March 2020. Furthermore, the PTC explicitly identified ISKP as a relevant entity, stipulating that their alleged crimes could only be investigated upon a separate, explicit request by the prosecutor, as these incidents were outside the initially authorised scope of the investigation (International Criminal Court, 2022⁷⁷; Leisner, 2022, p. 112).⁷⁸

Current Status of the ICC Investigation

The mandate: The Appeals Chamber's judgment in April 2023 reversed the PTC's decision limiting the scope of the investigation and mandated the Office of the Prosecutor (OTP) as follows:

"In relation to alleged crimes committed on the territory of Afghanistan since 1 May 2003, as well as 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 since 1 July 2002."

The inclusion of crimes connected to the Afghan conflict occurring in other State Parties since 1 July 2002 acknowledges the transnational nature of certain international crimes.

⁷⁴ International Criminal Court. (2021). "Prosecutor's Request for Resumption of Investigation." Retrieved from <https://www.icc-cpi.int/court-record/icc-02/17-161>

⁷⁵ International Criminal Court. (2022). "Order setting the schedule for the filing of submissions in the proceedings pursuant to article 18(2) of the Rome Statute and rule 55(2) of the Rules of Procedure and Evidence." Retrieved from https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2022_01551.PDF

⁷⁶ Hakimi, M. J. (2022). "The International Criminal Court's Afghan Dilemma: Complementarity and the Quest for Justice in Afghanistan." *Columbia Journal of Transnational Law*, 60.

⁷⁷ International Criminal Court. (2022). "Prosecution appeal of "Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation" (ICC-02/17-196)." Retrieved from <https://www.icc-cpi.int/court-record/icc-02/17-198>

⁷⁸ Leisner, K. (2022). "Prioritizing the Taliban at the ICC: Is the Court Able to Curb Political Prosecutions?." *Maryland Journal International Law*, 37, 93-121.

Darryl Robinson discusses how such crimes, despite occurring outside Afghanistan, fall within the ICC's purview if sufficiently linked to the Afghan situation, reflecting the interconnectedness of actions and actors in modern conflicts (Robinson, 2012).⁷⁹

The mandate's scope is broad but not unlimited: it restricts the start of the investigation to the Court's temporal jurisdiction. William Schabas elucidates that the ICC's temporal jurisdiction begins either from the Statute's entry into force or a state's ratification, whichever is later (Schabas, 2010).⁸⁰ Thus, the relevant period for Afghanistan commences on 1 May 2003. It requires a demonstrable link between the crimes in other states' territories and the Afghan situation. Kevin Jon Heller emphasises the necessity of a principled jurisdictional approach respecting the ICC's legal framework while ensuring accountability for international crimes (Heller, 2009).⁸¹ Furthermore, this mandate also illustrates the principle of complementarity. Schabas explains that the ICC jurisdiction is complementary, intervening only if the state with primary jurisdiction is unable or unwilling to conduct investigations (Schabas, 2017).⁸²

Investigation: The OTP's annual report, presented to the Assembly of State Parties (ASP) in December 2023, contained a short update regarding its Afghanistan investigation. As the prosecutor announced in September 2021, the OTP's priority is the allegations against the Taliban and ISKP. The update emphasised that the OTP collected the testimonies of survivors and witnesses (International Criminal Court, 2023).⁸³

In summary, the OTP's mandate for Afghanistan reflects the ICC's commitment to addressing impunity for international crimes and illustrates the Court's jurisdiction's complex legal landscape. While no detailed public information is available about the OTP's specific investigative actions in Afghanistan, it is likely at the case selection and prioritisation stage, balancing the ideals of global justice against pragmatic limitations and political realities.

Victims' Participation and Representation

Afghan victims were involved in the ICC's judicial process on two notable occasions: initially during the victim representation phase under Article 15 of the Rome Statute in 2017-2020 and subsequently in the context of Article 18 of the Rome Statute in 2021-2022. These legal proceedings, encompassing the preliminary stages and the subsequent appellate process,

⁷⁹ Robinson, D. (2012). "The Identity Crisis of International Criminal Law." *Leiden Journal of International Law*.

⁸⁰ Schabas, W. A. (2010). "The International Criminal Court: A Commentary on the Rome Statute." Oxford University Press.

⁸¹ Heller, K. J. (2009). "Situational Gravity Under the Rome Statute." *TMC Asser/CUP*, 2009.

⁸² Schabas, W. A. (2017). "An Introduction to the International Criminal Court." Cambridge University Press.

⁸³ International Criminal Court. (2023). Office of the Prosecutor's Annual Report to Assembly of State Parties. Retrieved from <https://www.icc-cpi.int/sites/default/files/2023-12/2023-otp-annual-report.pdf>

allowed the victims to actively engage directly or via legal representation (International Criminal Court, 2022).⁸⁴

Communications under Articles 15 and 53

Victims' right to participate in proceedings under Article 15 is anchored in paragraph (3) of Article 15 and Article 53 of the Rome Statutes. Rule 50 of the Rules of Procedure and Evidence stipulates that the OTP may inform victims or their legal representatives about its decision to request an investigation. The Pre-Trial Chamber, assigned to review the OTP's request, may solicit additional information from victims who have made representations under Article 15(3). Individuals, including victims and non-governmental organisations (NGOs), can submit information to initiate the preliminary examination of a situation by the OTP. This submission process is called 'communications.' Over a decade-long initial examination phase for Afghanistan, the OTP received 125 communications under Article 15 (International Criminal Court, 2017).⁸⁵ The first record of such communications dates to the first preliminary examination report of 2011, which documented 56 communications received over five years (2006-2011) (International Criminal Court, 2011).⁸⁶ The extent of victim submissions within these communications is unclear, and the limited outreach efforts may have restricted the volume of submissions, particularly given the scale and severity of the alleged crimes.

The Pre-Trial Chamber II's Victims Consultation (2017–2018)

In November 2017, PTC II, tasked with reviewing the OTP's request for an investigation into the Afghanistan situation, ordered a consultation to gather victims' views and concerns. This process, conducted by the Registry's Victims Participation and Reparations Section (VPRS), resulted in 699 submissions on behalf of 1,163,950 victims and 26 villages, with the overwhelming majority (680 out of 699) advocating for an investigation. This consultation highlighted the desire for justice among Afghan victims, echoing findings from reports like the AIHRC's coverage of the conflict from 1978 to 2001, published in 2004. However, security constraints, limited outreach, and logistical issues impeded broader victim participation (International Criminal Court, 2018⁸⁷; Kotecha, 2020, p. 133).⁸⁸

⁸⁴ International Criminal Court. (n.d.). "VPRS Victim's Booklet." Retrieved from https://www.icc-cpi.int/sites/default/files/itemsDocuments/vprs/abd-al-rahman/VPRS-Victims-booklet_ENG.pdf

⁸⁵ International Criminal Court. (2017). "Request for authorisation of an investigation pursuant to article 15." Retrieved from <https://www.icc-cpi.int/court-record/icc-02/17-7-red>

⁸⁶ International Criminal Court. (2011). "Report on Preliminary Examination Activities." Retrieved from <https://www.icc-cpi.int/sites/default/files/OTPreportonPreliminaryExaminations13December2011.pdf>

⁸⁷ International Criminal Court. (2018). "Final Consolidated Registry Report on Victims' Representations Pursuant to the Pre-Trial Chamber's Order ICC-02/17-6 of 9 November 2017." Retrieved from <https://www.icc-cpi.int/court-record/icc-02/17-29>

⁸⁸ Kotecha, B. (2020). "The international criminal court's selectivity and procedural justice." *Journal of International Criminal Justice*, 18(1), 107-139.

The consultation process was criticised due to the impact of Afghanistan’s limited internet and literacy rates, which hindered access to information and consequently led to only ten submissions from women. The reliance on civil society organisations for outreach was also critiqued, with some considering it an “irresponsible” approach that prioritised the ICC’s security over the needs of victims (Poltronieri Rossetti, 2019, p. 596).⁸⁹

Despite these challenges, the representation phase was a critical opportunity for the ICC to engage with Afghan victims. However, the PTC’s eventual rejection of the OTP’s request for an investigation, citing that it would not serve the “interests of justice,” was a significant let down. The Chamber’s rationale that the importance of a successful investigation and prosecution in Afghanistan was minimal contradicted the victims’ expressed desires for justice.

The Appeals Chamber’s Victims Consultation (2019–2020)

The OTP appealed the PTC II’s decision, arguing that the Chamber erred in its interpretation of articles 15(4) and 53(1)(c) concerning “the interests of justice.” The Appeals Chamber concurred with the OTP, recognising the right of the victims’ legal representatives to participate in the appeals process. This participation, however, was clouded by the Appeals Chamber’s ruling that the victims did not have the right to appeal at the pre-trial stage, as contended by the OTP. Despite this, the Chamber allowed the victims’ legal representatives to present oral arguments during the hearings (International Criminal Court, 2020).⁹⁰

This analysis reveals that while the ICC provided a platform for Afghan victims’ participation, the actual influence of this participation on judicial outcomes remains questionable. The situation highlights the challenges in operationalising a victim-centred approach within the international criminal justice framework.

Victim Participation (2021–2023) – Proceedings under Article 18:

In November 2021, the PTC II initiated the Article 18 victim representation process upon receiving the OTP’s request to resume the Afghanistan investigation (Leisner, 2022, pp. 103-104).⁹¹ Unlike the proceedings under articles 15 and 53, PTC II had no statutory obligation to consult victims but chose to provide this opportunity. However, victims’ legal representatives were apprehensive about the process, questioned its necessity, and raised concerns about the

⁸⁹ Poltronieri Rossetti, L. (2019). “The Pre-Trial Chamber’s Afghanistan Decision: A Step Too Far in the Judicial Review of Prosecutorial Discretion?.” *Journal of International Criminal Justice*, 17(3), 585-608.

⁹⁰ International Criminal Court. (2020). “Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan.” Retrieved from <https://www.icc-cpi.int/court-record/icc-02/17-138>

⁹¹ Leisner, K. (2022). “Prioritizing the Taliban at the ICC: Is the Court Able to Curb Political Prosecutions?.” *Maryland Journal International Law.*, 37, 93-121.

potential risks to victims in the changed political climate following the Taliban's return to power (Chigowe, 2022, pp. 703-704).⁹²

Challenges such as heightened security risks, the dire humanitarian situation, the absence of a country office, and COVID-19-related restrictions were cited by the VPRS as significant impediments to effective victim representation. Furthermore, the reliance on intermediaries for outreach, compounded by past experiences, posed significant barriers to reaching potential victims.

This process concluded in April 2022, resulting in 16 representations on behalf of approximately 11,150 individuals and 130 families, unanimously supporting the OTP's request. Victims, invoking the adage "Justice delayed is justice denied," voiced their demand for timely and authentic justice. They particularly opposed the OTP's de-prioritization policy, advocating for the investigation of all alleged crimes within the ICC's jurisdiction in Afghanistan. Additionally, a segment of the victims identified themselves as genocide victims, urging the ICC to investigate these incidents under the crime of genocide (International Criminal Court, 2022).⁹³

The nature of victim participation in this phase raises questions about the extent of its impact. The VPRS report does not reveal the identities of participating victims, making it difficult to ascertain whether they were the same individuals who participated in the initial consultation. Since the end of the first consultation in February 2018, numerous alleged war crimes and crimes against humanity, mainly targeting the Hazara/Shia community and women, have continued in Afghanistan. These incidents underscore the evolving nature of victimisation in the country (International Criminal Court, 2022).⁹⁴

Victims' Participation before the Appeals Chamber (2022-2023)

The OTP's appeal against PTC II's restrictions on the scope of the Afghanistan investigation prompted the Appeals Chamber to solicit the views of victims' legal representatives. Two representatives submitted written positions supporting the OTP's appeal and opposing any restriction on the scope of the investigation. Interestingly, the OTP subsequently withdrew its

92 Chigowe, L. T. (2022). "The ICC and the situation in Afghanistan: A critical examination of the role of the Pre-Trial Chambers in the initiation of investigations proprio motu." *Leiden Journal of International Law*, 35(3), 699-718.

93 International Criminal Court. (2022). "Final consolidated report on Article 18(2) Victim Representations." Retrieved from <https://www.icc-cpi.int/court-record/icc-02/17-190>

94 International Criminal Court. (2022). "Final consolidated report on Article 18(2) Victim Representations." Retrieved from <https://www.icc-cpi.int/court-record/icc-02/17-190>

appeal, but the Chamber, influenced by arguments from the victims' legal representatives, rejected this withdrawal (International Criminal Court, 2023).⁹⁵

This decision highlights the complex interplay between the OTP's prosecutorial strategy and victim representation, underscoring the crucial role of victim participation in shaping the legal discourse at the ICC. The situation again raises questions about the meaningfulness of victim participation, particularly when juxtaposed against judicial decisions that seemingly contradict the expressed desires of the victims.

Challenges and Constraints

This article categorises challenges into legal, political, and practical realms. Each category poses distinct and interconnected challenges that cumulatively and distinctly create formidable obstacles to the ICC's investigation and its mission in Afghanistan. The Court's responsibility to investigate the gravest of crimes, such as crimes against humanity, war crimes, and genocide, is tested by the intricate realities of the Afghanistan situation landscape. The ensuing discussion aims to unravel these complexities, shedding light on the ICC's hurdles in upholding justice and accountability in a nation marked by prolonged impunity and suffering.

Legal Challenges

Exploring the legal challenges focuses on three key areas: jurisdictional limitations, Bilateral Immunity Agreements (BIAs), and the lack of a legal framework for cooperation with the ICC in Afghanistan. These challenges are critical to understanding the ICC's capacity to address international crimes in Afghanistan as a country affected by conflict. The jurisdictional limitations of the ICC, rooted in the Rome Statute, determine the scope of the Court's authority and its (in)ability to pursue justice in Afghanistan. The BIAs, particularly those involving the United States, significantly impact the ICC's reach and influence, offering immunity to specific individuals from ICC jurisdiction and no grounds for cooperation under Article 98 of the Statute. Additionally, the absence of a structured legal framework for cooperation in Afghanistan hinders the effective conduct of investigations and the overall pursuit of justice. Analysing these challenges sheds light on the complexities the ICC faces in navigating the Afghanistan situation's political, legal, and operational landscape.

⁹⁵ International Criminal Court. (2023). "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber II entitled "Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation"." Retrieved from <https://www.icc-cpi.int/court-record/icc-02/17-218>

It highlights the need for a more robust and inclusive approach to addressing international crimes.

Jurisdictional Limitations

As the ICC endeavours to bring justice to complex conflict situations like Afghanistan, it encounters inherent jurisdictional limitations that shape its capacity to respond to international crimes. These constraints, embedded in the Rome Statute—the ICC’s foundational legal document—delineate the scope of the Court’s authority and, by extension, its ability to address the myriad violations that have occurred in such contexts. This part explores the multifaceted nature of these jurisdictional limitations, encompassing the ICC’s subject-matter, temporal and territorial jurisdiction, as well as the challenges posed by the principle of complementarity.

Each jurisdiction aspect presents challenges and implications for pursuing justice in Afghanistan. With subject-matter jurisdiction restricting the ICC to the gravest international crimes, numerous serious but non-qualifying offences are affected by temporal limitations excluding crimes committed before Afghanistan acceded to the Rome Statute. Moreover, the territorial jurisdiction constraints inhibit the ICC’s reach to crimes occurring outside the territory of state parties, such as those linked to the Afghanistan conflict but committed in places like Guantanamo Bay. The principle of complementarity, while foundational to the ICC’s *modus operandi*, complicates its interventions, especially in politically unstable contexts like Afghanistan.

This exploration highlights the inherent limitations within the ICC’s legal framework and underscores the need for a broader, more inclusive approach to justice and accountability in Afghanistan. By understanding these jurisdictional constraints, we gain insight into the complexities the ICC and the wider international justice system face in responding effectively to the challenges posed by situations such as that in Afghanistan.

Subject-Matter Jurisdiction: The mandate of the ICC is narrowly focused on investigating the gravest international crimes: war crimes, crimes against humanity, genocide, and the crime of aggression. This specificity, mandated by the Rome Statute, inherently limits the ICC’s reach, excluding various human rights violations and crimes that do not meet these strict criteria but could be essential and sensitive for victims and affected communities. Schabas discusses this aspect of the ICC’s jurisdiction, emphasising that many serious, consequential violations fall outside its scope (Schabas, 2016, p. 112).⁹⁶ As detailed by Cryer et al., the Rome Statute’s definitions of these crimes set high thresholds for investigation and prosecution, which means

⁹⁶ Schabas, W. A. (2016). "The International Criminal Court: A Commentary on the Rome Statute." Oxford University Press.

that numerous offences in conflict-affected zones like Afghanistan, while severe, do not qualify for ICC investigation (Cryer et al., 2019, p. 20).⁹⁷

In Afghanistan, a range of human rights abuses have occurred over decades of conflict. However, not all of these fall under the category of international crimes as defined by the Rome Statute. Local-level violence, abuses by lower-ranking officials, or crimes not widespread or systematic enough, though impactful, do not meet the ICC's criteria for grave international crimes, as explained by Akande (Akande, 2003, pp. 625-626).⁹⁸ This delineation of jurisdiction underlines a significant gap in the scope of international criminal law, leaving many violations unaddressed at the international level. A few particular instances of violations that do not fall within the scope of the ICC's investigation are provided below.

Gender-based discrimination in Afghanistan, particularly against women and girls, has been so severe that it is termed 'Gender Apartheid.' However, the Rome Statute does not explicitly recognise this term as an international crime, limiting legal recourse (Bennoune, 2022, p. 55).⁹⁹ The most relevant legal concept for addressing such issues within the Statute is gender persecution as part of crimes against humanity (de Silva de Alwis, 2023, pp. 7-9).¹⁰⁰ Article 7 of the Statute clarifies that discriminatory actions alone do not constitute gender persecution; there must be a connection to other criminal acts specified in the Statute (Oosterveld, 2017, p. 450).¹⁰¹ Therefore, while banning girls from education or women from work is a severe human rights violation, it does not independently constitute gender persecution unless linked to other criminal acts, including but not limited to murder or arrest, which have been committed in Afghanistan, and in a few instances, documented (Bennoune, 2022, pp. 55-56).¹⁰²

Furthermore, the OTP's preliminary examination findings notably excluded civilian casualties resulting from military operations conducted by the US, NATO member states, and the Republic forces, arguing there was an absence of evidence to prove the intention behind such incidents, including those resulting from US night raids (International Criminal court, 2017).¹⁰³ According to the UNAMA, between 2009 and 2019, it documented more than 100,000 civilian casualties (35,000 deaths and 65,000 others wounded) (Wierda, 2023, p.

97 Cryer, R., Friman, H., Robinson, D., & Wilmschurst, E. (2019). "An Introduction to International Criminal Law and Procedure (4th ed.)." Cambridge University Press.

98 Akande, D. (2003). "The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits." *Journal of International Criminal Justice*.

99 Bennoune, K. (2022). "The International Obligation to Counter Gender Apartheid in Afghanistan." *Columbia Human Rights Law Review*., 54, 1.

100 de Silva de Alwis, R. (2023, October). "Holding the Taliban Accountable for Gender Persecution: The Search for New Accountability Paradigms under International Human Rights Law, International Criminal Law and Women, Peace, and Security." In German Law Journal symposium keynote, U of Penn Law School, Public Law Research Paper (No. 23-37).

101 Oosterveld, V. (2017). "The ICC policy paper on sexual and gender-based crimes: a crucial step for international criminal law." *Wm. & Mary J. Women & L.*, 24, 443.

102 Bennoune, K. (2022). "The international obligation to counter gender apartheid in Afghanistan." *Columbia Human Rights Law Review*., 54, 1.

103 International Criminal Court. (2017). "Request for authorisation of an investigation pursuant to article 15." Retrieved from <https://www.icc-cpi.int/court-record/icc-02/17-7-red>

134).¹⁰⁴ In contrast, national investigations in Australia and the Netherlands have presented evidence indicating the deliberate involvement of their soldiers in the killing of civilians during military operations in Afghanistan, qualifying these as war crimes (Torrens, n.d.¹⁰⁵; Zwanenburg, 2022).¹⁰⁶ These contrasting findings underscore a critical point of contention: the ICC's investigation, if some of its aspects were not de-prioritised, could have a different result from its preliminary examination, which was limited to reviewing open sources, as highlighted in the OTP's 2017 request for authorisation (International Criminal Court, 2017).¹⁰⁷

Temporal Jurisdiction: It is limited to international crimes committed after July 1, 2002, which is the date when the Rome Statute came into force (Schabas, 2016).¹⁰⁸ This includes allegations related to the Afghanistan situation in states such as Poland, Lithuania, and Romania. For Afghanistan specifically, the ICC's temporal jurisdiction only covers alleged crimes committed on or after May 1, 2013, when Afghanistan ratified the Rome Statute and became a State Party to the ICC (Hazim, 2019, p. 4).¹⁰⁹ Crimes committed before this date, despite their severity or impact, fall outside the purview of the ICC. This includes violations perpetrated during various phases of Afghanistan's conflict-ridden history, such as those under the Afghanistan communist regime, by mujahideen groups, the Taliban, the Northern Alliance, and by the United States forces before 2003.

This temporal limitation is particularly significant given Afghanistan's tumultuous history, marked by prolonged conflict and widespread human rights abuses: the period before 2003 witnessed some of the most egregious violations in the nation's history, including mass atrocities and systematic human rights abuses. As Stewart notes, the inability of the ICC to address these past crimes creates a substantial accountability gap. This gap not only hinders justice for victims of pre-2003 atrocities but also impacts the perceived comprehensiveness and efficacy of international criminal justice mechanisms (Stewart, 2014, p. 66).¹¹⁰

As Ohlin explores, the ICC's temporal jurisdiction also reflects broader challenges in international law regarding retroactivity and the principle of legality (Ohlin, 2015, p. 225).¹¹¹

104 Wierda, M. (2023). "The Local Impact of the International Criminal Court." Cambridge University Press.

105 Torrens, Sh. (n.d.). "War crimes in Afghanistan: the Brereton Report and the Office of the Special Investigator." Retrieved from https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook47p/BreretonReport#:~:text=A%202020%20report%20of%20the,have%20been%20referred%20for%20prosecution.

106 Zwanenburg, M. (2022). "DUTCH JUDGMENT ON IHL COMPLIANCE IN CHORA DISTRICT, AFGHANISTAN." Retrieved from <https://lieber.westpoint.edu/dutch-judgment-ihl-compliance-chora-district-afghanistan/>

107 International Criminal Court. (2017). "Request for authorisation of an investigation pursuant to article 15." Retrieved from <https://www.icc-cpi.int/court-record/icc-02/17-7-red>

108 Schabas, W. A. (2016). "The International Criminal Court: A Commentary on the Rome Statute (2nd ed.)." Oxford University Press.

109 Hazim, A. M. (2019). "A Critical Analysis of the Rome Statute Implementation in Afghanistan." Fla. J. Int'l L., 31, 1.

110 Stewart, J. (2014). "The Turn to Criminal Law in International Law." Brill Nijhoff.

111 Ohlin, J. D. (2016). "The Assault on International Law." Oxford University Press.

The prohibition against retroactive application of criminal law is a fundamental principle in both domestic and international legal systems, ensuring fairness and legal certainty. However, this principle can conflict with the imperatives of justice and accountability in grave international crimes.

In conclusion, while the ICC's mandate in Afghanistan post-2003 is crucial for addressing recent international crimes, its inability to prosecute pre-2003 violations highlights significant limitations in achieving comprehensive justice for all periods of Afghanistan's conflict. This underscores the need for supplementary justice mechanisms, both domestically and internationally, to bridge the gap left by the ICC's temporal jurisdiction limitations.

Territorial Jurisdiction: The territorial jurisdiction significantly shapes the ICC's capacity to address international crimes, confining its investigative and prosecutorial powers to offences committed within the territories of State Parties, non-member states that have accepted the Court's jurisdiction or have been referred to the Court by the United Nations Security Council (Schabas, 2016, p. 7).¹¹² As Akande elucidates, this jurisdictional framework restricts the ICC's ability to pursue justice for crimes that, although connected to situations within a State Party, occur outside its borders (Akande, 2003, p. 626).¹¹³ A pertinent example is the case of international crimes committed by the United States, such as those alleged to have occurred in Guantanamo Bay Prison, established on Cuban soil in 2002, or on the territory of Pakistan. Despite their potential connection to the conflict in Afghanistan and the fulfilment of other jurisdictional criteria of the ICC, these acts fall outside the Court's territorial reach.

Allegations of torture and sexual abuse, like those found in the ICC's preliminary examination of US CIA and army activities, are outside the ICC's territorial jurisdiction, as Cuba is not a member state (Kersten, 2016, pp. 79-80).¹¹⁴ Furthermore, US military operations, including drone attacks in Pakistan to target individuals affiliated with 'terrorist groups', could fall outside the ICC's territorial jurisdiction. Despite this, legal representatives of victims of the US aerial bombing on Pakistan soil, those operated from Afghanistan, participated in the first appeal proceedings in 2019, requesting the inclusion of atrocities resulting from the US military operations on Pakistan soil in the ICC's Afghanistan investigation (International Criminal Court,).¹¹⁵ During the 2019 appeals hearings, the OTP explained that the exclusion of incidents like those mentioned by cross-border victims, referring to the US aerial bombing in Pakistan, in the OTP 2017 request for authorisation of

112 Schabas, W. A. (2016). "The International Criminal Court: A Commentary on the Rome Statute (2nd ed.)." Oxford Public International Law. DOI: 10.1093/law/9780198739777.001.0001

113 Akande, D. (2003). "The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits." Journal of International Criminal Justice.

114 Kersten, M. (2016). "Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace." Oxford University Press.

115 International Criminal Court. (2019). "Decision on the participation of amici curiae, the Office of Public Counsel for the Defence and the cross-border victims."

Retrieved from https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_06256.PDF

Afghanistan investigation “does not mean that these incidents cannot potentially be included, so long as they fall within the scope of the investigation based on temporal, geographic or other material parameters,” (International Criminal Court, 2019, p. 17).¹¹⁶

This constraint on the ICC’s territorial jurisdiction raises significant challenges in achieving comprehensive justice, particularly in interconnected global contexts where conflict actors often operate across multiple jurisdictions. The Court’s inability to extend its reach to crimes committed outside State Parties’ territories while operating from there can result in significant gaps in accountability. This is particularly relevant in situations like Afghanistan, where the actors involved, including state and non-state entities, have engaged in conduct spanning various regions.

The US consistently asserts that, as it is not a signatory to the Rome Statute, the ICC lacks jurisdiction over American nationals, particularly regarding actions in countries where the US has significant political and military influence. This stance is rooted in the principle of state consent, a fundamental concept in international law, which posits that a treaty does not bind a non-party state without its explicit consent. This argument underscores the complexities in enforcing international criminal law, especially concerning jurisdiction over citizens of non-signatory states (Schabas, 2020, pp.16-18).¹¹⁷ The ICC Appeals Chamber disagreed with the USA’s position. It argued that the ICC has jurisdiction over alleged crimes perpetrated on the territory of its state parties, like Afghanistan. It decided to proceed with an investigation into grave abuses in Afghanistan, including those by US forces, a move that marked a significant development and attracted strong US opposition (Scheffer, 2020, para. 10).¹¹⁸

The Principle of Complementarity-Related Challenges

The principle of complementarity is a cornerstone of the ICC’s operational framework. It mandates that the ICC can only exercise jurisdiction when national courts are unwilling or unable to prosecute international crimes (Patel, 2008, p. 511).¹¹⁹ As Stahn explores, this principle underpins the ICC’s mandate and presents unique legal challenges, particularly in contexts like Afghanistan (Stahn, 2012, p. 165).¹²⁰

Afghanistan and other states implicated in the situation can invoke Article 19 of the Rome Statute to challenge the admissibility of cases before the ICC. This provision allows states to argue that they are actively investigating or prosecuting the alleged crimes domestically, thus

116 International Criminal Court. (2019). “Transcript of the OTP Oral Statement in the Open Session of the Appeals Hearing.” Retrieved from https://www.icc-cpi.int/sites/default/files/Transcripts/CR2022_05274.PDF

117 Schabas, W. A. (2020). “An Introduction to the International Criminal Court (6th ed.).” Cambridge University Press.

118 Scheffer, D. J. (2020, March 6). “The ICC’s Probe Into Atrocities in Afghanistan: What to Know. Council on Foreign Relations.” Retrieved from <https://www.cfr.org/article/iccs-probe-atrocities-afghanistan-what-know>

119 Patel, N. B. (2008). “An Introduction to the International Criminal Court (3rd edn).” Commonwealth Law Bulletin. <https://doi.org/10.1080/030>

120 Stahn, C. (2012). “The Law and Practice of the International Criminal Court.” Oxford University Press.

rendering ICC intervention unnecessary. Applying this principle can become particularly contentious in politically unstable contexts like Afghanistan, where the capacity or willingness of national courts to conduct genuine proceedings may fluctuate over time.

Assessing a state's ability and willingness to prosecute is a complex process that requires the ICC to evaluate the national judicial proceedings carefully. According to DeGuzman, this involves a nuanced analysis of the domestic legal framework, the judiciary's independence and impartiality, and the overall effectiveness of the judicial processes (DeGuzman, 2012, pp. 55-58).¹²¹ Applying the complementarity principle becomes even more complicated in Afghanistan, where the judicial system has faced numerous challenges, including limited capacity, political influence, and security issues.

The complexities surrounding the principle of complementarity in the Afghanistan situation are further compounded by changes in political power and control, such as the Taliban's return to power. As Heller discusses, these political shifts can significantly affect the willingness and ability of the state to prosecute international crimes, influencing the ICC's assessment of the admissibility of cases (Heller, 2013, pp. 7-8).¹²²

In conclusion, while the principle of complementarity is fundamental to the ICC's operations, its application in Afghanistan poses significant legal challenges. The ICC must navigate a complex landscape of domestic judicial proceedings, political instability, and capacity constraints, all of which impact its decision-making regarding the admissibility of cases from Afghanistan.

Bilateral Immunity Agreements and Article 98 of the Rome Statute

The legal framework provided by Article 98 of the Rome Statute has played a crucial role in shaping the dynamics between the United States, Afghanistan, and the ICC. Specifically, this provision has been central to the discussions and negotiations involving Bilateral Immunity Agreements (BIAs) between the US and various nations, including Afghanistan. These agreements, which offer immunity from ICC jurisdiction in certain circumstances, are seen to shield US nationals, including military personnel, from potential ICC investigations and prosecutions (Meyer, 2005, p. 99).¹²³ The basis for such agreements is often rooted in Article 98 of the Rome Statute, which recognises the right of states to abstain from cooperating with

121 deGuzman, M. M. (2012). "How serious are international crimes? The gravity problem in international criminal law." *Columbia Journal of Transnational Law*, 51, 18. Temple University Legal Studies Research Paper No. 2012-13. Retrieved from <https://ssrn.com/abstract=2014987>

122 Heller, K. J. (2013). "'A Stick to Hit the Accused With': The Legal Recharacterization of Facts under Regulation 55. In C. Stahn, et al. (Eds.) *The Law and Practice of the International Criminal Court: A Critical Account of Challenges and Achievements*." Oxford University Press. Retrieved from <https://ssrn.com/abstract=2370700>

123 Meyer, E. M. (2005). "International Law: The Compatibility of the Rome Statute of the International Criminal Court with the US Bilateral Immunity Agreements Included in the American Servicemembers' Protection Act." *Okla. L. Rev.*, 58, 97.

the ICC when cooperation would conflict with other international treaties, such as BIAs (Rome Statute, 1998;¹²⁴ Reilly, 2019, p. 111).¹²⁵

The inauguration of George W. Bush as President in 2001 marked a significant turning point in the United States' approach to the ICC. The Bush administration's stance towards the ICC can be seen as overtly adversarial, with a clear intention to undermine the Court's authority on the international stage (Cryer et al., 2007, p. 140).¹²⁶ The US government actively pressured other nations to enter into BIAs with the US to achieve this objective. This campaign witnessed the remarkable participation of over 100 countries, including roughly half of the ICC's member states. Those countries that resisted the entreaties to enter BIAs faced the looming threat of economic sanctions as a coercive tool to secure compliance (Meyer, 2005, p. 115.¹²⁷; Max Planck, 2019¹²⁸; Roeben, 2019).¹²⁹

One noteworthy case amidst this orchestrated effort is Afghanistan, which signed BIAs with the US on two distinct occasions. The initial agreement was concluded in 2002, a year before Afghanistan formally became a member of the ICC. This initial BIA stipulated that Afghanistan would refrain from prosecuting US nationals within its jurisdiction and would abstain from surrendering them to international tribunals for prosecution. This accord gave US citizens immunity from ICC jurisdiction within Afghan territory. Subsequently, in 2014, Afghanistan entered into another agreement known as the Bilateral Security Agreement, effectively functioning as an extension of the earlier BIA. Notably, this revised agreement omitted the provision that had previously barred Afghanistan from surrendering citizens of NATO member states to the ICC, thereby diluting the ICC's reach within Afghanistan's territorial jurisdiction (Dimond, 2019, p. 191).¹³⁰

These developments illustrate the complex interplay between state sovereignty, international obligations, and the ICC's pursuit of accountability for alleged international crimes. While Article 98 allows states to protect their nationals or allies from ICC jurisdiction, it also highlights the challenges faced by the Court in fulfilling its mandate when powerful states, like the United States, engage in such agreements (Newton, 2016, p.392).¹³¹ This intersection of legal principles, state interests, and international justice underscores the ongoing debate

¹²⁴ The Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998).

¹²⁵ Reilly, J. (2019). "The Prosecution Paradox: How the International Criminal Court Affects Civil War Peace Negotiations." Retrieved from <https://core.ac.uk/download/224735774.pdf>

¹²⁶ Cryer, R., Friman, H., Robinson, D., & Wilmschurst, E. (2007). "An Introduction to International Criminal Law and Procedure." Cambridge University Press

¹²⁷ Meyer, E. M. (2005). "International Law: The Compatibility of the Rome Statute of the International Criminal Court with the US Bilateral Immunity Agreements Included in the American Servicemembers' Protection Act." Okla. L. Rev., 58, 97.

¹²⁸ The Max Planck Institute Luxembourg for Procedural Law. (2009). "Max Planck Encyclopedias of International Law [MPIL]".

¹²⁹ Roeben, V. (2019). "Institutions of international law: How international law secures orderliness in international affairs." Max Planck Yearbook of United Nations Law Online, 22(1), 187-217.

¹³⁰ Dimond, B. A. (2019). "When the ICC comes knocking, the United States should welcome it with open arms." Wash. Int'l LJ, 28, 181.

¹³¹ Newton, M. A. (2016). "How the International Criminal Court threatens treaty norms." Vand. J. Transnat'l L., 49, 371.

surrounding the ICC's effectiveness and ability to hold individuals accountable for grave international crimes in complex geopolitical contexts like Afghanistan.

Lack of Cooperation Legal Framework with the ICC

Having a legal framework for cooperation with the ICC is of paramount importance. This framework is the cornerstone for effective collaboration between a state and the ICC, ensuring the smooth conduct of investigations and the pursuit of justice for alleged international crimes. Several vital reasons underscore the significance of establishing such a legal framework:

Facilitation of Evidence Collection: A legal framework defines the procedures and mechanisms for evidence collection and sharing between the state and the ICC (Ambos, 2021, pp. 88-89).¹³² Without such a framework, gathering crucial evidence to support ICC investigations becomes ad hoc and potentially hindered, compromising the thoroughness and reliability of the collected evidence.

Access to Witnesses: Cooperation agreements often specify provisions for access to witnesses, ensuring their safety and protection (Sluiter, 2013, p. 255).¹³³ This is especially crucial in contexts where witnesses may be at risk due to their testimonies' sensitive nature. A well-defined legal framework establishes the responsibilities of the state and the ICC in safeguarding witnesses.

Extradition and Surrender of Suspects: A legal framework outlines the procedures for extraditing or surrendering suspects to the ICC (Schabas, 2020, p. 19).¹³⁴ This is particularly relevant when suspects are within the state party's jurisdiction and must be transferred to the ICC for prosecution. Without a clear legal framework, such transfers may face legal challenges.

Compliance with ICC Obligations: A legal framework assists states in fulfilling their obligations under the Rome Statute while balancing them with their national laws and interests (Schabas, 2016, p. 26).¹³⁵ This alignment ensures that the state party upholds its commitment to the ICC without violating domestic legal principles.

In the context of Afghanistan, the establishment of a legal framework for cooperation with the ICC, as observed in the pre-Taliban era, served to strengthen Afghanistan's commitment

132 Ambos, K. (2021). "Treatise on International Criminal Law (2nd Edition): Volume I: Foundations and General Part." Oxford Public International Law.

<https://doi.org/10.1093/law/9780192844262.001.0001>

133 Sluiter, G. (2009). "International Criminal Procedure: Principles and Rules." Oxford University Press.

134 Schabas, W. A. (2020). "An Introduction to the International Criminal Court (6th ed.)." Cambridge University Press.

135 Schabas, W. A. (2016). "The International Criminal Court: A Commentary on the Rome Statute (2nd ed.)." Oxford Public International Law. DOI:

10.1093/law/9780198739777.001.0001

to accountability for alleged international crimes. From 2016 until the final weeks of its government, the Islamic Republic of Afghanistan (Republic) actively sought to engage with the ICC to discourage its intervention within Afghanistan's borders. These efforts included translating the Rome Statute into local languages, publishing it in Afghanistan's official gazette, codifying international crimes in its penal code, and establishing a specialised prosecutorial department to investigate international crimes (Hazim, 2019, p. 641¹³⁶; Wierda, 2023).¹³⁷

To establish a comprehensive legal framework for cooperation with the ICC, the Republic formed a high-level committee under the second vice president, including relevant ministers. This committee was tasked with developing a roadmap for potential cooperation with the ICC. Additionally, a dedicated position directly under the President of Afghanistan was created to oversee matters related to the ICC. The appointee to this position served as Afghanistan's focal point for the ICC, facilitating direct communication with the President. Moreover, Afghanistan enlisted the services of a legal expert to handle its legal communications, complementing its political outreach efforts (Hazim, 2019, pp. 641-641¹³⁸; Qaane, 2017).¹³⁹

Nevertheless, with the Taliban's assumption of power in August 2021, all relevant laws, policies, and institutions that had been established to address alleged international crimes domestically or engage with the ICC were systematically dismantled. The Taliban's official stance on the ICC remains unclear. Despite the ongoing ICC investigation, the Taliban has refrained from making any definitive statements regarding their acceptance or rejection of the Court. In a related context, the Taliban's Chief of Justice issued a one-page statement concerning Gaza, where he called for the intervention of an "international court" due to perceived violations of international law and human rights by Israel in response to Hamas' October 7th attack (Haqqani, 2023).¹⁴⁰ However, the Taliban's general position is that they respect international law unless it contradicts Islamic law, which they claim as their domestic legal framework. This ambiguous stance does not provide a clear basis for assessing their cooperation with the ICC. Given their status as one of the primary suspects under investigation, optimism regarding their willingness to cooperate with the ICC remains uncertain.

136 Hazim, A. M. (2019). "A Critical Analysis of the Rome Statute Implementation in Afghanistan." *Fla. J. Int'l L.*, 31, 1..

137 Wierda, M. (2023). "The Local Impact of the International Criminal Court." Cambridge University Press.

138 Hazim, A. M. (2019). "A Critical Analysis of the Rome Statute Implementation in Afghanistan." *Fla. J. Int'l L.*, 31, 1..

139 Qaane, E. (2017). "Investigating Post-2003 War Crimes: The Afghan government wants "one more year" from the ICC." Afghanistan Analysts Network.

140 Supreme Court of the Islamic Emirate of Afghanistan. (2023). "Afghanistan Islamic Emirate supreme court declaration about aerial and ground brutal attacks and atrocities of Zionist Israel on Palestine." Retrieved from <https://supremecourt.gov.af/en/afghanistan-islamic-emirate-supreme-court-declaration-about-aerial-and-ground-brutal-attacks-and>

The absence of a legal framework for cooperation with the ICC may have significant repercussions, potentially resulting in limitations on the scope of the investigation. This could affect various aspects, including evidence collection, access to witnesses, and the protection of witnesses, all of which heavily rely on the cooperation of the Afghan government.

Examining the ICC's legal challenges in Afghanistan—jurisdictional limitations, Bilateral Immunity Agreements, and the lack of a legal framework for cooperation—reveals the intricate barriers to achieving justice in conflict-ridden areas. These challenges limit the ICC's jurisdictional reach and reflect broader issues in the international legal system. The jurisdictional limitations emphasise the need for a more inclusive justice mechanism to address crimes beyond the ICC's scope. The impact of BIAs, especially with the United States, highlights the intersection of state sovereignty, international obligations, and the pursuit of global justice. Additionally, the absence of a comprehensive legal framework for cooperation with the ICC in Afghanistan significantly impairs the Court's ability to conduct thorough investigations and prosecute responsible parties effectively. This analysis underscores the need for a multifaceted approach incorporating various international and local justice mechanisms, ensuring comprehensive accountability and upholding the principles of international criminal law. In summary, addressing these legal challenges is crucial for the ICC to fulfil its mandate effectively and contribute to lasting peace and justice in Afghanistan and similar conflict zones.

Political Challenges

The ICC's investigation in Afghanistan represents a pivotal moment in international law and justice, bringing the intricate interplay between legal mandates and geopolitical dynamics to the fore. This investigation, embroiled in a web of complex diplomatic challenges, underscores the delicate balance the ICC must maintain in its pursuit of justice. The political challenges the Court faces, particularly about the policies of the United States and the de facto authority in Afghanistan, the Taliban, not only test the ICC's judicial mandate but also its diplomatic acumen and adherence to international legal norms. This section aims to dissect these challenges, offering a nuanced understanding of the ICC's navigational strategies amidst conflicting interests and the overarching quest for accountability and justice in international law.

Afghanistan Diplomacy Challenges

De-prioritisation of Some Aspects of the Investigation: In September 2021, the OTP decided to de-prioritise certain aspects of its investigation in Afghanistan. This decision, announced in a statement by the OTP, involved scaling back on inquiries into allegations against the US CIA and military personnel and the Afghanistan Republic National Security Forces

(Lambridis, 2021, p.1007).¹⁴¹ Two years after this announcement, a spokesperson for the Taliban, the de facto government in Afghanistan, expressed scepticism in a news interview about the ICC’s ability to impartially investigate allegations against “occupying countries,” referencing the US, NATO members, and other states with a military presence in Afghanistan from 2002 to 2021. The spokesperson indicated that the Taliban’s engagement with the ICC’s investigation would be contingent on the perception of the Court’s neutrality (Tolnews, 2023).¹⁴² Before this, the Taliban’s Chief of Justice issued a one-page statement related to the situation in Gaza and requested an “international court” (by which he may have meant the ICC) to investigate the allegations against Israel (Haqqani, 2023).¹⁴³ Such selective responses highlight the complex dynamics at play in the Taliban’s relationship with international judicial bodies, including the ICC.

The ICC’s investigatory strategy, particularly the de-prioritisation of allegations against forces opposed by the Taliban and the focus on allegations against the Taliban themselves, could be construed by the group as a lack of neutrality. This perception is influenced by the broader international view of the ICC’s impartiality, shaped by events such as the de-prioritisation of US-related allegations following sanctions against some US officials and the Court’s positions on situations in Ukraine and Gaza. These international perspectives and critiques from various entities, including human rights groups, lend credence to the Taliban’s narrative questioning the ICC’s neutrality (Human Rights Watch, 2024).¹⁴⁴

Lack of International Legal Identity for the Taliban: The ICC, the OTP specifically, operates under international law, which fundamentally depends on formal diplomatic relations and state recognition. This framework is challenged by the Taliban’s role as Afghanistan’s de facto government, lacking a recognised international legal identity. This status raises questions about the legitimate representation of Afghanistan in ICC proceedings, complicating the ICC’s engagement with Afghanistan authorities due to ambiguities in state representation and communication channels, all while adhering to international law and the ICC’s procedural rules.

Though it is unclear how the OTP is handling the situation, in 2022, while the PTC II was evaluating the OTP’s request to resume the investigation in Afghanistan, uncertainties over Afghanistan’s representations led to delays in decision-making. The challenge was twofold: direct engagement with the Taliban could imply recognition, overstepping the ICC’s judicial

141 Lambridis, P. (2021). “The International Criminal Court and Afghanistan: Leveraging Politics to Bolster Accountability and Enhance Legitimacy.” NYUJ Int’l L. & Pol., 54.

142 TOLnews. (2023, December 7). “Amnesty International calls for probe of war crimes in Afghanistan.”

143 Supreme Court of the Islamic Emirate of Afghanistan. (2023). “Afghanistan Islamic Emirate supreme court declaration about aerial and ground brutal attacks and atrocities of Zionist Israel on Palestine.” Retrieved from <https://supremecourt.gov.af/en/afghanistan-islamic-emirate-supreme-court-declaration-about-aerial-and-ground-brutal-attacks-and>

144 Human Rights Watch. (2024). :World Report 2024: Afghanistan.” Retrieved from <https://www.hrw.org/world-report/2024/country-chapters/afghanistan>

mandate, and relying on representatives of the now-defunct Republic might not accurately represent the current Afghanistan situation. Despite the Republic's collapse in August 2021, its diplomats, disconnected from the Taliban's Foreign Ministry, still represent Afghanistan internationally (Qaane, 2022).¹⁴⁵

To navigate this complexity, the PTC II sought guidance from the ICC's Assembly of State Parties Bureau and the Office of the UN Secretary-General, but their input offered little resolution. The Bureau lacked the specific information requested (International Criminal Court, 2021).¹⁴⁶ The UN indicated that government recognition matters for individual Member States, not the Secretary-General or the UN Secretariat (International Criminal Court, 2021).¹⁴⁷ UN intergovernmental organs like the UN Security Council or the Credentials Committee make decisions about member state representation at the UN (United Nations, 2021).¹⁴⁸ The Taliban's request for accreditation to attend UN General Assembly sessions was denied by the Credentials Committee, allowing the Republic's diplomat, now the Afghanistan Permanent Representative, to maintain this role. He perceives himself not as a representative of the Taliban or the Republic but of the Afghan people (Ruttig, 2023, para. 10-14).¹⁴⁹

While the PTC II was seeking advice, without specificity, it set various public deadlines for observations from Afghan authorities and considered indirect communication methods. Eventually, the PTC II appealed to the UN Secretary-General to extend its final request to Afghanistan's current representatives. This request was passed to Afghanistan's Permanent Representative to the UN in New York, a Republic appointee and a critic of the Taliban regime. The Taliban remained silent, though PTC II's invitation to receive Afghanistan observation about the OTP's request was publicly posted on the ICC website, and the media reported about it (Qaane, 2022, para. 17).¹⁵⁰

For the OTP and the Registry, the Afghanistan embassy in The Hague remains the formal communication conduit with the ICC. The embassy, however, lacks decision-making power. The Ambassador in The Hague, who also represents Afghanistan at the ICC, disclosed his

145 Qaane, E. (2022). "Delaying Justice? The ICC's war crimes investigation in limbo over who represents Afghanistan." Afghanistan Analysts Network - English. Retrieved from <https://www.afghanistan-analysts.org/en/reports/war-and-peace/delaying-justice-the-iccs-war-crimes-investigation-in-limbo-over-who-represents-afghanistan/>

146 International Criminal Court. (2021). "CR2021_10230.PDF." Retrieved from https://www.icc-cpi.int/CR2021_10230.PDF

147 International Criminal Court. (2021). "CR2021_10229.PDF." Retrieved from https://www.icc-cpi.int/CR2021_10229.PDF

148 The United Nations. About UN Membership. United Nations. Retrieved from <https://www.un.org/en/about-us/about-un-membership>

149 Ruttig, Th. (2023). "Whose Seat Is It Anyway: The UN's (non)decision on who represents Afghanistan." Afghanistan Analysts Network. Retrieved from <https://www.afghanistan-analysts.org/en/reports/political-landscape/whose-seat-is-it-anyway-the-uns-nondecision-on-who-represents-afghanistan/>

150 Afghanistan Analysts Network. (2002). "Delaying Justice? The ICC's war crimes investigation in limbo over who represents Afghanistan. Retrieved from <https://www.afghanistan-analysts.org/en/reports/war-and-peace/delaying-justice-the-iccs-war-crimes-investigation-in-limbo-over-who-represents-afghanistan/>

communications with the Taliban's Foreign Ministry for consular matters (Ruttig, 2023).¹⁵¹ In a private meeting, he confirmed forwarding ICC communications to Kabul, which essentially went unanswered. Prosecutor Karim Khan's intention to visit Afghanistan, announced in December 2022, was conveyed through the embassy. The Taliban, citing unpreparedness, declined to host the Prosecutor (Interview, 2023).¹⁵²

The reliance on the Afghan embassy in The Hague, staffed by representatives of the former government, presents challenges in accurately and currently communicating with the Taliban as de facto authorities. The Taliban's non-responsiveness to ICC communications exacerbates this issue. Direct engagement with the Taliban risks being interpreted as implicit recognition, exceeding the ICC's judicial mandate and complicating interactions with the current Afghan rulers. Such recognition or legitimacy by an international body like the ICC carries considerable political implications.

The Taliban's Sharia-Based Legal Views: The Taliban's adherence to their interpretation of Sharia law and their view of its superiority over international legal frameworks poses significant obstacles to the ICC's operations (Taliban, 2024).¹⁵³ It could be strategically used as a rationale for non-cooperation with the ICC's investigation. By positioning Sharia law as divinely ordained and above human-made international law, the Taliban may argue that the ICC's jurisdiction and legal processes are fundamentally incompatible with their religious and legal principles. This stance not only presents a direct challenge to the ICC's authority but also serves as a potential justification for the Taliban's refusal to engage with or acknowledge the legitimacy of the ICC's investigation, particularly given their status as a primary suspect in the inquiry. This non-cooperation based on religious and legal grounds could significantly impede the ICC's efforts to investigate and prosecute alleged crimes in Afghanistan.

The Taliban General Amnesty: The Taliban's announcement of a general amnesty following their return to power in Afghanistan in August 2021 presents a complex situation in terms of human rights and justice. It extends to all, including those who worked with or against them before their takeover. This announcement was part of their efforts to project a more moderate image, contrasting with their previous rule marked by strict interpretations of Islamic law and harsh punishments (United States, 2022).¹⁵⁴ However, despite this announcement, there have been credible reports of retaliatory acts, including targeted killings and disappearances,

151 Afghanistan Analysts Network. (2023). "Whose Seat Is It Anyway: The UN's (non)decision on who represents Afghanistan." Retrieved from <https://www.afghanistan-analysts.org/en/reports/political-landscape/whose-seat-is-it-anyway-the-uns-nondecision-on-who-represents-afghanistan/>

152 A private bilateral meeting happened in the Afghanistan Embassy in the Hague on 20 June 2023.

153 Islamic Emirate of Afghanistan. (2024). "Congratulatory Message of the Supreme Leader of the Islamic Emirate on the Arrival of the Auspicious Eid-ul Fitr." Retrieved from <https://justpaste.it/dghxm>

154 U.S. Department of State. (2022). "2022 Country Reports on Human Rights Practices: Afghanistan". Retrieved from <https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/afghanistan/>

suggesting a gap between the Taliban’s public commitments and their actions on the ground. The Taliban have faced criticism for not adhering to their amnesty pledge. Reports indicate targeted killings of perceived opponents and alleged reprisals against officials associated with the former government. Incidents of arbitrary killings, torture, and forced disappearances have been documented, revealing the Taliban’s failure to uphold their promises of amnesty (United Nations, 2023).¹⁵⁵

While the Taliban’s general amnesty was initially seen as a step towards preventing revenge killings and fostering reconciliation, its implementation has been problematic, leading to the resumption of the ICC’s investigation, as one of the ICC’s foundational objectives is to end this kind of amnesty, one which ensures impunity for gravest crimes (International Criminal Court, 2021).¹⁵⁶ The Republic regime also had an amnesty bill, one of the few reasons the OTP initiated Article 15 proceedings of the Rome Statute in 2017. The National Reconciliation, General Amnesty, and National Stability Law, passed by the Afghan Parliament in May 2008 and published in the official gazette in December 2008, aimed to promote national reconciliation by granting amnesty to those involved in conflicts before 2002 and those who reconciled with the Republic after 2002. This law was criticised for promoting impunity, as it provided a blanket amnesty without focusing on specific crimes. Notably, the law did not prevent individual victims from suing alleged perpetrators under the principle of *haq ul-abd* (or *hoquq ul-ibad*), a Sharia principle that recognises the right of individuals to seek justice for their violated rights in a court of law (Guderzo, 2010, pp. 179-180).¹⁵⁷ Although the ICC would see the general amnesty as a reason to intervene, the Taliban could use it to not cooperate with the Court’s investigation.

US Diplomacy Challenges

The relationship between the US and the ICC has evolved since the Court’s establishment. The US played a significant role in the negotiations that led to the creation of the ICC but ultimately voted against the Rome Statute in 1998. President Bill Clinton signed the Statute in 2000, indicating an intention to reconsider ratification, but did not submit it to the Senate. In 2002, the George W. Bush administration formally withdrew the US signature, indicating

¹⁵⁵ United Nations Assistance Mission in Afghanistan. (2023). “A BARRIER TO SECURING PEACE: HR VIOLATIONS AGAINST FORMER GOVERNMENT OFFICIALS & FORMER ARMED FORCE MEMBERS.” Retrieved from <https://unama.unmissions.org/barrier-securing-peace-hr-violations-against-former-government-officials-former-armed-force-members>

¹⁵⁶ International Criminal Court. (2022). “Prosecution’s communication of materials and further observations pursuant to article 18(2) and rule 54(1).” Retrieved from https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2022_06044.PDF

¹⁵⁷ Guderzo, M. (2010). “Case study for Afghanistan: Action Plan for Peace, Reconciliation and Justice in Afghanistan (AP).” In MULTIPART Thematic Paper on Multi-Stakeholder Partnerships Active in the Issue-Area of Reconciliation, Confidence-Building and Inter-Communal Bridge-Building (MULTIPART Work Package 4D) (pp. 173-228). Università di Lubiana.

it would not become a state party to the Rome Statute (Birdsall, 2010, pp. 454-455¹⁵⁸; Scheffer, 2005, pp. 334-335).¹⁵⁹

Bush Administration's Policy Shift: The Bush administration's first term was marked by intense opposition to the ICC, primarily due to concerns about potential prosecutions of US citizens. This period saw the American Service-Members' Protection Act (ASPA) enacted to protect US military personnel from the ICC's jurisdiction. The US also pursued bilateral immunity agreements to exempt its citizens from the Court's jurisdiction. However, in its second term, the Bush administration's stance softened somewhat, especially regarding the prosecution of atrocities in Darfur, Sudan (Meyer, 2005, pp. 104-107).¹⁶⁰

Obama Administration's Engagement: The Obama administration shifted towards a more cooperative stance with the ICC. It participated as an observer in the Assembly of States Parties and supported the Court's investigations in Sudan. The administration also sent delegations to ICC conferences and made pledges to assist the Court, reflecting a policy of engagement rather than outright opposition. However, the ASPA and BIAs the US signed remained enforced (Dimond, 2019, p.185).¹⁶¹

Trump Administration's Confrontational Stance: The US adopted a more antagonistic approach under President Donald Trump. In 2020, Executive Order 13928 was issued, imposing sanctions on ICC officials involved in the investigation of alleged war crimes by US personnel in Afghanistan. This move marked a significant escalation in the US-ICC relationship, prompting legal challenges and international condemnation (Poorhashemi, 2020, p. 2).¹⁶²

Biden Administration's Approach: President Joe Biden lifted the Trump-era sanctions against ICC officials in 2021, indicating a return to a more cooperative stance. However, while expressing willingness to engage, the Biden administration objected to the Court's jurisdiction over non-state parties like the US and Israel. Its recent decision to support the ICC's investigation into alleged abuses by Russian forces in Ukraine marks a significant shift in the US approach towards the Court. This move represents a departure from the longstanding US policy of limited cooperation with the ICC, particularly evident during the Trump administration when sanctions were imposed on ICC officials. The ICC's issuance of an arrest warrant for Russian President Vladimir Putin for war crimes, specifically the illegal deportation of children from Ukraine to Russia, underscores the gravity of the situation. The

¹⁵⁸ Birdsall, A. (2010). "The monster that we need to slay"? Global governance, the United States, and the International Criminal Court." *Global Governance*, 451-469.

¹⁵⁹ Scheffer, D. (2005). "Article 98 (2) of the Rome Statute: America's original intent." *Journal of International Criminal Justice*, 3(2), 333-353.

¹⁶⁰ Meyer, E. M. (2005). "International Law: The Compatibility of the Rome Statute of the International Criminal Court with the US Bilateral Immunity Agreements Included in the American Servicemembers' Protection Act." *Okla. L. Rev.*, 58, 97.

¹⁶¹ Dimond, B. A. (2019). "When the ICC comes knocking, the United States should welcome it with open arms." *Wash. Int'l LJ*, 28, 181.

¹⁶² Poorhashemi, A. (2020). "US Sanctions Against the International Criminal Court: Where is International Law Going?." *JURIST-Professional Commentary*.

support of the US indicates a willingness to collaborate (Novaković, 2022, pp. 623-624¹⁶³; Kersten, 2021).¹⁶⁴

The USA's relationship with the ICC has fluctuated by nature and has been influenced by domestic political dynamics and differing presidential administrations' views on international justice and national sovereignty. Its support has been case-based and whenever it fits its national interests.

ASPA Analysis: The ASPA reveals the ground for analysing the USA's views about the ICC. It encompasses several critical provisions shaping the USA's engagement with the ICC and its member states. First, the ASPA restricts US government support for the ICC, reflecting a cautious approach towards international legal bodies that could potentially exercise jurisdiction over US personnel. This limitation concerns the potential for politically motivated prosecutions and the implications for US sovereignty (Wedgwood, 1999, pp. 102-103).¹⁶⁵

Furthermore, the ASPA explicitly prohibits providing military assistance to countries party to the ICC. This prohibition is conditional and can be waived if these nations enter into bilateral agreements, commonly referred to as Article 98 agreements, with the US, pledging not to hand over US nationals to the ICC. This aspect of the ASPA has been the subject of international debate, as it effectively creates a two-tier system of military cooperation based on a country's relationship with the ICC (Akande, 2003, p. 619).¹⁶⁶

Lastly, a particularly controversial element of the ASPA is the authorisation granted to the US president to use "all means necessary and appropriate," including military force, to release US military personnel and other officials detained or imprisoned by or on behalf of the ICC (Lavaud, 2003).¹⁶⁷ This provision, often dubbed the "Hague Invasion Clause," underscores the lengths the US is prepared to go to protect its service members from international legal processes perceived as potentially hostile or unfair (Panáková, 2011, pp. 59-61).¹⁶⁸

163 Novaković, M. (2022). "The differences in US foreign policy towards the UN and ICC in Trump and Biden administrations." *Међународни проблеми*, 74(4), 611-630.

164 Kersten, M. (2021). "Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace." Oxford University Press.

165 Wedgwood, R. (1999). "The International Criminal Court: a American view." *European Journal of International Law*, 10(1), 93-107.

166 Akande, D. (2003). "The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits." *Journal of International Criminal Justice*, 1(3), 618-650.

167 Lavaud, Floriane, Singh, Ashika, & Glimcher, Isabelle. (2023). "The American Servicemembers' Protection Act and the Dodd Amendment: Shaping United States Engagement with the ICC - Part II." *Just Security*. Retrieved from <https://www.justsecurity.org/85121/the-american-servicemembers-protection-act-and-the-dodd-amendment-shaping-united-states-engagement-with-the-icc-part-ii/>

168 Panáková, J. (2011). "Law and politics of universal jurisdiction." *Amsterdam LF*, 3, 49.

ASPA's Impacts: Two Examples: The number of BIAs the US signed and the Trump Administration's approach to the ICC could reveal some of the impact ASPA caused. For BIAs, see the relevant section under legal challenges.

The Trump administration adopted a highly aggressive stance towards the ICC's actions. In 2020, President Trump issued an executive order authorising economic sanctions and travel restrictions against ICC officials directly engaged in investigating American troops and intelligence officials for potential war crimes in Afghanistan (Executive Order 13928¹⁶⁹; Van Schaack, 2020).¹⁷⁰ The administration argued that the ICC had no jurisdiction over US personnel, citing the American Service-Members' Protection Act (ASPA). The US State Department revoked the visa of the ICC's chief prosecutor, Fatou Bensouda, to oppose the court's investigations (Drake, 2019, P. 1019).¹⁷¹ The administration's measures were justified as protecting national sovereignty and preventing what it perceived as unjust and politically motivated prosecutions against US personnel. This perspective was grounded in a broader scepticism of international institutions and multilateralism (McIlhatton, 2019).¹⁷²

The Trump Administration's aggressive policy presented the ICC with a significant dilemma. This scenario raises critical questions about the ICC's ability to uphold its foundational objectives in the face of opposition from a significant global actor. On the one hand, pursuing investigations against the US adheres to the Court's mandate to investigate and prosecute war crimes and crimes against humanity impartially. On the other hand, such actions risk jeopardising the Court's existing relationships and cooperation with member states, potentially undermining its overall effectiveness and legitimacy.

It has been argued that this situation exemplifies the tension between the principles of international justice and the political realities of global power dynamics. In adhering to its mandate, the ICC faces the challenge of maintaining its authority and credibility in the international community (Eboe-Osuji, 2019).¹⁷³ Investigating powerful non-member states like the US could have significant political and diplomatic repercussions, potentially affecting the Court's ability to function effectively in other contexts (Kersten, 2016, p. 179).¹⁷⁴

169 Executive Order 13928 (2020). "Blocking Property of Certain Persons Associated With the International Criminal Court." Federal Register, 85(115).

170 Van Schaack, B. (2020). "Executive Order 13928 on Blocking Property of Certain Persons Associated with the International Criminal Court." International Legal Materials, 60(1), 18-23.

171 Drake, M. (2019). "They Hate US for Our War Crimes: An Argument for US Ratification of the Rome Statute in Light of the Post-Human Rights Era, 53 UIC J. MARSHALL. L. REV. 1011 (2019)." UIC Law Review, 52(4), 4.

172 McIlhatton, Clodagh. (2019, March 29). "THE TRUMP ADMINISTRATION POLICY TOWARD THE INTERNATIONAL CRIMINAL COURT." Queen's University Belfast Student Law Journal. Retrieved from <https://blogs.qub.ac.uk/studentlawjournal/2019/03/29/the-trump-administration-policy-toward-the-international-criminal-court/>

173 Eboe-Osuji, Chile. (2019). "The US and the ICC." Retrieved from <https://www.icc-cpi.int/sites/default/files/itemsDocuments/191114-president-stat-us-and-icc.pdf>

174 Kersten, M. (2016). "Justice in conflict: the effects of the International Criminal Court's interventions on ending wars and building peace." Oxford University Press.

In conclusion, as outlined in this analysis, the ICC's investigation in Afghanistan highlights a critical juncture in the landscape of international justice. The Court's efforts to balance its foundational objectives with the political and diplomatic realities it faces are emblematic of the ongoing tensions between international law and state sovereignty. The challenges posed by the USA's aggressive stance and the complex legal status of the Taliban have tested the ICC's resilience and capacity to adapt and navigate these unprecedented waters. This scenario underscores the need for the ICC to continue evolving its strategies, ensuring its pursuit of justice remains robust and effective, even in the face of formidable political challenges. The Court's handling of these issues will undoubtedly shape the future trajectory of international criminal justice, setting precedents for how such tribunals can operate in an increasingly complex global landscape.

Practical Challenges

The ICC confronts many practical challenges in administering justice for grave international crimes. These challenges are particularly pronounced in contexts like Afghanistan, where the ICC grapples with multifaceted obstacles. This part delves into the various practical issues faced by the ICC in Afghanistan, ranging from cooperation hurdles to logistical and resource constraints. These challenges test the ICC's operational capabilities and highlight the intricate balance between pursuing accountability and navigating the practical realities of international justice. The unique context of Afghanistan, with its complex political, legal, and cultural landscape, further exacerbates these challenges, necessitating a nuanced and strategic approach by the ICC.

Lack of Cooperation

The efficacy and success of the ICC are intrinsically linked to the level of cooperation it receives from state parties and the international community. The ICC's reliance on state cooperation for crucial aspects such as the arrest and surrender of suspects, access to evidence, and witness protection underscores the centrality of this support to its operations (Schabas, 2011, p. 19).¹⁷⁵ The ICC, lacking an enforcement mechanism, depends significantly on states' political will and legal commitment to fulfil their obligations under the Rome Statute. This treaty established the Court (Dutton, 2011, p. 480).¹⁷⁶

The issue of (lack of) cooperation presents practical challenges with profound legal, political, and practical roots and consequences. State parties are legally obligated to cooperate with the ICC, as the provisions of the Rome Statute, to which they are signatories, are binding

¹⁷⁵ Schabas, W. A. (2011). "An Introduction to the International Criminal Court (4th ed.)." Cambridge University Press.

¹⁷⁶ Dutton, Y. M. (2011). "Explaining state commitment to the International Criminal Court: strong enforcement mechanisms as a credible threat." Wash. U. Global Stud. L. Rev., 10, 477.

(Schabas, 2011).¹⁷⁷ While Article 98 of the Statute provides a narrowly defined legal framework allowing state parties to refrain from cooperation, specifically in surrendering suspects, its scope is limited. This exception should not impede other critical aspects of cooperation, such as participation in investigations, the protection of witnesses and victims, and the enforcement of sentences (Cassese, 2003, p. 442).¹⁷⁸

Nevertheless, the complexities of real-time cooperation with the ICC are influenced by various factors. Political considerations impact state cooperation significantly, often influenced by national interests and diplomatic relations (Schabas, 2011, p. 20).¹⁷⁹ Sovereignty concerns present another major challenge, with states balancing the demands of international law and their sovereignty (Cassese, 2011, p. 196).¹⁸⁰ Insecurity concerns in conflict zones, the risks and instability can significantly impede the ICC's operational capacity. Legal and judicial challenges arise from differences in legal systems and procedures, while challenges with non-member states involve states that are not legally bound to cooperate with the ICC, creating jurisdictional issues (McIntyre, 2021, pp. 511-513).¹⁸¹ Diplomacy and international criminal justice are often intertwined, as pursuing justice can affect international relations (Teitel, 2011, p. 139).¹⁸² Finally, practical and logistical challenges such as geographical and language barriers can hinder practical cooperation (Kaul, 2007, p. 578).¹⁸³

As mentioned previously, the inherent challenges of international criminal justice and Afghanistan's unique political, legal, and cultural landscape shape the lack of cooperation in the ICC's investigation in Afghanistan. Sections on legal and political challenges explain some of these in detail, briefly repeated here to keep the text flowing.

The United States and Bilateral Immunity Agreements (BIAs): The United States has expressed a stance of non-cooperation with the ICC in matters concerning the investigation or prosecution of its citizens. This position is reinforced by the Bilateral Immunity Agreements (BIAs) under Article 98 of the Rome Statute. These agreements effectively create a precedent for non-cooperation by exempting US nationals from ICC jurisdiction, raising significant

177 Schabas, W. A. (2011). "An Introduction to the International Criminal Court (4th ed.)." Cambridge University Press.

178 Cassese, A. (2003). "International Criminal Law." Oxford University Press.

179 Schabas, W. A. (2011). "An Introduction to the International Criminal Court (4th ed.)." Cambridge University Press.

180 Cassese, A. (2011). "International criminal law: cases and commentary." Oxford University Press.

181 McIntyre, G. (2021). "The ICC, self-created challenges and missed opportunities to legitimize authority over non-states parties." *Journal of International Criminal Justice*, 19(3), 511-541.

182 Teitel, R. G. (2011). "Humanity's law." Oxford University Press.

183 Kaul, H. P. (2007). "The International Criminal Court: current challenges and perspectives." *Wash. U. Global Stud. L. Rev.*, 6, 575.

questions about the universality and impartiality of international justice (Meyer, 2005, pp. 115-116).¹⁸⁴

The Ambiguous Legal Status of the Taliban's De Facto Government: The ambiguous legal status of the Taliban's de facto government in Afghanistan poses substantial challenges for communication and cooperation with the ICC. This uncertainty complicates the ICC's efforts to engage with local authorities, impacting the effectiveness of investigations within the region (Rahimi & Hazim, 2022, p. 237)¹⁸⁵; Wigard & Jahangiri, 2022).¹⁸⁶

The Taliban's Refusal to Cooperate and Cultural Considerations: The Taliban's expected refusal to cooperate in investigations, particularly against its members, and its opposition to surrendering Muslims to a non-Muslim court, like the ICC, introduces significant cultural and religious complexities to the situation. This stance reflects broader issues of international justice, cultural and religious sensitivity (Hazim, 2016, pp. 668-669).¹⁸⁷

Geographical and Linguistic Challenges: The geographical distance between Afghanistan and the ICC's headquarters in The Hague and language barriers present additional obstacles. Many locals, including victims, do not speak or understand the ICC's official languages, while Afghanistan's linguistic diversity, with Dari and Pashto as its national languages, further complicates communication (Hazim, 2016, p. 660¹⁸⁸; Bishay, 2020, p. 128).¹⁸⁹

Divergence Between Legal Systems: The divergence between the legal system in Afghanistan under Taliban rule and the legal framework of the Rome Statute presents significant legal and procedural challenges. The Taliban's legal and judicial systems are not currently well-defined. They claim their primary legal source is Shaira/Islamic Law, which is divine law (Hakimi, 2021),¹⁹⁰ and state that they would accept human-made law if it incorporates Sharia. This discrepancy can hinder the practical application and enforcement of international law in the Afghan context ((Zezen, 2022, pp. 7-8).¹⁹¹

184 Meyer, E. M. (2005). "International Law: The Compatibility of the Rome Statute of the International Criminal Court with the US Bilateral Immunity Agreements Included in the American Servicemembers' Protection Act." Okla. L. Rev., 58, 97.

185 Rahimi, H., & Hazim, M. (2022). "International Law and the Taliban's Legal Status: Emerging Recognition Criteria?." Wash. Int'l LJ, 32, 228.

186 Wigard, K., & Jahangiri, G. (2022). "The International Criminal Court and Afghanistan: A tale of misunderstandings and misinformation." Journal of International Criminal Justice, 20(1), 203-222.

187 Hazim, A. M. (2016). "Toward Cooperation between Afghanistan and the International Criminal Court." George Washington International Law Review., 49, 615.

188 Hazim, A. M. (2016). "Toward Cooperation between Afghanistan and the International Criminal Court." George Washington International Law Review., 49, 615.

189 Bishay, J. I. (2020). "Solemnly Declare to tell the Truth': Internationalising the Solemn Undertaking Before the International Criminal Court'." Intersections of Law and Culture at the International Criminal Court, 127-46.

190 Hakimi, M. J. (2021). "The International Criminal Court's Afghan Dilemma: Complementarity and the Quest for Justice in Afghanistan." Colum. J. Transnat'l L., 60.

191 Zezen, Z. M. (2022). "The network of Islamic radicalism: proposing a mapping model." Islamic Studies Review, 1(1), 1-22.

Resource and Capacity Constraints

Budgetary Limitations: The ICC's budget is often inadequate for the scale and complexity of its investigations and prosecutions. The Court's budget is primarily funded by contributions from member states, and fluctuations or shortfalls in these contributions can directly impact its operational capabilities (Ford, 2023, p. 1).¹⁹² Financial constraints extend to logistical and operational aspects of the ICC's work. This includes funding for field operations, witness protection programs, and the necessary technology and infrastructure to support complex international investigations (Kersten, 2016, p. 112).¹⁹³

The OTP annual budget is around 50 million euros. It has 12 ongoing investigations. According to Karim Khan, his office's core budget is inadequate and insufficient (International Criminal Court, 2023, p. 7).¹⁹⁴ The need to manage multiple, complex cases across different geographic regions with limited financial resources can lead to prioritisation decisions that may affect the breadth and depth of investigations. In September 2021, Karim Khan explained that his decision to de-prioritise the allegations against the US and the Republic forces was resource limitation. The ICC's Afghanistan investigation could be expansive, depending on the scale and type of cases the OTP decides to investigate (International Criminal Court, 2021).¹⁹⁵ However, investigating all crimes within its jurisdiction would be too vast (more on this later).

Human Resources: The ICC's operations require a diverse range of specialised personnel, including legal experts, investigators, and language interpreters adept in dealing with complex international legal cases and the nuances of different cultural contexts. Recruiting and retaining such skilled professionals is challenging, particularly in a competitive international job market. Limited funding can restrict the ICC's ability to offer competitive salaries and benefits, which may impact the recruitment and retention of top talent (Warrick, 1996, p. 359).¹⁹⁶

Beyond recruitment, the ongoing training and development of staff are crucial for the ICC to keep pace with evolving legal precedents, investigative techniques, and international human rights standards. Financial constraints can limit opportunities for professional development,

¹⁹² Ford, S. (2023). "Funding the ICC for its Third Decade. In *The International Criminal Court in its Third Decade* (pp. 368-383)." Brill Nijhoff.

¹⁹³ Kersten, M. (2016). "Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace." Oxford University Press.

¹⁹⁴ International Criminal Court. (2022). "Proposed Programme Budget for 2023." Retrieved from <https://asp.icc-cpi.int/sites/asp/files/2022-07/ICC-ASP-21-INF2-ENG.pdf>

¹⁹⁵ International Criminal Court. (2021). Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, following the application for an expedited order under article 18(2) seeking authorisation to resume investigations in the Situation in Afghanistan. Retrieved from <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-un-security-council-situation-libya-pursuant-0>

¹⁹⁶ Warrick, T. S., & Bassiouni, M. C. (1996). "Organization of the International Criminal Court: Administrative and Financial Issues." *Denv. J. Int'l L. & Pol'y*, 25, 333.

potentially affecting the quality and efficacy of the ICC's work (Concannon Jr, 2000, p. 230).¹⁹⁷

ICC staff often face high workloads due to the complexity and volume of cases, compounded by resource limitations. This can lead to burnout and high turnover rates, which can affect the Court's continuity and institutional memory. Staff burnout and turnover can also directly impact the length and efficiency of legal proceedings.

Ensuring diversity and representation among the staff is essential for the ICC to address crimes in varied cultural and geopolitical contexts effectively. Achieving a balanced representation of gender, ethnicity, and nationality can be challenging but is crucial for the Court's credibility and inclusiveness (Chandrachud, 2012, pp. 490-491).¹⁹⁸

In Afghanistan, recruiting qualified Afghan nationals with a deep understanding of the country and expertise in international justice presents a considerable challenge for the OTP. Including staff from the specific region under investigation is vital, especially when the ICC can establish an office or deploy staff within the country. These local staff members can significantly enhance the investigation by contributing their nuanced understanding of the local context and facilitating connections between the investigation and the community. This local insight is invaluable when the Court operates outside the region. However, employing staff from the country in question may raise concerns regarding the impartiality of the Court. While such perceptions of partiality may not necessarily be accurate, they are a part of the broader narrative that shapes how the ICC's work is perceived and received, particularly by those who may view the Court or its investigations unfavourably (Hernández, 2012, pp. 185-187).¹⁹⁹

Investigating Undocumented Crimes

In the Afghanistan situation, the mandate of the OTP encompasses the investigation of alleged crimes committed on Afghan soil since May 1, 2003, and those outside Afghanistan but closely linked to the Afghan conflict since July 1, 2002. A substantial portion of these crimes remains undocumented. While organisations such as the United Nations Assistance Mission in Afghanistan (UNAMA) and the Afghanistan Independent Human Rights Commission (AIHRC) have recorded a segment of these crimes, their documentation primarily covers incidents post-2009. Human rights groups like Amnesty International and Human Rights Watch have documented specific incidents, which the OTP has utilised as sources in its preliminary examination reports. However, it is arguable that the nature and

¹⁹⁷ Concannon Jr, B. (2000). "Beyond complementary: The international criminal court and national prosecutions, a view from Haiti." *Colum. Hum. Rts. L. Rev.*, 32, 201.

¹⁹⁸ Chandrachud, A. (2012). "Diversity and the International Criminal Court: Does geographic background impact decision making." *Brook. J. Int'l L.*, 38, 487.

¹⁹⁹ Hernández, G. I. (2012). "Impartiality and bias at the International Court of Justice." *Cambridge J. Int'l & Comp. L.*, 1, 183.

extent of this documentation may not possess the requisite rigour and comprehensiveness to meet the evidentiary standards required in criminal proceedings.

Investigating older, undocumented crimes is challenging, particularly in a dynamic and turbulent context like Afghanistan. Over time, physical evidence can be lost, degraded, or tampered with, making it difficult to collect and analyse. The longer the period since the crime was committed, the harder it becomes to gather reliable physical evidence. This is a significant issue in conflict zones like Afghanistan, where preserving crime scenes may not have been possible (Kersten, 2016, p. 43).²⁰⁰

As time passes, the availability of witnesses becomes a significant concern. Witnesses may have moved, passed away, or become unreachable for various reasons. Additionally, human memory is subject to decay, and recollections of events 10 to 15 years ago may be less reliable, making witness testimonies less precise or more susceptible to challenge.

The investigation of undocumented crimes that occurred several years ago poses a significant financial burden, particularly for institutions like the International Criminal Court (ICC), which operates under notable resource constraints. The retrospective investigation of such crimes requires extensive financial resources for gathering evidence and witness testimonies and deploying specialised staff and technological tools necessary for thorough investigations. These expenses are compounded when considering the logistical costs of operating in regions with challenging infrastructures, such as conflict or post-conflict zones. Given the ICC's limited budget, primarily funded by contributions from member states and subject to fluctuations, the Court faces tough decisions regarding allocating its resources Ford, 2023, p. 1).²⁰¹ In practice, this financial reality often leads to a de-prioritisation of older, undocumented cases, as the ICC must strategically direct its limited resources toward instances where evidence is more readily available and the likelihood of successful prosecution is higher. While necessary due to fiscal prudence, this pragmatic approach underscores a critical dilemma in international justice—balancing the pursuit of accountability for past crimes with the practical limitations imposed by resource constraints.

Case Selection and Prioritisation

Due to the complex interplay of legal, political, and practical challenges and strategic factors, as discussed so far, those alleged crimes that fall within the ICC's jurisdiction could be subject to de-selection and de-prioritisation. These factors and challenges reflect the Court's

200 Kersten, M. (2016). "Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace." Oxford University Press.

201 Ford, S. (2023). "Funding the ICC for its Third Decade. In *The International Criminal Court in its Third Decade* (pp. 368-383)." Brill Nijhoff.

constraints, particularly reliance on governmental cooperation, insecurity, and resource and logistic limitations in the real world. This reality brings to the forefront the critical dilemma faced by the Court: balancing the pursuit of comprehensive justice with pragmatic limitations. The constraints directly link numbers and types of selected and prioritised cases: greater challenges result in investigating and prosecuting fewer and easier cases.

Additionally, strategic factors like the impacts of prosecution on victims, affected communities, and prevention of ongoing and future crimes influence prosecutorial discretion. While this selective approach allows the ICC to prosecute and address certain cases, it often results in a process potentially overlooking many grievances and undermining the ICC's core mission of ending impunity and fostering justice and crime prevention, particularly in contexts like Afghanistan. This underscores the inherent dilemmas faced in international criminal justice: balancing limited resources with the imperative to pursue the gravest violations while navigating the political and practical landscape's intricacies.

Case Selection Process and Criteria

Case selection and de-prioritisation are unavoidable in international criminal justice. Many crimes are investigated by a few institutions with many limitations. Article 53 of the Rome Statute endows the Prosecutor with the discretion to select and prioritise the most severe offences, considering the interest of justice and of the victims. To elucidate the exercise of this discretion, the OTP has formulated guidance documents, notably the "Policy Paper on Case Selection and Prioritisation," the "Policy Paper on Interests of Justice", and the "Policy Paper on Victims' Participation." The latter, instituted in 2010, reflects, among other things, upon the OTP's 2009-2012 Prosecutorial Strategy, outlining a rationale for case selection and prioritisation that includes conducting succinct investigations, minimising the risk to individuals involved with the OTP, and advocating for speedy trials. Nonetheless, it underscores the necessity for cases to embody the full spectrum of victimisation (Ferstman, 2016, pp. 5-6)²⁰²; International Criminal Court, 2010).²⁰³

The OTP's 2016 Policy Paper on Case Selection and Prioritisation goes further by highlighting that investigating and prosecuting "each and every alleged criminal act within a given situation or every person allegedly responsible for such crimes" is not the responsibility of the OTP as it is practically "unfeasible" and could be contrary to the principle of "complementarity." The feasibility of investigating and prosecuting effectively within its limited resources is a crucial consideration (International Criminal Court, 2016).²⁰⁴ It hinges

202 Ferstman, C. (2016). "Prosecutorial discretion and victims' rights at the International Criminal Court: demarcating the battle lines." *Acta Juridica*, 2016(1), 17-39.

203 International Criminal Court. (2010). "Policy Paper on Victims' Participation." Retrieved from https://www.icc-cpi.int/sites/default/files/iccdocs/otp/Policy_Paper_on_Victims_Participation_April_2010.pdf

204 International Criminal Court. (2016). "POLICY PAPER ON CASE SELECTION AND PRIORITISATION." Retrieved from https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf

on the OTP's ability to navigate complex political and security environments, which can significantly influence the accessibility of sites and evidence, the protection of witnesses, the well-being of victims, the likelihood of securing governmental cooperation, and the enforcement of arrest warrants. Therefore, the strategic choices made by the OTP must reflect a pragmatic understanding of the operational context, ensuring that legal and judicial activities are theoretically sound and practically achievable (Whiting, 2013, pp. 163-164).²⁰⁵

Moreover, the OTP must consider the broader implications of case selection on the ICC's mandate and legitimacy. This involves assessing the potential for trials to contribute to wider goals of deterrence, accountability, and justice for victims. The Office's "Policy Paper on Case Selection and Prioritisation" underscores the importance of selecting cases that reflect the gravest crimes and those most responsible for them, thus ensuring that the Court's limited resources are utilised most effectively. The case selection and prioritisation process must be independent, impartial, and objective. A database of obtained information and evidence, called "Case Selection Document", is continuously updated during the investigation. At a minimum, it is annually reviewed to ensure that case selection and prioritisation fulfil the criteria of "complementarity," "gravity", and "interests of justice" in the light of newly collected information and evidence (International Criminal Court, 2016, pp. 6-7).²⁰⁶

In case selection, the principle of complementarity serves several critical functions. Firstly, it reinforces the responsibility of states to investigate and prosecute serious international crimes, promoting the rule of law and encouraging national judicial reforms (Fay, 2021, pp. 10-12²⁰⁷; Bensouda, 2014).²⁰⁸ The ICC contributes indirectly to the global fight against impunity by incentivising states to strengthen their legal systems. Secondly, complementarity respects state sovereignty by acknowledging the primary jurisdiction of domestic courts and only intervening as a court of last resort. This also has implications for the legitimacy and acceptance of the ICC (Stahn & El Zeidy, 2011, pp. 23-24).²⁰⁹ Applying complementarity in case selection is a practical response to the ICC's limited resources. By prioritising cases where states are genuinely unable or unwilling to prosecute, the ICC ensures its efforts are focused where they are most needed and can have the most significant impact (Kleffner, 2008, p. 261).²¹⁰ This selective approach allows the Court to allocate its resources effectively and maintain a manageable caseload.

205 Whiting, A. (2013). "Dynamic investigative practice at the International Criminal Court." *Law & Contemp. Probs.*, 76, 163.

206 International Criminal Court. (2016). "POLICY PAPER ON CASE SELECTION AND PRIORITISATION." Retrieved from https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf

207 Fay, M. (2021). "Positive Complementarity: How to Fix a Failed ICC?." Seton Hall University.

208 Bensouda, F. (2014). "The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law." *UN Chronicle*, 51(4), 15-17.

209 Stahn, C., & El Zeidy, M. M. (Eds.). (2011). "The International Criminal Court and Complementarity: From Theory to Practice." Cambridge University Press. <https://doi-org.ludwig.lub.lu.se/10.1017/CBO9781316134115>

210 Kleffner, J. K. (2008). "Complementarity in the Rome Statute and National Criminal Jurisdictions." Oxford University Press.

The gravity threshold is “the predominant case selection criteria”, encompassing the gravity of crimes and the degree of criminal responsibility of suspects and charges. Assessing the gravity of crimes requires qualitative and quantitative examinations utilising factors like the scale, nature, manner of commission and impact of the crime. The scale of the crimes includes, among other things, the number of victims, extent of damage, and widespread. The nature of the crimes “refers to the specific factual elements” like gender persecution and genocide. The manner of the commission includes, among other things, the extent of the cruelty and systematic, and means, manner and intention of executing crimes. The impact of the crime assessment scrutinises the extent of damage caused by the crimes on affected individuals and communities and the destruction of protected objects (International Criminal Court, 2016, p. 4).²¹¹

The OTP emphasises that “greater responsibility of the alleged perpetrators” will be a determining factor in selecting situations and cases for prosecution. It strategically targets mid- to high-level perpetrators to establish cases against those most responsible for serious international crimes while not excluding lower-level perpetrators in cases of severe conduct. Responsibility assessment extends beyond formal ranks, considering the extent of unlawful behaviour, participation, intent, motives, and abuse of power. The OTP’s charge framing reflects the individual’s degree of responsibility, emphasising the role of commanders and superiors under Article 28 to enforce responsible command and prevent future crimes (International Criminal Court, 2016, pp. 13-15).²¹²

The charges must represent the breadth of criminality within specific contexts as a factor in case selection, aiming to ensure that serious crimes do not remain unpunished. In line with regulation 34(2), the OTP selects charges that exemplify the main types of victimisations and affected communities, striving for a representative sample. Special attention is given to historically under-prosecuted crimes, including those against children, sexual and gender-based crimes, and attacks on protected entities and personnel (International Criminal Court, 2016, P.15).²¹³

The 2007 Policy Paper on the Interests of Justice illustrates that investigating and prosecuting alleged crimes presumably favour justice interests. Approving it otherwise during the investigation may deter the investigation even when other criteria are met because the “interests of justice” is a potential counterbalance between legal compliance and broader implications of the investigation on preventing atrocities, victims and affected community.

211 International Criminal Court. (2016). “POLICY PAPER ON CASE SELECTION AND PRIORITISATION.” Retrieved from https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf

212 International Criminal Court. (2016). “POLICY PAPER ON CASE SELECTION AND PRIORITISATION.” Retrieved from https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf

213 International Criminal Court. (2016). “POLICY PAPER ON CASE SELECTION AND PRIORITISATION.” Retrieved from https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf

Though the OTP's mandate is not to ensure the interests of peace, it is expected to respect the broader legal framework of international peace and security while adhering to its mandate to prosecute the gravest crimes (International Criminal Court, 2007, P. 10).²¹⁴

The concept of the interests of victims is an integral part of the interests of justice. It is deeply embedded in the Rome Statute and reinforced by the OTP's policies. Determining the interests of victims during investigations requires a nuanced and victim-centred approach. Central to this process is the recognition that victims have a legitimate interest in seeing justice done, which includes holding perpetrators accountable and receiving reparations for their suffering. Their interests also extend to protecting their safety, well-being, and dignity throughout the judicial process (International Criminal Court, 2007, pp. 5-6).²¹⁵ The OTP engages in active and sensitive consultations with victims and their representatives. This includes discussions with individual victims, community leaders, and NGOs representing or assisting victims. These consultations are designed to understand the victims' perspectives, fears, expectations, and desires, ensuring their voices are heard and considered in the investigative and prosecutorial strategy (Gallen, 2017, p. 323).²¹⁶

Case Prioritisation Process and Criteria

Due to the challenges and constraints which the Office of the Prosecutor (OTP) faces, not all selected cases may proceed to investigation and prosecution simultaneously. Article 54(1)(b) of the Rome Statute mandates that the OTP strategically prioritise certain cases to enhance the effectiveness of investigations, considering practical and strategic considerations. This prioritisation does not imply that de-prioritized cases will be disregarded; instead, it involves a comparative evaluation of selected cases. This assessment focuses on factors such as the potential impact on victims and communities, the influence on ongoing or future crimes, the ability to engage conflicting parties, and the investigation or prosecution history concerning the individuals or groups involved. Operational criteria for case prioritisation include the availability and robustness of evidence, feasibility of evidence collection, levels of cooperation, security conditions, protection measures for those involved with the OTP, the likelihood of securing suspects' appearances in court, and the probability of achieving successful legal outcomes (International Criminal Court, 2016, p. 16).²¹⁷

²¹⁴ International Criminal Court. (2007). Policy Paper on the Interests of Justice. <https://www.icc-cpi.int/sites/default/files/ICCOTPIInterestsOfJustice.pdf>

²¹⁵ International Criminal Court. (2007). "Policy Paper on the Interests of Justice." Retrieved from <https://www.icc-cpi.int/sites/default/files/ICCOTPIInterestsOfJustice.pdf>

²¹⁶ Gallen, J. (2017). "The International Criminal Court: In the interests of transitional justice?." In *Research Handbook on Transitional Justice* (pp. 305-327). Edward Elgar Publishing.

²¹⁷ International Criminal Court. (2016). "POLICY PAPER ON CASE SELECTION AND PRIORITISATION." Retrieved from https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf

Case Selections and Prioritisation in the Afghanistan Investigation

In its 2023 annual report, the OTP shortly detailed its investigative procedures in Afghanistan, emphasising collecting pertinent evidence, conducting interviews with potential witnesses, pinpointing representative incidents, consulting with experts, and coordinating with partner entities. The investigation primarily targets “alleged crimes committed by members of the Taliban and the Islamic State [ISKP]” (International Criminal Court, 2023, p. 25).²¹⁸ Before the renewed authorisation of the Afghanistan investigation, Prosecutor Karim Khan initiated a strategic shift, reducing the focus on inquiries involving the United States and the Afghan Republic by de-prioritising their allegations. However, he affirmed the ongoing preservation of evidence related to these entities, underscoring a commitment to uphold accountability within the principle of complementarity (International Criminal Court, 2021, para. 6-8).²¹⁹

This strategic adjustment was justified by the OTP’s limited resources and driven by the need to effectively address the most severe, ongoing and under-prosecuted alleged crimes, “include allegations of indiscriminate attacks on civilians, targeted extrajudicial executions, persecution of women and girls, crimes against children and other crimes affecting the civilian population at large” (International Criminal Court, 2021, para. 6).²²⁰ Although the Prosecutor only highlighted his office resource constraints, the political challenges the US imposed on the Court and the BIAs it has signed with over 100 countries, which complicated cooperation in surrendering US citizens to the Court, could not be ignored in the feasibility test of the OTP.

Legally, the Prosecutor’s strategic shift has not violated any statutory provisions. While some regard this approach as pragmatic and realistic given the constraints, it has sparked considerable debate. Critics argue that prioritising some instances over others could inadvertently establish a hierarchy among victims, leading to perceptions of selective justice (Mbengue & McClellan, 2018, pp. 190-191²²¹; Mensa-Bonsu, 2015, pp. 41-42).²²² This concern echoes earlier criticisms of the ICC, particularly when its focus was predominantly on African nations, prompting allegations that the Court pursued weaker states while

218 International Criminal Court. (2023). Office of the Prosecutor Annual Report 2023. Retrieved from <https://www.icc-cpi.int/sites/default/files/2023-12/2023-otp-annual-report.pdf>

219 International Criminal Court. (2021, September 27). Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, following the application for an expedited order under article 18(2) seeking authorisation to resume investigations in the Situation in Afghanistan. Retrieved from <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-un-security-council-situation-libya-pursuant-0>

220 International Criminal Court. (2021, September 27). Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, following the application for an expedited order under article 18(2) seeking authorisation to resume investigations in the Situation in Afghanistan. Retrieved from <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-un-security-council-situation-libya-pursuant-0>

221 Mbengue, M. M., & McClellan, K. (2018). “The ICC and Africa: should the latter remain engaged?” *Ethiopian Yearbook of International Law* 2017, 187-203.

222 Mensa-Bonsu, H. J. (2015). “The ICC, International Criminal Justice and International Politics.” *Africa Development*, 40(2), 33-53.

neglecting more powerful ones, thereby questioning the ICC's impartiality and efficacy (Nkansah, 2014, pp. 12-14).²²³ Such a narrative has implications for the ICC's credibility. Despite these critiques, Khan has maintained his investigative strategy and has publicly responded to the criticisms, leading to further discussions about the transparency and adaptability of the ICC's prosecutorial policies.

De-prioritised Aspects

The OTP's preliminary examination findings discovered that the US CIA and its military personnel and the Republic's national security forces, at least, allegedly committed several acts of war crimes that fall within the ICC's jurisdiction.

The US CIA and military personnel are allegedly implicated in the commission of war crimes, including torture and cruel treatment (Article 8(2)(c)(i)), outrages upon personal dignity (Article 8(2)(c)(ii)), and rape and other forms of sexual violence (article 8(2)(e)(vi)). Specifically, evidence suggests that approximately 54 detainees—chosen from a broader victim pool—were subjected to the mentioned criminal acts by US armed forces primarily between 2003 and 2004 on the Afghanistan territory. Additionally, there is a basis to believe that about 24 detainees—also selected from a larger group—faced similar treatment by CIA members not only in Afghanistan but also in other State Parties, including Poland, Romania, and Lithuania, mainly during the same period. The implementation of interrogation techniques, purportedly aimed at gathering actionable intelligence, was reportedly part of a policy discussed, reviewed, and authorised by various levels of the US armed forces, the Department of Defence, the CIA, and other US government branches (International Criminal Court, 2017, p. 56).²²⁴

The Republic National Security Forces, particularly the National Directorate for Intelligence (NDS) and Afghanistan National Police (ANP), were allegedly found responsible for committing the war crimes of torture, cruel treatment, outrages upon personal dignity, and sexual violence under Article 8 of the Rome Statute. The OTP could not prove its systemic nature, but the information it gathered revealed that the alleged atrocities were perpetrated in a widespread manner ((International Criminal Court, 2017, p. 58).²²⁵

223 Nkansah, L. A. (2014). "International Criminal Court in the trenches of Africa." *African Journal of International Criminal Justice*, (1), 8-37.

224 International Criminal Court. (2017). "Report on Preliminary Examination Activities." Retrieved from https://www.icc-cpi.int/sites/default/files/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf

225 International Criminal Court. (2017). "Report on Preliminary Examination Activities." Retrieved from https://www.icc-cpi.int/sites/default/files/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf

Targeting High-Level Perpetrators

The ICC strategically targets individuals bearing the most significant responsibility for international crimes, a principle rooted in its foundational mandate to hold those at the highest echelons of power accountable. This prosecutorial strategy ensures that critical decision-makers and orchestrators of grave violations are brought to justice (Case Matrix Network, 2016, p. 17-20).²²⁶ However, this approach inherently leads to a gap in the prosecution of lower-level perpetrators, who may also have played significant roles in the commission of selected and prioritised crimes but do not fall within the ICC's primary focus.

In Afghanistan, where numerous actors have been involved in complex and prolonged conflict, this prosecutorial policy potentially allows a substantial number of lower-level perpetrators to evade the ICC's investigation. This situation is especially pertinent given Afghanistan's history of internal conflict and foreign interventions, where myriad groups and individuals have been implicated in serious violations. As Robinson outlines, this selective approach, while pragmatic and resource-driven, raises concerns about comprehensive accountability and the potential for a partial or incomplete perception of justice (Robinson, 2008, pp. 960-961).²²⁷

As Kersten discussed, this issue is further complicated by the challenges of attributing criminal responsibility in complex command structures typical in conflict-affected zones like Afghanistan (Kersten, 2016).²²⁸ High-level perpetrators often detach from the direct commission of crimes, complicating the evidentiary process. In contrast, lower-level perpetrators, who may have directly committed crimes under orders or duress, might escape scrutiny under the ICC's current prosecutorial policy.

Moreover, the focus on high-level perpetrators risks overlooking the broader systemic issues contributing to the commission of international crimes (Case Matrix Network, 2016).²²⁹ Addressing these systemic issues in Afghanistan is crucial to achieving lasting peace and justice. The reliance on the principle of complementarity, expecting national systems to prosecute lower-level offenders, often falls short in conflict or post-conflict societies where the legal infrastructure may be weak or compromised.

Therefore, while the ICC's focus on high-level perpetrators aligns with its mandate and resource constraints, it also underscores the need for a more inclusive justice mechanism that

226 Case Matrix Network; Centre for International Law Research and Policy. (2016). "International Criminal Law Guidelines: Command Responsibility." Retrieved from <https://www.legal-tools.org/doc/7441a2/pdf/>

227 Robinson, D. (2008). "The identity crisis of international criminal law." *Leiden Journal of International Law*, 21(4), 925-963.

228 Kersten, M. (2016). "Justice in conflict: the effects of the International Criminal Court's interventions on ending wars and building peace." Oxford University Press

229 Case Matrix Network; Centre for International Law Research and Policy. (2016). "International Criminal Law Guidelines: Command Responsibility." Retrieved from <https://www.legal-tools.org/doc/7441a2/pdf/>

encompasses the leaders and the rank-and-file perpetrators. This inclusive approach is essential for holistic justice and reconciliation, as it addresses the full spectrum of culpability and provides a more comprehensive redress for the victims of international crimes.

Conclusion

The International Criminal Court's incursion into the legal terrain of Afghanistan signifies a monumental and hopeful stride against the entrenched legacy of impunity. This scourge has long shielded the perpetrators of mass atrocities. The atrocities that have marred Afghanistan are not merely incidents but a chronicle of grave and widespread violence, spanning over four tumultuous decades, leaving a legacy of suffering across the fabric of its society. This protracted conflict has engendered a staggering number of victims and survivors, whose afflictions and quest for acknowledgement have been met with the cold comfort of blanket amnesties and a dearth of reparative justice.

The significance of the ICC's investigation in this context cannot be overstated; it stands as a profound beacon of hope, illuminating the path toward redressing the grievous wounds inflicted upon Afghanistan's populace. It is the first of its kind—an international effort for accountability and justice within the war-weary borders of Afghanistan. However, this laudable quest is beset with formidable challenges, a multifaceted array that the ICC shares with other jurisdictions, yet is exacerbated by Afghanistan's unique circumstances. The de facto rule of the Taliban and the intricate geopolitical footprint of the United States present unparalleled complexities. These factors, coupled with the ICC's intrinsic constraints, cast a shadow of doubt over the Court's ability to achieve its foundational aspirations, combating impunity, preventing further atrocities, and administering justice to those who have endured the ravages of conflict.

Confronted with these realities, the Office of the Prosecutor is compelled to exercise discernment in case selection and prioritisation, an undertaking mired in operational and strategic constraints. With its gauntlet of challenges, the Court is poised to adjudicate only a select few cases, implicating a limited cadre of perpetrators. This stark limitation not only affects the delivery of justice but also threatens the rights of countless victims and survivors, potentially perpetuating the very impunity the ICC seeks to dismantle. In a poignant twist of irony, the ICC's endeavours might inadvertently enshrine a narrative of immunity and marginalise a swath of those it aims to serve.

It is imperative to underscore the duality of hope and disappointment accompanying the ICC's involvement in Afghanistan. The ICC's investigation is a beacon of hope for countless

victims seeking redress for the atrocities endured, a tangible step towards accountability and a sense of recognition and validation of the sufferings of victims, which, for too long, have remained in the shadows. However, the inherent limitations of the ICC underscore a palpable risk of disappointment. Particularly concerning is the plight of victims whose experiences cannot be included in the legal frameworks. This exclusion, inadvertently, could foster a sense of disillusionment among those whose stories remain untold and injustices unaddressed, particularly in instances involving foreign armies and their complex layers of accountability.

Therefore, while the ICC's endeavours in Afghanistan offer a glimmer of hope, it is crucial to temper expectations with the reality of the court's capacities and the multifaceted challenges it faces. Acknowledging these limitations openly not only fosters a realistic understanding of the ICC's role but also highlights the pressing need for complementary mechanisms. These mechanisms, encompassing international and local efforts, are essential for bridging the gaps in the ICC's reach. They could include universal jurisdiction, national inquiries, UN reporting and accountability mechanisms, regional human rights courts, or/and domestic tribunals. They are the sine qua non for enacting tangible change in the aftermath of such extensive human rights violations. While the nature and efficacy of these complementary systems require further scholarly exploration, the glimpses offered by the "Accountability and Amnesty" section of this article shed light on the potential pathways to augment combating impunity hands-in-hand with the ICC. A holistic approach to justice in post-conflict societies is essential, encompassing international and national legal systems and other mechanisms. This broader approach is crucial to addressing the full spectrum of human rights violations.

In sum, the ICC's intervention in Afghanistan is a clarion call, a testament to the unyielding quest for justice in the face of overwhelming adversity. It reaffirms the imperative for a collaborative, multifaceted approach to international criminal justice that can meet the challenges of complex and resource-strapped environments like Afghanistan's.

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