

Articles

The International Criminal Court's Afghan Dilemma: Complementarity and the Quest for Justice in Afghanistan

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The principle of complementarity is a cornerstone of the International Criminal Court's (ICC) framework. Enshrined in Article 17 of the Rome Statute, the doctrine balances the overarching precept of ending impunity for atrocity crimes against the primacy of national criminal jurisdictions. Under the complementarity regime, the ICC may only assert jurisdiction when a state fails to act, including when its legal system is unwilling or unable to genuinely carry out proceedings.

Shortly after the Appeals Chamber of the ICC authorized an investigation in March 2020 of alleged war crimes and crimes against humanity in Afghanistan, the government of Afghanistan requested that the ICC's Office of the Prosecutor (OTP) defer to its domestic proceedings. This Article argues that, contrary to Afghanistan's contention, potential cases arising from the OTP's investigation would be

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admissible before the ICC. Afghanistan has consistently neglected its responsibility to bring perpetrators of international crimes to justice. The recent ascendance of the Taliban into power is unlikely to change this status quo.

The complementarity analysis reveals that, besides the likely absence of proceedings against individuals who bear the greatest responsibility for the alleged crimes, authorities in the Afghan legal system remain unwilling and unable to genuinely carry out the requisite investigations and prosecutions. The state's unwillingness and inability to conduct genuine proceedings are evinced through the Taliban's return to power, the flawed Afghan peace process, the amnesty framework, and an array of other factors pertinent to the issue of admissibility. Considering the deeply ineffective domestic accountability mechanism, the ICC must step in and ensure that impunity is no longer guaranteed in Afghanistan.

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INTRODUCTION

On March 5, 2020, the Appeals Chamber of the International Criminal Court (ICC or “Court”) unanimously authorized an investigation into the situation in Afghanistan.¹ The decision opened the door for the Office of the Prosecutor (OTP or “Prosecutor”) to commence a formal probe into alleged war crimes and crimes against humanity committed by the Taliban and their affiliates, the Afghan national security forces, and—controversially—the U.S. military and the Central Intelligence Agency.² As a state party to the Rome Statute (“Statute”),³ the ICC’s founding treaty, Afghanistan is subject to the Court’s jurisdiction over crimes against humanity, war crimes, and genocide committed within the country after May 1, 2003.⁴

1. See Situation in the Islamic Republic of Afghanistan, ICC-02/17-138, Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ¶ 79 (Mar. 5, 2020) [hereinafter Appeals Chamber Decision]. For further background on the ICC investigation in Afghanistan, see Mehdi J. Hakimi, *The ICC and Afghanistan – Time to End Impunity?*, YALE J. INT’L L. FORUM (Aug. 31, 2018), <https://www.yjil.yale.edu/forum-the-icc-and-afghanistan-time-to-end-impunity> [<https://perma.cc/DV57-W2BC>].

2. See Appeals Chamber Decision, *supra* note 1, ¶ 4.

3. *The States Parties to the Rome Statute*, INT’L CRIM. CT., https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx [<https://perma.cc/VP4Y-4EFZ>]. The United States is not a party to the Rome Statute and has vociferously opposed the ICC’s investigation of American citizens. *Id.* This Article does not address the U.S. component of the ICC probe. Unlike Afghanistan, the United States has a highly robust judicial system in place.

4. See Rome Statute of the International Criminal Court, art. 12(1), July 1, 2002, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

Afghanistan's deferral request, however, delayed the start of the OTP's investigation.⁵ On March 26, 2020, in a letter to the Prosecutor, the Afghan government under President Ashraf Ghani claimed that it was "investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts . . . which may constitute crimes referred to in Article 5 of the Statute."⁶ Accordingly, Afghanistan requested that "the Prosecutor defer to Afghanistan's national investigations and proceedings in accordance with the provisions of Article 18."⁷

Article 18(2) of the Rome Statute provides that a state may inform the Prosecutor of any investigations of persons within its jurisdiction for crimes outlined in Article 5 and request deferral of the ICC probe.⁸ The requesting state must provide sufficient supporting information concerning its internal investigations in accordance with Rule 53 of the ICC's Rules of Procedure and Evidence.⁹ Upon such request, the OTP must generally defer to that state's domestic proceedings unless the Pre-Trial Chamber, on the Prosecutor's application, authorizes the investigation.¹⁰ The OTP may also request additional information from that state.¹¹

Afghanistan's deferral request was woefully insufficient, lacking important supporting information regarding its proceedings.¹² Afghan authorities blamed the COVID-19 pandemic for their failure to furnish the necessary information concerning their investigations of the alleged crimes,¹³ requesting more time to provide the requisite

5. *See generally* Situation in the Islamic Republic of Afghanistan, ICC-02/17-139-Anx1, Annex 1 to the Notification to the Pre-Trial Chamber of the Islamic Republic of Afghanistan's Letter Concerning Article 18(2) of the Statute (Mar. 26, 2020) [hereinafter Afghan Deferral Request].

6. *Id.* at 2.

7. *Id.* at 3.

8. Rome Statute, *supra* note 4, art. 18(2).

9. *Rules of Procedure and Evidence of the International Criminal Court*, r. 53, U.N. Doc. ICC-ASP/1/3 (Sept. 10, 2002) [hereinafter Rules of Procedure and Evidence].

10. Rome Statute, *supra* note 4, art. 18(2).

11. Rules of Procedure and Evidence, *supra* note 9, r. 53.

12. *See* Situation in the Islamic Republic of Afghanistan, ICC-02/17-139, Notification to the Pre-Trial Chamber of the Islamic Republic of Afghanistan's Letter Concerning Article 18(2) of the Statute, ¶ 2 (Apr. 15, 2020) [hereinafter Deferral Request Notification]. The deferral request lacked the requisite supporting information regarding cases purportedly investigated or under investigation by Afghan authorities. *Id.*

13. *Id.* ¶ 2.

materials.¹⁴ Despite deficiencies in the deferral request, the Prosecutor agreed to grant Afghanistan additional time to supply the supporting information required under Article 18(2) and Rule 53.¹⁵ In so doing, the OTP emphasized the “importance the Prosecutor places on her proper assessment of complementarity.”¹⁶

The principle of complementarity is a cornerstone of the ICC framework.¹⁷ It governs the exercise of the Court’s jurisdiction and, as such, is critical to the admissibility of a case before the ICC.¹⁸ The doctrine, enshrined in Article 17 of the Statute,¹⁹ emphasizes the primary jurisdiction of states to prosecute international crimes.²⁰ Under the complementarity regime, the Court could only assert jurisdiction after Afghanistan fails to act to address the alleged crimes raised in the OTP’s probe, including when its legal system is *unwilling or unable* to genuinely carry out proceedings.²¹

Afghanistan has been the scene of mass violence and atrocities for approximately four decades.²² Despite optimism following the

14. Afghanistan pledged to provide the required evidence justifying its deferral request by June 12, 2020. *Id.*

15. *Id.* ¶ 4. It appears that, in any event, the OTP will not be taking active investigative steps with respect to Afghanistan’s deferral request while the Covid-19 constraints persist. *Id.* ¶ 5.

16. *Id.* ¶ 4.

17. See, e.g., Martha Minow, *Do Alternative Justice Mechanisms Deserve Recognition in International Criminal Law?: Truth Commissions, Amnesties, and Complementarity at the International Criminal Court*, 60 HARV. INT’L L.J. 1, 5 (2019); Sascha Dominik Dov Bachmann & Eda Luke Nwibo, *Pull and Push - Implementing the Complementary Principle of the Rome Statute of the ICC Within the African Union: Opportunities and Challenges*, 43 BROOK. J. INT’L L. 457, 541 (2018).

18. Prosecutor v. Katanga, ICC-01/04-01/07-1008-AnxA, Informal Expert Paper: The Principle of Complementarity in Practice, ¶ 1 (Mar. 30, 2009) [hereinafter ICC Expert Paper].

19. Rome Statute, *supra* note 4, art. 17.

20. ICC Expert Paper, *supra* note 18, ¶ 1. Such prioritization of national jurisdictions distinguishes the ICC from other judicial bodies such as the international criminal tribunals for the former Yugoslavia and Rwanda (the ICTY and the ICTR). *Id.*

21. Rome Statute, *supra* note 4, art. 17 (emphasis added). According to the ICC’s inaugural chief prosecutor, Luis Moreno-Ocampo, “the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.” ICC Expert Paper, *supra* note 18, at 3.

22. See, e.g., PATRICIA GOSSMAN & SARI KOUVO, TELL US HOW THIS ENDS: TRANSITIONAL JUSTICE AND PROSPECTS FOR PEACE IN AFGHANISTAN 23–24 (June 2013), http://www.afghanistan-analysts.org/wp-content/uploads/2013/06/2013-06_AAN_TransitionalJustice2.pdf [<https://perma.cc/8KZN-3HFW>].

ouster of the Taliban in 2001, transitional justice has proved elusive.²³ Domestic de jure measures to fight impunity, such as a new Penal Code and a new Criminal Procedure Code, have been largely symbolic.²⁴ Instead, with many warlords and alleged perpetrators of grave crimes still wielding power, Afghanistan has de facto codified impunity through its Amnesty Law.²⁵

The Taliban's takeover of Afghanistan in August 2021 has further diminished hopes for accountability and justice.²⁶ Even prior to the Taliban's control of the country, the focus on the peace process overshadowed the pressing need to end impunity.²⁷ The peace negotiations were beset by the lack of meaningful participation of key stakeholders like victims of the war in Afghanistan.²⁸ The absence of political will to fight impunity is further compounded by a judicial system plagued by corruption and other institutional shortcomings.²⁹ Moreover, despite having acceded to the Rome Statute in 2003, Afghanistan persistently failed to cooperate with the Court.³⁰

This Article argues that, despite contentions made in the deposed Afghan government's brief, potential cases arising from the OTP's investigation would be admissible before the ICC. Afghanistan has consistently neglected its primary responsibility to bring perpetrators of grave international crimes to justice.³¹ That pattern is highly unlikely to change now that the Taliban have gained control over the country. Before the Taliban seized power, the Afghan government's peace negotiations with the insurgent group, which resulted in the release of senior Taliban commanders and other individuals allegedly responsible for Rome Statute crimes, had further

23. See Huma Saeed, *The Failure of Transitional Justice in Afghanistan: Impunity Turned into Law*, JUST SECURITY (Sept. 16, 2021), <https://www.justsecurity.org/78252/the-failure-of-transitional-justice-in-afghanistan-impunity-turned-into-law> [<https://perma.cc/U7EV-VFQ7>].

24. See *infra* Part VI (discussing, inter alia, the lack of effective implementation of the laws in Afghanistan).

25. See *infra* Part V.

26. See David Zucchini, *Afghan Women Who Once Presided Over Abuse Cases Now Fear for Their Lives*, N.Y. TIMES (Oct. 22, 2021), <https://www.nytimes.com/2021/10/21/world/asia/afghan-judges-women-taliban.html> [<https://perma.cc/X6HQ-5K3Q>]; see *infra* Part IV.

27. See *infra* Section III.B.

28. See *infra* Section III.B.

29. See *infra* note 374 and accompanying text.

30. See Abdul Mahir Hazim, *A Critical Analysis of the Rome Statute Implementation in Afghanistan*, 31 FLA. J. INT'L L. 1, 2–3 (2019).

31. See *infra* Part II.

laid bare—and exacerbated—the rampant culture of impunity.³² In addition to the likely absence of proceedings against individuals who bear the greatest responsibility for the alleged crimes, the Afghan legal system remains unwilling and unable to genuinely carry out the requisite investigations and prosecutions.³³ Consequently, the ICC should override any alleged investigation by authorities in Afghanistan and independently prosecute the crimes specified.

This Article applies the Rome Statute's complementarity analysis to the situation in Afghanistan in six Parts. Part I explains the principle of complementarity. Part II examines the now deposed Afghan government's claim concerning its internal investigations into the alleged crimes. Part III discusses the flawed peace process with the Taliban and its implications on the question of willingness and ability to genuinely carry out proceedings. Part IV surveys the Taliban's takeover of Afghanistan and prospects for justice and accountability under the new regime. Finally, Parts V and VI critically analyze Afghanistan's Amnesty Law and other factors pertinent to the issue of admissibility. The Article concludes that in accordance with the complementarity doctrine, considering the ineffective domestic accountability mechanism, the ICC should exercise its jurisdiction and commence the long-overdue investigation into alleged war crimes and crimes against humanity in Afghanistan.

I. THE PRINCIPLE OF COMPLEMENTARITY

The principle of complementarity has been viewed as the cornerstone and lynchpin of the ICC's legitimacy.³⁴ The doctrine governs the exercise of the Court's jurisdiction³⁵ and, in doing so, defines the relationship between the ICC and national jurisdictions.³⁶ The importance of this notion is underscored at the very outset of the Rome Statute. The preamble and Article 1 emphasize that the ICC "shall be complementary to national criminal jurisdictions."³⁷ In other words, states have the primary responsibility and right to prosecute

32. See *infra* Section III.B.

33. See *infra* Parts II–VI.

34. See *supra* note 17 and accompanying text.

35. ICC Expert Paper, *supra* note 18, ¶ 1.

36. Evolving models of the complementarity regime under the Rome Statute include passive, positive, and proactive complementarity. For an overview of these models, see, e.g., Bachmann & Nwibo, *supra* note 17, at 479–84.

37. Rome Statute, *supra* note 4, pmbl., art. 1.

international crimes,³⁸ and the Court does not seek to “compete” with them for jurisdiction.³⁹ The ICC, as a court of last resort, may only intervene if national legal systems fail to act.⁴⁰ The core idea is that the ICC is meant to “complement” national justice systems, not replace them.⁴¹

Evidently, the complementarity regime serves important objectives. It promotes compliance with the Statute.⁴² By prioritizing national justice processes, it seeks to strike a balance between state sovereignty and the international community’s interest in prosecuting core crimes under international law.⁴³ Moreover, given the ICC’s dependence on state cooperation, it aims to foster an efficient relationship between states parties and the Court.⁴⁴ In doing so, the doctrine serves the pragmatic function of leveraging the domestic legal systems’ comparative advantage in prosecuting international crimes, especially in light of the ICC’s limited resources.⁴⁵ Ultimately, it enlists national jurisdictions in the global fight against impunity and the quest to fulfill the “promise of universal justice.”⁴⁶

The approach to complementarity, in practice, may be informed by the twin principles of partnership and vigilance. The partnership principle reflects the importance of maintaining a positive and constructive relationship, for instance, by providing advice and

38. ICC Expert Paper, *supra* note 18, ¶ 1.

39. *Id.* ¶ 2.

40. *Id.* ¶ 1. For further in-depth discussion of the principle of complementarity, see generally JO STIGEN, *THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND NATIONAL JURISDICTIONS: THE PRINCIPLE OF COMPLEMENTARITY* (2008); MOHAMED M. EL ZEIDY, *THE PRINCIPLE OF COMPLEMENTARITY IN INTERNATIONAL CRIMINAL LAW: ORIGIN, DEVELOPMENT AND PRACTICE* (2008).

41. See Minow, *supra* note 17, at 5.

42. See, e.g., ICC Expert Paper, *supra* note 18, ¶ 2; David Hughes, *Investigation as Legitimation: The Development, Use and Misuse of Informal Complementarity*, 19 MELB. J. INT’L L. 84, 93 (2018).

43. Markus Benzing, *The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity*, 7 MAX PLANCK U.N.Y.B. 591, 597 (2003).

44. See Hughes, *supra* note 42, at 93–94.

45. The proximity of domestic courts to crime scenes and superior access to witnesses, evidence, and resources are key considerations as well. ICC Expert Paper, *supra* note 18, ¶ 1; see also Tatiana E. Sainati, *Divided We Fall: How the International Criminal Court Can Promote Compliance with International Law by Working with Regional Courts*, 49 VAND. J. TRANSNAT’L L. 191, 204–05 (2016).

46. See Hughes, *supra* note 42, at 94; see also, *Overview: Rome Statute of the International Criminal Court*, U.N. OFF. OF LEGAL AFFS., <https://legal.un.org/icc/general/overview.htm> [<https://perma.cc/ED5N-FVWV>].

guidance where states are genuinely investigating and prosecuting the alleged crimes.⁴⁷ Vigilance, on the other hand, demands that the Court diligently fulfill its responsibilities under the Statute, including verifying that domestic procedures are conducted genuinely and effectively.⁴⁸ These dialogue and monitoring functions, while in tension, are interlinked.⁴⁹

Complementarity is critical to the admissibility of a case before the ICC.⁵⁰ Article 17(1)(a) of the Statute establishes a two-step test to determine whether a case is admissible.⁵¹ First, the Court must determine whether there is an ongoing investigation or prosecution of the case at the national level.⁵² Inaction by the state renders the case admissible.⁵³ The state must take steps “directed at ascertaining” whether the same person is responsible for the alleged conduct such as “interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses.”⁵⁴ Notably, this step requires that domestic authorities undertake “tangible, concrete and progressive investigative steps.”⁵⁵ A state’s “mere preparedness to take such steps

47. ICC Expert Paper, *supra* note 18, ¶ 3.

48. *Id.*

49. *Id.* ¶ 4.

50. The admissibility requirement, enshrined in Article 17 of the Statute, imposes two broad barriers to the exercise of jurisdiction by the Court. Rome Statute, *supra* note 4, art. 17. These include complementarity (Article 17(1)(a)-(c), including the principle of *ne bis in idem*) and gravity (Article 17(1)(d)). *Id.* The existence of either impediment renders the case inadmissible. *See, e.g.*, Prosecutor v. Lubanga, ICC-01/04-01/06-772, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo Against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute of 3 October 2006, ¶ 23 (Dec. 14, 2006).

51. *See* Prosecutor v. Katanga, ICC-01/04-01/07-1497, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ¶¶ 1, 75–79 (Sept. 25, 2009) [hereinafter Prosecutor v. Katanga]; *see also* Prosecutor v. Al-Senussi, ICC-01/11-01/11-466-Red, Decision on the Admissibility of the Case Against Abdullah Al-Senussi, ¶ 26 (Oct. 11, 2013) [hereinafter Prosecutor v. Al-Senussi].

52. Prosecutor v. Al-Senussi, *supra* note 51, ¶ 26.

53. Prosecutor v. Katanga, *supra* note 51, ¶¶ 2, 78.

54. Prosecutor v. Ruto, ICC-01/09-01/11-307, Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, ¶ 41 (Aug. 30, 2011) [hereinafter Prosecutor v. Ruto].

55. Prosecutor v. Gbagbo, ICC-02/11-01/12-75-Red, Judgment on the Appeal of Côte d’Ivoire Against the Decision of Pre-Trial Chamber I of 11 December 2014 Entitled “Decision

or the investigation of *other* suspects is not sufficient.”⁵⁶ Moreover, the contours and parameters of the case being investigated, irrespective of its stage, must be clear.⁵⁷

The existence of proceedings, however, does not render a case inadmissible *per se*.⁵⁸ In that situation, the Court proceeds to the second step: Is the state unwilling *or* unable to genuinely carry out such investigation or prosecution?⁵⁹ The term “genuine” implies a basic level of objective quality.⁶⁰

Under Article 17(2) of the Statute, the state shall be deemed “unwilling” if the national proceedings are undertaken for the purpose of “shielding the person concerned from criminal responsibility;”⁶¹ “there has been an unjustified delay in the proceedings which is inconsistent with an intent to bring the person concerned to justice;”⁶² or the proceedings are not conducted “independently or impartially,” and they are “inconsistent with an intent to bring the person concerned to justice.”⁶³ The state has a duty to make a good faith effort to carry out the necessary proceedings.⁶⁴ Moreover, the proceedings must encompass both the same person *and* substantially the same conduct as alleged in the proceedings before the Court.⁶⁵

Under the second prong, the state may be fully willing yet “unable” to carry out the necessary investigation or prosecution, thus

on Côte d’Ivoire’s Challenge to the Admissibility of the Case against Simone Gbagbo”, ¶¶ 119, 122 (May 27, 2015).

56. Prosecutor v. Ruto, *supra* note 54, ¶ 41 (emphasis in original).

57. Prosecutor v. Gaddafi, ICC-01/11-01/11-547-Red, Judgment on the Appeal of Libya Against the Decision of Pre-Trial Chamber I of 31 May 2013 Entitled “Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi”, ¶ 83 (May 21, 2014).

58. See Prosecutor v. Lubanga, ICC-01/04-01/06-2-tEN, Warrant of Arrest, 4 (Feb. 10, 2006).

59. Prosecutor v. Al-Senussi, *supra* note 51, ¶ 26; Prosecutor v. Katanga, *supra* note 51, ¶¶ 1, 75–79.

60. ICC Expert Paper, *supra* note 18, ¶ 23. Human rights standards may be relevant in assessing the genuineness of the proceedings. *Id.*

61. Rome Statute, *supra* note 4, art. 17(2)(a).

62. *Id.* art. 17(2)(b).

63. *Id.* art. 17(2)(c).

64. See El Zeidy, *supra* note 40, at 168 (noting the unwillingness requirement is a “test of good faith of national authorities”). Unwillingness may be evinced, for instance, through sham or feigned proceedings. ICC Expert Paper, *supra* note 18, ¶ 23.

65. See, e.g., Prosecutor v. Harun, ICC-02/05-01/07, Decision on the Prosecution Application under Article 58(7) of the Statute, ¶ 24 (Apr. 27, 2007).

rendering the case admissible.⁶⁶ Pursuant to Article 17(3) of the Statute, in determining “inability,” the “Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”⁶⁷ Even if the state is able to obtain the accused and the necessary evidence, its capacity to conduct timely investigations and fair trials remains a critical consideration.⁶⁸

A showing of either of the two factors under the second step of the test—unwillingness or inability—is sufficient to render a case admissible.⁶⁹ In practice, however, the same factual circumstances may often have a bearing on both scenarios.⁷⁰ Furthermore, the two scenarios may be interdependent.⁷¹ The assessment of a state’s ability and willingness to genuinely carry out proceedings must be conducted vis-à-vis that state’s own laws.⁷² In evaluating alleged departures from national laws, the ICC will only consider those irregularities that relate to one or more of the scenarios outlined in Article 17(2) or (3).⁷³

Evidently, contextual considerations specific to the state are crucial to the complementarity analysis. Indeed, it may be necessary to draw inferences from the general environment—such as the independence and impartiality of the system—to a particular (potential) case.⁷⁴ General evidence of political interference, sham trials, and reluctance to prosecute certain offenders may indicate non-genuineness in a particular (potential) case.⁷⁵ To prevent such a finding, the ICC Rules of Procedure and Evidence encourage states to show that “[domestic] courts meet internationally recognized norms

66. Rome Statute, *supra* note 4, art. 17(1)(a).

67. *Id.* art. 17(3).

68. Payam Akhavan, *Complementarity Conundrums: The ICC Clock in Transitional Times*, 14 J. INT’L CRIM. JUST. 1043, 1046 (2016).

69. Prosecutor v. Al-Senussi, *supra* note 51, ¶ 169.

70. *Id.* In the cases of *Gaddafi* and *Al-Senussi*, for instance, the Court held that a country’s laws and procedures are relevant to analyzing both willingness and ability. *Id.* ¶ 203. The Court thus examined various aspects of Libya’s legal system in its “genuineness” analysis. *Id.* ¶¶ 203–06.

71. For instance, “unwillingness” in the executive branch may create “inability” in the judicial branch to conduct genuine proceedings. ICC Expert Paper, *supra* note 18, ¶ 45.

72. Prosecutor v. Al-Senussi, *supra* note 51, ¶ 221. The relevant national laws include a state’s ratified human rights instruments. *Id.*

73. *Id.* ¶ 243.

74. ICC Expert Paper, *supra* note 18, ¶ 35.

75. *Id.*

and standards for the independent and impartial prosecution of similar conduct.”⁷⁶

Assessing “genuineness” invariably involves inferences and circumstantial evidence.⁷⁷ Indeed, the concerned parties may well attempt to “cover up involvement and to whitewash crimes.”⁷⁸ Indicia of “unwillingness” may include, *inter alia*, evidence of political interference in the proceedings; general institutional deficiencies in the investigative, prosecutorial, or judicial institutions; and procedural irregularities.⁷⁹

Regarding “inability,” relevant indicia of “total or substantial collapse or unavailability of its national judicial system” include: lack of necessary personnel in the investigative, prosecutorial, or judicial bodies; lack of judicial facilities; lack of necessary criminal legislation; lack of access to the judicial system; obstruction by non-governmental groups; and amnesties and immunities.⁸⁰

Complementarity issues may arise at different stages in the Court’s proceedings.⁸¹ Assessing admissibility is thus an ambulatory process—it depends on the factual situation on the ground which is not necessarily static.⁸² As such, the Prosecutor must revisit the complementarity issue at later phases by reviewing the progress of national proceedings during the course of investigations.⁸³ The two steps of this test, while distinct, are closely intertwined. Hence, evidence of ongoing proceedings (under the first step) may be relevant for the purpose of assessing the ability or willingness to genuinely conduct such proceedings (under the second step).⁸⁴ Moreover, in line with the principle of objectivity under Article 54(1) of the Statute, the admissibility fact-finding and analysis should be undertaken in an “objective, uniform and principled manner.”⁸⁵

76. Rules of Procedure and Evidence, *supra* note 9, r. 51.

77. ICC Expert Paper, *supra* note 18, ¶ 44.

78. *Id.*

79. *Id.* ¶ 47.

80. *Id.* ¶ 50.

81. *Id.* ¶ 24. The admissibility assessment can occur at earlier stages, such as when determining whether to launch an investigation, as well as at later stages when a specific suspect is identified. Assessments at earlier junctures need to be more generalized. *Id.*

82. Prosecutor v. Katanga, *supra* note 51, ¶ 56.

83. Situation in the Islamic Republic of Afghanistan, ICC-02/17-33, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ¶ 73 (Apr. 12, 2019) [hereinafter Chamber Decision].

84. Prosecutor v. Al-Senussi, *supra* note 51, ¶ 210.

85. ICC Expert Paper, *supra* note 18, ¶ 5.

As discussed in the subsequent Parts, contrary to the recently-deposed Afghan government's position, the complementarity analysis will very likely render the potential cases arising from the investigation admissible. Particularly in light of the Taliban's recent military takeover of Afghanistan, this finding is all the more plausible.⁸⁶ With respect to the first step of the test, Afghanistan has failed to investigate or prosecute the persons most responsible for the alleged core crimes.⁸⁷ Regarding the second step, Afghanistan remains unwilling or unable to genuinely carry out proceedings concerning the alleged crimes.⁸⁸ The next sections will apply the complementarity analysis to the situation in Afghanistan, explaining why arguments for national jurisdiction over the alleged crimes fail on both steps of the test.

II. NATIONAL PROCEEDINGS IN AFGHANISTAN

As explained above, the first step of the complementarity analysis requires a determination on whether there is an ongoing investigation or prosecution of the alleged crimes at the national level in Afghanistan.⁸⁹

Although the Taliban are now in power, it was the Afghan government under former President Ghani that sought to delay the ICC probe by submitting the deferral request.⁹⁰ In evaluating the question of complementarity, it is important to closely examine the conduct of the former Afghan government for several reasons. First, it was the former government that requested deferral of the ICC investigation.⁹¹ Neither the former government nor the Taliban have revoked that request, which remains pending before the Court. Given the uncertainty surrounding which entity represents the state authorities of Afghanistan, the ICC thus must give serious consideration to all relevant circumstances, including the conduct of the former government in fulfilling its Rome Statute obligations.

Second, the Taliban will very likely object to the ICC probe, and the complementarity argument will be a key tool at their disposal to thwart the OTP's scrutiny. The Taliban have inherited the legal frameworks and institutions of the former administration (including its

86. *See infra* Part IV.

87. *See infra* Part II.

88. *See infra* Parts III–VI.

89. *See supra* Part I.

90. *See* Afghan Deferral Request, *supra* note 5, at 2–5.

91. *Id.*

judicial, prosecutorial, and law enforcement bodies).⁹² As such, they too could claim that Afghanistan's national legal system will properly address the alleged crimes since those legal frameworks and institutions are still (technically) intact.

Third, the conduct of the former government is closely intertwined with that of the Taliban in key respects, particularly in relation to the peace process, and thus reflects both regimes' degrees of compliance with the Rome Statute.⁹³

Fourth, despite Afghanistan's accession to the Rome Statute in 2003, the former government's conduct reflects the longstanding culture of impunity in the country and underscores the urgency of prompt action by the Court.⁹⁴

The recently-deposed Afghan government had passed important legislative measures to build its capacity to meet its obligations under the Rome Statute.⁹⁵ The new Afghan Penal Code, adopted in 2017, incorporates the Rome Statute crimes of genocide,⁹⁶ crimes against humanity,⁹⁷ war crimes,⁹⁸ and aggression.⁹⁹ The new Penal Code also provides for the criminal responsibility of commanders and high ranking officials in the context of those four crimes.¹⁰⁰ Moreover, recent amendments to the Criminal Procedure Code exempt the Rome Statute crimes from the default statute of limitations.¹⁰¹ In addition, Afghanistan claims to have recently established the Directorate on International Crimes and the Anti-Torture Commission.¹⁰²

92. *See infra* Part IV.

93. *See infra* Part III.

94. *See infra* Part VI.

95. Situation on the Islamic Republic of Afghanistan, ICC-02/17-130, Written Submissions of the Government of the Islamic Republic of Afghanistan, ¶ 18 (Dec. 2, 2019) [hereinafter Written Submissions of the Government of the Islamic Republic of Afghanistan].

96. KODE JAZA [PENAL CODE], Official Gazette No. 1260, arts. 333–334 (Afg.) [hereinafter PENAL CODE].

97. *Id.* arts. 335–336.

98. *Id.* arts. 337–340.

99. *Id.* art. 341.

100. *Id.* arts. 342–343; Written Submissions of the Government of the Islamic Republic of Afghanistan, *supra* note 95, ¶ 18.

101. *See* Situation in the Islamic Republic of Afghanistan, ICC-02/17-7-Red, Public Redacted Version of “Request for Authorisation of an Investigation Pursuant to Article 15”, ¶ 273 (Nov. 20, 2017) [hereinafter OTP Request].

102. *See* Afghan Deferral Request, *supra* note 5, at 6.

While these legal reforms are a positive step intended to facilitate the domestic investigation and prosecution of ICC crimes, they have not brought meaningful progress on the goal of holding the main perpetrators to account for the crimes alleged in the OTP's investigation. Moreover, it is unclear whether the Taliban will comply with these legal reforms which were instituted under the former government, further casting doubt on Afghanistan's commitment to fighting impunity for grave crimes.

According to the OTP's official request for judicial authorization to commence a formal probe, submitted in November 2017, the available information indicates that Afghanistan has conducted no investigations or prosecutions of individuals who bear the greatest responsibility for the Rome Statute crimes allegedly committed by members of the Taliban and affiliated armed groups.¹⁰³ Consequently, pursuant to the first step of the test under Article 17(1)(a), the Prosecutor determined that the potential case(s) concerning alleged crimes by members of the Taliban and affiliated armed groups would be admissible in light of the inaction by the Afghan government.¹⁰⁴ The Prosecutor reached a similar determination on admissibility with respect to crimes allegedly committed by Afghan national security forces.¹⁰⁵ After reviewing the OTP's submissions regarding the absence of ongoing proceedings in Afghanistan, the Pre-Trial Chamber held that potential cases arising from the investigation would be admissible under Article 17.¹⁰⁶

Afghanistan's recent request for the deferral of the OTP's formal probe, submitted in March 2020, was deficient. It failed to meet the requirements under Article 18(2) of the Statute and Rule 53 of the Rules of Procedure and Evidence to provide the requisite supporting information regarding cases purportedly investigated or under investigation by Afghan authorities.¹⁰⁷

103. OTP Request, *supra* note 101, ¶ 269.

104. *Id.* ¶ 275.

105. *Id.* ¶¶ 276, 288.

106. Chamber Decision, *supra* note 83, ¶¶ 75, 77.

107. Deferral Request Notification, *supra* note 12, ¶ 2. The Afghan government claimed to be investigating 151 cases, but only 28 made it to court. *See, e.g.*, Patricia Gossman, *ICC Investigation Vital for Justice in Afghanistan*, HUM. RTS. WATCH (June 11, 2020), <https://www.hrw.org/news/2020/06/11/icc-investigation-vital-justice-afghanistan> [<https://perma.cc/9H9S-KVME>]. In addition, none of the cases involving government security forces included those most responsible for the alleged crimes. *Id.* Moreover, the government claimed to be investigating 36 cases of Taliban members accused of serious crimes, yet it failed to specify whether any of those individuals had been arrested or

There are several facts that cast doubt on claims that the Afghan government will be able to hold the necessary proceedings to support a request for complementarity. First, the Taliban's control of the country, including its judicial system, has changed the reality in Afghanistan. The Taliban's various policies and actions, such as the release of prisoners¹⁰⁸ and declaration of a general amnesty, have likely terminated any investigations or prosecutions that the previous government may have been conducting.¹⁰⁹ The impact of this recent change in government will be further discussed in Part IV, but it plainly undermines faith in the judicial apparatus in Afghanistan.

In the case of *Gaddafi*, the Appeals Chamber held that, absent final judgments with *res judicata* effect, domestic first-instance proceedings will not render a case inadmissible before the ICC.¹¹⁰ Given the Taliban's *de facto* control of Afghanistan, which has sent many judges into hiding, the prospects of making a showing of even domestic first-instance proceedings are highly doubtful.¹¹¹

Second, the Afghan government's justification for its deficient deferral request, which relied on the COVID-19 pandemic constraints, is unconvincing.¹¹² The coronavirus outbreak was declared a pandemic in March 2020—nearly seventeen years after Afghanistan's obligations under the Rome Statute took effect in May 2003, and roughly twenty-eight months after the OTP lodged its request for

prosecuted. Indeed, it appears that some Taliban suspects in serious cases were swapped in prisoner or hostage exchanges. *Id.*

108. See, e.g., Ivana Saric, *Thousands of Prisoners Freed by Taliban Could Pose Threat to U.S.*, AXIOS (Aug. 15, 2021), <https://www.axios.com/taliban-bagram-prisoners-release-87ec6885-6930-46d6-9e96-473a252dcf7d.html> [<https://perma.cc/NN69-FZJP>]; see also Eric Garcia, *Pentagon Admits 'Thousands' of Isis-K Militants Released from US Prisons by Taliban*, INDEPENDENT (Aug. 27, 2021, 7:09 PM), <https://www.independent.co.uk/news/world/americas/us-politics/isis-k-us-prisons-taliban-b1910021.html> [<https://perma.cc/K8WA-3SLE>].

109. Sammy Westfall, *Taliban Leaders Are Promising Peace, Order and Amnesty in Afghanistan. They Promised That Last Time, Too*, WASH. POST (Aug. 22, 2021, 6:00 AM), <https://www.washingtonpost.com/world/2021/08/22/taliban-historical-rhetoric> [<https://perma.cc/Z3D2-JEWR>].

110. Prosecutor v. Gaddafi, ICC-01/11-01/11-695, Judgment on the Appeal of Mr. Saif Al-Islam Gaddafi Against the Decision of Pre-Trial Chamber I Entitled 'Decision on the "Admissibility Challenge by Dr. Saif Al-Islam Gaddafi Pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute"', ¶ 59 (Mar. 9, 2020).

111. See, e.g., Claire Press, *Female Afghan Judges Hunted by the Murderers They Convicted*, BBC NEWS (Sept. 28, 2021), <https://www.bbc.com/news/world-asia-58709353> [<https://perma.cc/ZV8C-EC3F>].

112. See Afghan Deferral Request, *supra* note 5, at 3.

commencing a formal investigation in November 2017.¹¹³ While the invocation of COVID-19 constraints may have been in good faith, given Afghanistan's longstanding conflict and the authorities' knowledge of crimes, it is curious that the Afghan government was unable to provide the necessary supporting materials for its purported proceedings during this extensive intervening period prior to the COVID-19 pandemic.

Third, Afghanistan has a history of disregarding its Rome Statute obligations, including full cooperation with the Court in investigating and prosecuting ICC crimes.¹¹⁴ Examples of required cooperation include "the provision of records and documents" in relation to national proceedings.¹¹⁵ Contrary to Afghanistan's claim that it "remains fully committed to fulfilling all of its obligations . . . and cooperating with the OTP and the Court,"¹¹⁶ according to a 2016 report by the OTP, "[t]he Government has not provided *any* information on national proceedings to the Office, *despite multiple requests* for such information from the Office since 2008[.]"¹¹⁷ Afghanistan's persistent non-cooperation evinces bad faith and, as such, may warrant a negative inference on the question of admissibility.

Fourth, it appears that the Afghan Directorate on International Crimes and the Anti-Torture Commission has not yet filed any cases before courts since its establishment under the 2018 Law on the Prohibition on Torture.¹¹⁸ The lack of filings is, at least in part, attributable to the absence of the requisite legal framework governing the Directorate's work.¹¹⁹ The Directorate is further constrained by limited capacity to carry out proper investigations and proceedings relating to international crimes.¹²⁰ Collectively, these facts hint at the

113. *Coronavirus Confirmed as Pandemic by World Health Organization*, BBC NEWS (Mar. 11, 2020), <https://www.bbc.com/news/world-51839944> [<https://perma.cc/2K6V-MXKK>].

114. Rome Statute, *supra* note 4, art. 87.

115. *Id.* art. 93(1)(i).

116. Afghan Deferral Request, *supra* note 5, at 4.

117. INT'L CRIM. CT., REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2016, ¶ 217 (2016) (emphasis added) [hereinafter OTP Report 2016].

118. Ehsan Qaane, *A Request to Delay: Another Afghan Government Attempt to Prevent an ICC War Crimes Investigation?*, AFG. ANALYSTS NETWORK (May 13, 2020), <https://www.afghanistan-analysts.org/en/reports/rights-freedom/a-request-to-delay-another-afghan-government-attempt-to-prevent-an-icc-war-crimes-investigation> [<https://perma.cc/UXV3-8ST6>].

119. *Id.*

120. *Id.*

body's inability to properly investigate the alleged crimes at issue. Additionally, under the Taliban's regime, the Directorate's fate is highly uncertain.

Fifth, even before the Taliban's takeover, it appears that the Afghan government had already released the only leaders of the main anti-government armed group that it had prosecuted. According to the OTP's report in 2016, only two leaders or senior members of militant groups—both from the Taliban-affiliated Haqqani Network—seem to have been prosecuted and convicted by Afghan courts.¹²¹ Like other instances of non-cooperation, however, the Afghan government refused to provide information to the ICC on these proceedings.¹²² The evidence indicates that these high-level individuals were freed in 2019 by the Afghan government in exchange for hostages held by the Taliban.¹²³

Sixth, the absence of supporting information is particularly instructive in light of the Afghan government's assertion that some investigations were apparently already completed.¹²⁴ While difficulties in obtaining records concerning ongoing investigations may be understandable given the pandemic challenges, it is rather surprising that Afghanistan does not have the necessary documents on hand for investigations that, according to Afghan authorities, have already been completed—including proceedings against the released senior Haqqani leaders.¹²⁵ A competent judicial system should have such critical documents on concluded investigations easily available for submission to the Court.

Assuming, *arguendo*, that Afghanistan's contention regarding the existence of national proceedings concerning the alleged crimes is valid, the potential cases arising from the OTP's investigation would nonetheless still likely be admissible under the second step of the test, as Afghanistan remains unwilling or unable to genuinely carry out such proceedings. Parts III–VI of the Article focus on this second step of the complementarity analysis.

121. OTP Report 2016, *supra* note 117, ¶ 215.

122. *Id.*

123. See, e.g., Sayed Salahuddin & Sharif Hassan, *U.S., Australian Hostages Held by Taliban in Afghanistan Are Freed in Exchange for Haqqani Commanders*, WASH. POST (Nov. 19, 2019), https://www.washingtonpost.com/world/three-taliban-militants-flown-to-qatar-hinting-at-possible-prisoner-swap/2019/11/19/9ea56ed0-0a8b-11ea-8054-289aef6e38a3_story.html [<https://perma.cc/UL7E-F8WZ>]; see also *infra* Section III.A.

124. The Afghan government claims that the forthcoming information and supporting materials would “cover both the past and current national investigations.” Afghan Deferral Request, *supra* note 5, at 3 (emphasis added).

125. See *infra* Section III.A.

III. THE AFGHAN PEACE PROCESS AND IMPLICATIONS FOR GENUINE PROCEEDINGS

The former Afghan government's peace negotiation with the Taliban also bears upon the question of complementarity. Key issues concerning the peace process indicate that, even before the Taliban's takeover of Kabul, the former Afghan government was unwilling or unable to genuinely carry out proceedings pursuant to Article 17 of the Rome Statute. These issues include the government's decision to release senior leaders of the Haqqani Network, the Doha Agreement and the Taliban prisoner swap, and the Afghan authorities' practice of releasing dangerous detainees. This Part will discuss these aspects of the peace process respectively.

A. *Crossing Self-Imposed "Red Lines": The Release of Senior Haqqani Leaders*

In November 2019, President Ghani ordered the release of three senior commanders of the Haqqani Network—Anas Haqqani, Hafiz Abdul Rashid, and Haji Mali Khan—in exchange for two western hostages held by the Taliban.¹²⁶ According to the OTP, “members of the Taliban and their affiliated Haqqani Network . . . appear most responsible for the largest number of serious crimes committed by anti-government armed groups.”¹²⁷ The Haqqani Network, a brutal wing of the Taliban, has allegedly perpetrated numerous sophisticated and deadly attacks, suicide bombings, and kidnappings.¹²⁸ The militant group was designated a terrorist organization by the U.S. government in 2012.¹²⁹

The released high-level Taliban members are considered as among the group's “elite.”¹³⁰ Anas Haqqani, the younger brother of

126. See Salahuddin & Hassan, *supra* note 123; see also *US and Australian Hostages Freed in Taliban Prisoner Swap*, BBC NEWS (Nov. 19, 2020), <https://www.bbc.com/news/world-asia-50471186> [<https://perma.cc/DHR9-8WDA>].

127. OTP Request, *supra* note 101, ¶ 53.

128. See Salahuddin & Hassan, *supra* note 123; see also David Zucchini & Adam Goldman, *Two Western Hostages Are Freed in Afghanistan in Deal with Taliban*, N.Y. TIMES (Nov. 19, 2019), <https://www.nytimes.com/2019/11/19/world/asia/afghanistan-taliban-prisoner-exchange-peace-talks.html> [<https://perma.cc/H4W2-FSQU>].

129. Salahuddin & Hassan, *supra* note 123.

130. *Taliban Commanders 'Land in Qatar' as Part of Prisoner Swap Move*, AL JAZEERA (Nov. 20, 2019), <https://www.aljazeera.com/news/2019/11/20/taliban-commanders-land-in-qatar-as-part-of-prisoner-swap-move> [<https://perma.cc/ASS6-U5GE>].

the Taliban's deputy leader and a son of the Haqqani Network's founder,¹³¹ is a leading fundraiser and propagandist.¹³² Hafiz Abdul Rashid, a brother of one of the Taliban's negotiators in the Doha peace talks, is "a senior Taliban commander who had equipped suicide bombers, chosen their targets and moved them from safe houses in Pakistan into Afghanistan."¹³³ Afghan officials described the capture of Haqqani and Rashid, in 2014, as "one of the biggest and important arrests" with major strategic impact.¹³⁴ Haji Mali Khan is also a senior Taliban commander and an uncle of the Taliban's deputy leader.¹³⁵ Khan allegedly supported suicide attacks, maintained close ties with al-Qaeda, and served as an emissary of the militant group in Pakistan.¹³⁶

To illustrate Anas Haqqani's significance, the Afghan government had previously declared that releasing the Taliban leader was a "red line" which would not be crossed without the approval of the Afghan people.¹³⁷ Notwithstanding the government's pledge, and unlike President Ghani's recourse to a consultative assembly for hundreds of other dangerous Taliban prisoners, there was no consultation with the Afghan people on freeing these three senior Taliban commanders.¹³⁸ President Ghani's surrender of these three high-ranking Taliban members was viewed as playing "his strongest card against the Taliban," losing leverage in the peace negotiations.¹³⁹

Besides releasing Anas Haqqani, President Ghani had declared that "[w]omen's rights are our red line in the peace process and we will never go back."¹⁴⁰ Moreover, Vice President Amrullah Saleh had also

131. Salahuddin & Hassan, *supra* note 123.

132. Zucchini & Goldman, *supra* note 128.

133. *Id.* Rasheed was the Taliban's military commander for southeastern Afghanistan. Bill Roggio, *Anas Haqqani Extols Virtues of His 'Legendary Father' on Taliban's Official Website*, FDD'S LONG WAR J. (Sept. 3, 2020), <https://www.longwarjournal.org/archives/2020/09/anas-haqqani-extols-virtues-of-his-legendary-father-on-talibans-official-website.php> [<https://perma.cc/G9TT-8PGY>].

134. Declan Walsh, *2 Haqqani Militant Leaders Are Captured, Afghan Officials Say*, N.Y. TIMES (Oct. 16, 2014), <https://www.nytimes.com/2014/10/17/world/asia/haqqani-leaders-arrested-afghanistan-khost.html> [<https://perma.cc/3AHE-H3RP>].

135. Roggio, *supra* note 133.

136. *Id.*

137. Zucchini & Goldman, *supra* note 128.

138. *See infra* Section III.B.2.

139. Zucchini & Goldman, *supra* note 128.

140. *Women's Rights Our Red Line In Peace Process: Ghani*, TOLONNEWS (Apr. 12, 2019), <https://tolonews.com/afghanistan/women's-rights-our-red-line-peace-process-ghani> [<https://perma.cc/73EQ-G5PW>].

previously stated that the constitution and human rights were among the government's red lines in the peace negotiations.¹⁴¹ The evidence, however, shows that they largely excluded women in the peace talks.¹⁴² In addition, even state actors have been complicit in gender-based violence against women in Afghanistan.¹⁴³

For the reasons explained in this section, releasing these three senior Taliban commanders demonstrated the unwillingness of the Afghan government to genuinely carry out proceedings against those who appear to be most responsible for the alleged international crimes in Afghanistan. In particular, President Ghani's surrender of these leaders to the Taliban showed that (1) the proceedings—lacking the necessary independence and impartiality—are inconsistent with an intent to bring the persons concerned to justice (Article 17(2)(c));¹⁴⁴ and (2) the release effectively shielded the persons concerned from criminal responsibility (Article 17(2)(a)).¹⁴⁵ Moreover, besides indicating unwillingness, the aforementioned factors impugned the ability of the state to otherwise genuinely carry out its proceedings (Article 17(3)).¹⁴⁶

There were significant questions about the legality and propriety of the Afghan government's release of these three senior Taliban commanders for the purposes of conducting genuine proceedings. First, the process of releasing these three Taliban leaders contravened the government's self-proclaimed valid approval procedure for freeing many other highly dangerous Taliban prisoners. In August 2020, President Ghani confessed that he lacked the independent legal authority to release hundreds of high-profile Taliban

141. *Taliban Afraid of Elections for Being 'Isolated': Saleh*, TOLONews (July 23, 2019), <https://tolonews.com/elections-2019/taliban-afraid-elections-being-%E2%80%98isolated%E2%80%99-saleh> [https://perma.cc/YL6Z-FBJL].

142. See, e.g., JORRIT KAMMINGA ET AL., *BECAUSE SHE MATTERS: ENSURING WOMEN'S MEANINGFUL PARTICIPATION IN PEACEBUILDING IN AFGHANISTAN 3* (Cordaid & Oxfam eds., Sept. 2020), <https://www.cordaid.org/en/wp-content/uploads/sites/11/2020/09/tr-because-she-matters-afghanistan-peacebuilding-150920-en.pdf> [https://perma.cc/J5TF-7Q53] (finding that Afghan women have been absent from approximately 80% of peace-related meetings held between 2005 and 2020).

143. See Mehdi J. Hakimi, *Elusive Justice: Reflections on the Tenth Anniversary of Afghanistan's Law on Elimination of Violence Against Women*, 18 *Nw. J. Hum. Rts.* 52, 63–67 (2020).

144. Rome Statute, *supra* note 4, art. 17(2)(c).

145. *Id.* art. 17(2)(a).

146. *Id.* art. 17(3)(c).

prisoners.¹⁴⁷ His solution was convening a consultative assembly to approve their release.¹⁴⁸ It is puzzling, however, why President Ghani did not feel the need for a similar consultation and approval process prior to sanctioning the release of these three Haqqani leaders. Indeed, given the seniority and influential role of these Taliban commanders, the Afghan government should have been even more vigilant before crossing its own self-imposed “red line.” Instead, President Ghani did the opposite by summarily releasing these senior militant leaders without even a brief public consultation as he had pledged to do.¹⁴⁹

Second, under the Afghan Criminal Procedure Code, the perpetrators of war crimes and crimes against humanity may not be pardoned or have their sentences commuted.¹⁵⁰ The Afghan Penal Code also provides for the criminal responsibility of commanders and high ranking officials in the context of Rome Statute crimes,¹⁵¹ which is likely the category that these three senior Haqqani commanders fell into.¹⁵² That explains, for instance, the OTP’s requests for information on two senior Haqqani leaders convicted by Afghan courts in 2016—very likely among these three freed Taliban commanders.¹⁵³ It is unclear how the release of these Taliban commanders complies with Afghan criminal law and related Rome Statute obligations. As with the case of hundreds of other serious Taliban offenders, there were additional questions concerning the legality of surrendering these three Taliban leaders.¹⁵⁴

147. *President Ashraf Ghani’s Message on the Occasion of Eid-ul-Adha*, OFF. OF THE PRESIDENT OF AFG. (July 31, 2020), <https://web.archive.org/web/20210612113733/https://president.gov.af/en/president-ashraf-ghanis-message-on-the-occasion-of-eid-ul-adha//https://perma.cc/88PX-TLFG> [hereinafter President Ghani’s Speech].

148. This consultative assembly, however, also likely lacks the requisite legal authority to sanction such release under Afghan law. *See infra* Section III.B.2.

149. It is also unclear what role, if any, the competent judicial authorities played in President Ghani’s decision to release the high-level commanders.

150. QANOON-E EJRAAT-E JAZAYEE [CRIMINAL PROCEDURE CODE], Annex 1, Official Gazette no. 1318, arts. 10–11 (2018) (Afg.), <https://www.afghanistan-analysts.org/wp-content/uploads/2016/01/2015-09-Pres.-Legis.-Decree-76-Annex-1-to-CPC-English-2016-Jan.-11-v.4-from-UNAMA-RoL-Hartmann-2.pdf> [https://perma.cc/6UWL-BPS5] [hereinafter CPC Annex 1].

151. PENAL CODE, *supra* note 96, arts. 342–343. These provisions are intended to reflect similar Rome Statute rules concerning the criminal responsibility of commanders and other superiors. *See* Rome Statute, *supra* note 4, art. 28.

152. For instance, according to Afghan officials, Hafiz Rashid was responsible for a car bombing that killed at least 89 people in a bazaar in eastern Afghanistan in summer 2014. Walsh, *supra* note 134.

153. *See* OTP Report 2016, *supra* note 117, ¶ 215.

154. *See infra* Section III.B.2.

Third, the evidence suggests that this high-level release was likely influenced by political rather than legal considerations. Back in 2016, the Taliban had warned that there would be “very disastrous and dangerous consequences for the current regime” and “a lot of blood will be spilled” if Afghan authorities executed Anas Haqqani.¹⁵⁵ In attempting to justify his government’s reversal on the “red line” issue of releasing Anas Haqqani,¹⁵⁶ President Ghani stated that the decision was “a tough, but important” one and a “humanitarian gesture,”¹⁵⁷ intended to bring “peace and stability” to Afghanistan.¹⁵⁸ In reference to his decision to release the three Taliban leaders, President Ghani added that “to reach a peace with dignity we have to pay this bitter price.”¹⁵⁹

In response, the Taliban stated that the prisoner swap was “good progress for building . . . goodwill and can aid the peace progress.”¹⁶⁰ The Afghan government did not appear to offer any explanation on the legal basis for its decision. Anas Haqqani then became an official representative of the Taliban in the intra-Afghan peace negotiations.¹⁶¹ The Afghan peace process also saw the release of other senior Taliban leaders such as Mullah Abdul Ghani Baradar.¹⁶²

Fourth, it is also unclear what role, if any, the competent judicial authorities played in releasing the prisoners consistent with Afghan law. In September 2016, the Taliban openly threatened to

155. See, e.g., Bill Roggio, ‘Blood Will Be Spilled’ If Anas Haqqani Is Executed, Taliban Threatens, FDD’S LONG WAR J. (Sept. 6, 2016), <https://www.longwarjournal.org/archives/2016/09/blood-will-be-spilled-if-anas-haqqani-is-executed-taliban-threatens.php> [https://perma.cc/4BPQ-ZASY].

156. Anisa Shaheed, *Ghani’s Changing Stance on Release of Prisoners*, TOLONews (Aug. 10, 2020), <https://tolonews.com/afghanistan/ghani’s-changing-stance-release-prisoners> [https://perma.cc/88YE-YPVU].

157. *US and Australian Hostages Freed in Taliban Prisoner Swap*, *supra* note 126.

158. Salahuddin & Hassan, *supra* note 123.

159. *Ghani: Haqqani Network Prisoners to Be Freed for AUAF Professors*, TOLONews (Nov. 12, 2019), <https://tolonews.com/afghanistan/ghani-confirms-release-haqqani-network-prisoners> [https://perma.cc/X6R6-77UV].

160. Salahuddin & Hassan, *supra* note 123.

161. Tamim Hamid, *Doha Talks: A Closer Look at the Taliban Team*, TOLONews (Sept. 12, 2020), <https://tolonews.com/afghanistan-166248> [https://perma.cc/7HFA-4956].

162. *Mullah Baradar: Taliban Say Founder ‘Freed by Pakistan’*, BBC NEWS (Oct. 24, 2018), <https://www.bbc.com/news/world-asia-45971366> [https://perma.cc/EM9K-6CXD]. Pakistan released Mullah Abdul Ghani Baradar in October 2018. *Id.* Mullah Baradar, a co-founder of the Taliban, previously served as the group’s second-in-command and coordinated their military operations in southern Afghanistan. *Id.*

attack “judicial installations” if Afghanistan’s higher courts upheld the lower court’s death sentence for Anas Haqqani.¹⁶³ In their warning, the Taliban claimed that “many judicial installations were [previously] attacked” by the militant group, resulting in a “severe blow to the government.”¹⁶⁴ The combination of the threats from the Taliban and the sudden release of prisoners strongly imply that the government short-circuited appropriate legal and judicial processes for political reasons. Such circumvention impugns the independence and impartiality of the proceedings and is inconsistent with an intent to bring the alleged perpetrators to justice.

Fifth, it appears that the released Taliban leaders include the *only* leaders of the Haqqani Network to have ever been held by the Afghan government.¹⁶⁵ According to a 2016 report by the OTP, “two senior members of the Haqqani Network were [reportedly] prosecuted and convicted by a national primary court in August 2016 for an unknown alleged conduct.”¹⁶⁶ The report further stated that, apart from these two senior Haqqani Network members, “no leaders of the principal anti-government armed groups, or other members situated at the highest echelons of responsibility . . . have been reportedly investigated or prosecuted.”¹⁶⁷ Anas Haqqani and Hafiz Abdul Rashid were captured in 2014.¹⁶⁸ According to August 2016 reports, Afghanistan’s Attorney General’s Office had confirmed that Anas Haqqani was sentenced to death by an Afghan primary court,¹⁶⁹ which prompted threats by the Taliban against the enforcement of the verdict in September 2016.¹⁷⁰ Considering the need for greater vigilance in prosecuting those most responsible for international crimes, releasing Haqqani Network members of this seniority and significance lends further weight to the argument that there was possible impropriety in the legal proceedings.

Sixth, the OTP’s report also underscored the Afghan government’s failure to share information on proceedings against these

163. Roggio, *supra* note 155.

164. *Id.*

165. OTP Report 2016, *supra* note 117, ¶ 215.

166. *Id.*

167. *Id.*

168. Walsh, *supra* note 134.

169. See, e.g., *Afghan Court Sentences Senior Taliban Leader Anas Haqqani to Death*, ZEE NEWS (Aug. 29, 2016), https://zeenews.india.com/news/asia/afghan-court-sentences-senior-taliban-leader-anas-haqqani-to-death_1923601.html [<https://perma.cc/Z2R9-92GQ>].

170. See, e.g., Roggio, *supra* note 155.

senior Haqqani figures.¹⁷¹ Afghanistan's lack of transparency regarding the cases of these high-level Taliban leaders violated its Rome Statute obligation to cooperate with the Court.¹⁷² Such non-cooperation on potentially critical cases, in conjunction with the subsequent release of, in all likelihood, the same individuals, evinced bad faith by the state and, accordingly, warrants drawing an adverse inference regarding Afghanistan's willingness to carry out genuine proceedings. Besides the case of these senior Haqqani commanders, the Afghan government was also criticized for secrecy in releasing other Taliban prisoners.¹⁷³

The foregoing concerns around the legality and propriety of the release of these senior Taliban commanders, who were among the most influential Taliban leaders ever held by Afghan authorities, along with Afghanistan's lack of transparency, demonstrated an unwillingness to genuinely carry out proceedings on two grounds. First, these issues impugned the independence and impartiality of these proceedings as well as the government's "intent to bring [the alleged perpetrators] to justice."¹⁷⁴ Second, the national proceedings or decisions concerning the three Taliban commanders, which culminated in their release, were arguably undertaken "for the purpose of shielding [them] from criminal responsibility."¹⁷⁵

Besides demonstrating the unwillingness of the Afghan government under Article 17(2) of the Statute, it could be further argued that, pursuant to Article 17(3) of the Statute, the aforementioned factors also impugned the ability of the state to "otherwise" genuinely "carry out its proceedings," particularly in light of the apparently limited role of the Afghan judicial system in the

171. OTP Report 2016, *supra* note 117, ¶ 215.

172. Rome Statute, *supra* note 4, arts. 86–87.

173. See, e.g., Anisa Shaheed, *Some Jirga Delegates Admit Lack of Information on 400 Inmates*, TOLONews (Aug. 9, 2020), <https://tolonews.com/afghanistan/some-jirga-delegates-admit-lack-information-400-inmates> [<https://perma.cc/X6GX-YELX>]; see also Gulabudin Ghubar, *Govt Bashed for Not Disclosing 400 Prisoners' Information*, TOLONews (Aug. 2020), <https://tolonews.com/afghanistan/govt-bashed-not-disclosing-400-prisoners-information> [<https://perma.cc/JUV2-37XG>].

174. Rome Statute, *supra* note 4, art. 17(2)(c).

175. *Id.* art. 17(2)(a). The Afghan authorities' deliberate conduct—in crossing their own red line of not releasing the Haqqani leaders, potentially violating Afghan law and Rome Statute obligations, acting with apparent political motivations, limiting the role of competent judicial authorities in the matter, and obstinately refusing to share information with the ICC—effectively shielded these senior Taliban commanders from criminal responsibility. This practical outcome is all the more evident now that the Taliban control Afghanistan, including its criminal justice system.

release process and broader systemic challenges plaguing the national judicial apparatus.¹⁷⁶

B. The Doha Agreement and the Taliban Prisoner Swap

On February 29, 2020, the United States and the Taliban signed an agreement in Doha, Qatar, intended to accelerate peace efforts in Afghanistan.¹⁷⁷ The accord dealt with various issues including, inter alia, the withdrawal of foreign troops from Afghanistan, counter-terrorism obligations by the Taliban, and the start of intra-Afghan negotiations.¹⁷⁸

The Doha pact also called for the release of 5,000 Taliban prisoners in exchange for 1,000 Afghan government captives as a “confidence building measure with the coordination and approval of all relevant sides.”¹⁷⁹ Despite initial refusal,¹⁸⁰ President Ghani agreed to release the 5,000 Taliban prisoners¹⁸¹—a reversal just two days after a controversial inauguration ceremony for his second presidential term.¹⁸²

The OTP attributes many atrocities to the Taliban and their affiliated Haqqani Network.¹⁸³ Yet the Afghan government completed

176. See Rome Statute, *supra* note 4, art. 17(3); see also *infra* Part VI.

177. Agreement for Bringing Peace to Afghanistan between the Islamic Emirate of Afghanistan Which Is Not Recognized by the United States as a State and Is Known as the Taliban and the United States of America, U.S.-Islamic Emirate of Afghanistan, Feb. 29, 2020, <https://www.state.gov/wp-content/uploads/2020/02/Agreement-For-Bringing-Peace-to-Afghanistan-02.29.20.pdf> [<https://perma.cc/SSH7-KKPF>] [hereinafter U.S.-Taliban Agreement].

178. *Id.*

179. *Id.*

180. According to President Ghani, “the release of any prisoners was a decision for his government to take and ... he wasn’t ready to release prisoners before the start of negotiations.” Kathy Gannon, *Afghan Peace Deal Hits First Snag over Prisoner Releases*, ASSOCIATED PRESS (Mar. 1, 2020), <https://apnews.com/article/8cfce4344ad386697c78b033a3cb3dc6> [<https://perma.cc/9WZN-KD2M>].

181. David Welna, *In Reversal, Afghan Leader Agrees to Release Taliban Prisoners*, NPR (Mar. 11, 2020, 5:31 PM), <https://www.npr.org/2020/03/11/814640011/in-reversal-afghan-leader-agrees-to-release-taliban-prisoners> [<https://perma.cc/8CVU-BUQS>].

182. Mujib Mashal et al., *Ghani Takes the Oath of Afghan President. His Rival Does, Too.*, N.Y. TIMES (Mar. 9, 2020), <https://www.nytimes.com/2020/03/09/world/asia/afghanistan-president-inauguration-ghani-abdullah.html> [<https://perma.cc/JZ39-U9WD>].

183. See OTP Request, *supra* note 101, ¶¶ 72, 123.

the controversial release of the 5,000 Taliban prisoners as part of the peace negotiations.¹⁸⁴ After the completion of the prisoner swap, the intra-Afghan peace negotiations commenced on September 12, 2020, in Doha, Qatar.¹⁸⁵ Overall, the Afghan government freed more than 5,600 Taliban members.¹⁸⁶

As with the surrender of the senior Haqqani commanders,¹⁸⁷ various aspects of the Taliban prisoner release suggested the Afghan government's unwillingness to hold perpetrators of core crimes accountable to justice. These issues include the likely involvement of some freed prisoners in crimes under the Rome Statute, the flawed approval process of the release, and the freed inmates' return to the battlefield. The following three subsections will examine these issues in turn.

1. Freed Detainees Likely Included Perpetrators of Crimes Under the Rome Statute

Many Taliban inmates released by the Afghan government were convicted of grave crimes.¹⁸⁸ Approximately 200 prisoners were allegedly behind “masterminding attacks on embassies, public squares, and government offices, killing thousands of civilians in recent years.”¹⁸⁹ According to official government documents, 156 prisoners were sentenced to death, 105 were convicted of homicide, and dozens more convicted of other serious crimes such as kidnapping

184. Ayaz Gul, *Afghan Prisoner Swap Ends, Peace Talks to Finally Begin*, VOICE OF AM. (Sept. 3, 2020, 3:12 PM), https://www.voanews.com/a/south-central-asia_afghan-prisoner-swap-ends-peace-talks-finally-begin/6195397.html [<https://perma.cc/AJ5X-9E45>].

185. Susannah George, *Emboldened on an International Stage, Taliban Set for First Official Peace Talks with the Afghan Government*, WASH. POST (Sept. 12, 2020), https://www.washingtonpost.com/world/asia_pacific/afghanistan-taliban-peace-talks/2020/09/11/e06a598c-ddb4-11ea-b4f1-25b762cddb4_story.html [<https://perma.cc/8XPU-FBYA>].

186. *See e.g.*, Ayaz Gul, *Afghan Leaders: US-Backed Peace Talks with Taliban to Begin Next Week*, VOICE OF AM. (Aug. 27, 2020, 11:13 PM), <https://www.voanews.com/south-central-asia/afghan-leaders-us-backed-peace-talks-taliban-begin-next-week> [<https://perma.cc/WH75-3W75>]; *see also* Abdulhaq Omeri, *Taliban Seeks Release of More Prisoners in Talks with US Envoy*, TOLONews (Oct. 29, 2020), 29, 2020), 29, 2020), <https://tolonews.com/afghanistan-167393> [<https://perma.cc/CK28-2VZE>].

187. *See supra* Section III.A.

188. *Afghan Loya Jirga Meeting to Decide Fate of Remaining 400 Taliban Prisoners*, RADIO FREE EUR./RADIO LIBERTY (Aug. 7, 2020, 3:06 PM), <https://www.rferl.org/a/afghanistan-loya-jirga-taliban-prisoners/30770715.html> [<https://perma.cc/UE74-G7VK>].

189. *Id.*

and rape.¹⁹⁰ The documents also revealed that forty-four prisoners were “blacklisted” by the Afghan government and its partners.¹⁹¹ The crimes of some inmates were classified as “unidentifiable.”¹⁹²

According to the Taliban, however, *all* of the released 5,000 prisoners were sentenced to death.¹⁹³ Despite the inconsistency between the Taliban and Afghan government statements on the number of released detainees who were sentenced to death, there seems to be little doubt about the gravity of offenses perpetrated by many of these freed prisoners.

President Ghani confessed that the prisoners “have a lot of blood on their hands.”¹⁹⁴ Nevertheless, he deemed the government’s decision to release these “hardened criminals” as “dangerous” but “necessary.”¹⁹⁵ Other countries, including France and Australia, objected to certain Taliban prisoners being released.¹⁹⁶ There was no guarantee that the released prisoners would not resume fighting.¹⁹⁷

190. Mujib Mashal & Fatima Faizi, *Afghanistan to Release Last Taliban Prisoners, Removing Final Hurdle to Talks*, N.Y. TIMES (Aug. 9, 2020), <https://www.nytimes.com/2020/08/09/world/asia/afghanistan-taliban-prisoners-peace-talks.html> [<https://perma.cc/29RL-UA4A>].

191. *Id.*

192. *Id.*

193. *See, e.g.*, Zahra Rahimi, *Taliban Warns Govt Against Execution of Its Jailed Members*, TOLONews (Jan. 21, 2021), <https://tolonews.com/afghanistan-169415> [<https://perma.cc/G9Q5-XS3J>].

194. Chris Bradford, *WAR ON DRUGS: Britain Will Be Flooded with Class A Drugs If 400 Taliban Fighters Released under US Peace Deal, Afghan President Warns*, THE SUN (Aug. 19, 2020, 4:27 PM), <https://www.thesun.co.uk/news/12444140/britain-flooded-class-a-drugs-taliban-us-afghan-president> [<https://perma.cc/A9AM-V4PZ>].

195. Frud Bezhan, *Stalling Strategy? Long-Delayed Afghan Peace Talks Hit by New Obstacles*, RADIO FREE EUR./RADIO LIBERTY (Aug. 19, 2020, 4:40 PM), <https://www.rferl.org/a/afghan-taliban-peace-talks-halted-by-concern-over-dangerous-prisoners-other-obstacles/30792422.html> [<https://perma.cc/YFK5-YND4>]; *see also* *Taliban Prisoner Release: Afghan Government Begins Setting Free Last 400*, BBC NEWS (Aug. 14, 2020), <https://www.bbc.com/news/world-asia-53775035> [<https://perma.cc/TNX2-XLEM>].

196. Abdul Qadir Sediqi, *Australia, France Object to Release of Final Taliban Prisoners: Officials*, REUTERS (Aug. 17, 2020, 9:55 AM), <https://www.reuters.com/article/us-afghanistan-taliban-prisoners/australia-france-object-to-release-of-final-taliban-prisoners-officials-idUSKCN25D1MQ> [<https://perma.cc/W4RD-5EWG>].

197. *See, e.g.*, *Freed Taliban Prisoners Eye Return to the Battlefield*, AGENCE FRANCE-PRESSE (June 10, 2020, 5:02 PM), <https://www.france24.com/en/20200610-freed-taliban-prisoners-eye-return-to-the-battlefield> [<https://perma.cc/528E-QJ9C>] (for instance, according to a Taliban commander, there should be “no ambiguity” concerning the re-deployment of the released prisoners to the battlefield); *see also infra* Section III.B.3.

The released inmates appeared to include perpetrators of crimes prohibited by the Rome Statute. For instance, some of these prisoners were allegedly responsible for the 2017 truck bombing near the Germany embassy in Kabul that killed more than 150 civilians and wounded 300 more—the deadliest insurgent attack since 2001.¹⁹⁸ Other inmates were linked to the 2018 attack on the Intercontinental Hotel in Kabul that killed forty people.¹⁹⁹

Both of these high-profile attacks arguably constitute the crime against humanity of murder pursuant to Article 7(1)(a) of the Statute.²⁰⁰ Indeed, the Prosecutor had highlighted similar attacks by the Taliban and affiliated armed groups in successfully seeking judicial authorization to commence a formal investigation.²⁰¹ The OTP's examples of acts of murder allegedly committed by the Taliban, for example, included the 2009 car bomb attack near the Indian embassy in Kabul²⁰² as well as the attacks on guesthouses and hotels in Kabul in 2010 and 2012.²⁰³

Human rights organizations have echoed these concerns about releasing Taliban members implicated in ICC crimes. The Afghanistan Independent Human Rights Commission, for instance, stated that “Taliban inmates who are accused of being involved in war crimes or crimes against humanity shouldn't be released from the jails by the government during the swap.”²⁰⁴

198. Hamid Shalizi & Abdul Qadir Sediqi, *Afghan President Signs Off on Taliban Prisoner Release, Peace Talks Expected in Days*, REUTERS (Aug. 10, 2020, 2:03 AM), <https://www.reuters.com/article/us-afghanistan-taliban/afghan-president-signs-off-on-taliban-prisoner-release-peace-talks-expected-in-days-idUSKCN2560DL> [https://perma.cc/C2VW-2FWD]; see also Rod Nordland, *Death Toll in Kabul Bombing Has Hit 150, Afghan President Says*, N.Y. TIMES (June 6, 2017), <https://www.nytimes.com/2017/06/06/world/asia/kabul-bombing-death-toll-increases.html> [https://perma.cc/PLJ4-DFTQ]; see also *Afghan Talks to Kick Off as Kabul Set to Free Taliban Prisoners*, AL JAZEERA (Aug. 10, 2020), <https://www.aljazeera.com/news/2020/08/afghan-talks-kick-kabul-set-free-taliban-prisoners-200810054832569.html> [https://perma.cc/E5XS-ZWUZ].

199. *Afghan Talks to Kick Off as Kabul Set to Free Taliban Prisoners*, *supra* note 198; see also Bezhani, *supra* note 195.

200. Rome Statute, *supra* note 4, art. 7(1)(a).

201. OTP Request, *supra* note 101, ¶ 102.

202. *Id.*

203. *Id.* ¶¶ 103, 105.

204. *Ghani Signs Decree to Release Taliban Prisoners*, TOLONews (Mar. 11, 2020), <https://tolonews.com/afghanistan/ghani-signs-decree-release-taliban-prisoners> [https://perma.cc/2YCK-SLX9].

Furthermore, the government has not disclosed sufficient details regarding the specific crimes of the 156 inmates sentenced to death. Although the Taliban claim that all 5,000 prisoners were sentenced to death, Afghanistan's Penal Code mandates the death penalty in very limited circumstances, which include the commission of war crimes and crimes against humanity.²⁰⁵ Thus, it is possible, perhaps likely, that some of those freed 156 convicts who were sentenced to death may have committed acts that constituted war crimes or crimes against humanity.

As with the release of the senior Haqqani leaders, freeing significant numbers of Taliban prisoners linked to grave crimes that likely violate the Rome Statute demonstrated the Afghan government's unwillingness to genuinely carry out proceedings. In particular, as discussed in the subsequent section, the release of numerous individuals who may be implicated in ICC crimes shows the lack of independence and impartiality of the proceedings, which "is inconsistent with an intent to bring the person[s] concerned to justice."²⁰⁶ Moreover, freeing these convicts despite the gravity of their crimes may also indicate that the national proceedings or decisions were undertaken "for the purpose of shielding [them] from criminal responsibility."²⁰⁷

2. The Flawed Approval Process of the Prisoner Release

President Ghani admitted that he lacked the legal authority to release the most serious Taliban offenders.²⁰⁸ His solution was to put the ball in the court of a hastily re-convened consultative assembly known as Loya Jirga, composed of about 3,200 Afghan delegates from various provinces, in August 2020.²⁰⁹ According to President Ghani, the consultative assembly "decided to approve the release of the

205. PENAL CODE, *supra* note 96, art. 170(1).

206. Rome Statute, *supra* note 4, art. 17(2)(c).

207. *Id.* art. 17(2)(a).

208. President Ghani's Speech, *supra* note 147; *see also* Ashraf Ghani, Opinion, *Ashraf Ghani: Afghans and Their International Partners Have Paid the Costs. Now We're Taking a Risk for Peace.*, WASH. POST (Aug. 14, 2020), <https://www.washingtonpost.com/opinions/2020/08/14/ashraf-ghani-afghans-their-international-partners-have-paid-costs-now-were-taking-risk-peace> [<https://perma.cc/M267-JALZ>].

209. *See, e.g.,* *Afghan Loya Jirga Meeting to Decide Fate of Remaining 400 Taliban Prisoners*, *supra* note 188; *see also* *Afghan Assembly Approves Taliban Prisoner Release*, BBC NEWS (Aug. 9, 2020), <https://www.bbc.com/news/world-asia-53706638> [<https://perma.cc/6KVS-PXL6>].

prisoners, and the next day [the President] signed the [release] order.”²¹⁰

The approval process of the prisoner release was plagued by serious deficiencies that further suggest the Afghan government’s unwillingness to genuinely carry out investigations and prosecutions of ICC crimes. Broadly speaking, these deficiencies relate to the legality of the prisoner release and the flawed Loya Jirga process.

(i) *The Legality of the Prisoner Release*

There are material doubts concerning the legality of the Taliban prisoner release under Afghan law.²¹¹ First, there is a constitutional prohibition against releasing detainees with pending cases. Under the Afghan Constitution, the president has the power to pardon or commute the sentence of a person in accordance with the law.²¹² However, no institution, including the presidency, has the authority to release individuals whose cases are still pending before judicial organs.²¹³ Due to the government’s lack of transparency regarding the detainees, it is unclear whether the released 5,600 Taliban prisoners had pending cases before investigative, prosecutorial, or judicial bodies.²¹⁴

Second, in case of convictions, the perpetrators of war crimes and crimes against humanity may not be pardoned or have their sentences commuted under Afghan law.²¹⁵ In addition, there are further limitations for these particular convicts such as the unavailability of temporary release or conditional release.²¹⁶ As discussed earlier, the freed Taliban prisoners include individuals

210. Ghani, *supra* note 208.

211. See Ehsan Qaane, *To Release, or Not to Release? Legal Questions Around Ghani’s Consultative Loya Jirga on Taliban Prisoners*, AFG. ANALYSTS NETWORK (Aug. 7, 2020), <https://www.afghanistan-analysts.org/en/reports/war-and-peace/to-release-or-not-to-release-legal-questions-around-ghanis-consultative-loya-jirga-on-taliban-prisoners> [<https://perma.cc/37E7-LZC7>].

212. CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN Jan. 4, 2004, art. 64(18) [hereinafter CONSTITUTION].

213. *Id.* art. 122(1).

214. See, e.g., *Prisoner Release and Human Rights: Need for Clarity and Consistency from All Parties*, AFG. INDEP. HUM. RTS. COMM’N (July 18, 2020), https://www.aihrc.org.af/home/press_release/8933# [<https://perma.cc/6QPV-V64S>] (AIHRC issued a press release expressing concerns about the lack of information regarding the freed prisoners).

215. CPC Annex 1, *supra* note 150, art. 10.

216. *Id.* art. 12.

whose conduct likely constitutes crimes against humanity, such as the perpetrators of the truck bombing near the German embassy in 2017 and the attack on the Intercontinental Hotel in 2018.²¹⁷ The Afghanistan Independent Human Rights Commission (AIHRC) has also emphasized the legal prohibition against releasing Taliban inmates allegedly involved in ICC crimes.²¹⁸

Third, the release appears to contravene Afghanistan's Amnesty Law.²¹⁹ Before granting legal immunity to those involved in military conflict, the Amnesty Law stipulates that such individuals shall "join the process of national reconciliation" and "respect [Afghanistan's] constitution and other laws and abide them."²²⁰ However, there seems to be no evidence that the freed inmates actually fulfilled these statutory conditions.²²¹ Indeed, the only commitment made by the released prisoners was not to return to the battlefield—which was breached repeatedly.²²²

Fourth, individuals convicted of crimes against the internal and external security of Afghanistan face further legal hurdles. Under Afghan law, these particular convicts may only be pardoned, or have their punishment reduced, based on the recommendation of the Commission for the Consolidation of Peace.²²³ That commission, however, was dissolved in 2010.²²⁴

217. See *supra* Section III.B.1.

218. Ghani Signs Decree to Release Taliban Prisoners, *supra* note 204. According to the deputy head of the AIHRC, under "national and international laws, the president does not have the authority to release those individuals who are accused of being involved in war crimes and crimes against humanity." *Id.*

219. For analysis of the Amnesty Law, see *infra* Part V.

220. QANON-E MOSALEHA-E MILLI, AFW-E UMOMI WA SUBATE-E MILLI [LAW ON NATIONAL RECONCILIATION, GENERAL AMNESTY, AND NATIONAL STABILITY], Official Gazette No. 965, art. 3(2) (2008) (Afg.) (<https://www.legal-tools.org/doc/7825c2/pdf/#:~:text=This%20law%20is%20adopted%20for,enforced%20laws%20of%20the%20country>) [<https://perma.cc/Y9J2-YJZF>] [hereinafter Amnesty Law].

221. Qaane, *supra* note 211.

222. See *infra* Section III.B.3.

223. Amnesty Law, *supra* note 220, art. 4(2).

224. See, e.g., Qaane, *supra* note 211. While it appears that the Commission for the Consolidation of Peace has undergone changes and may have been superseded by other institutions, there is no clear indication that the statutory requirement mandating the Commission's recommendation for pardoning these particular Taliban convicts has been fulfilled in practice.

Fifth, Shari'a law bars the state from releasing convicts under certain circumstances.²²⁵ Islamic criminal law specifies that the punishment for certain crimes may not be pardoned or commuted by the state. These include crimes of *Hadd*, *Qisas*, and *Diat*.²²⁶ The penalties for these crimes cannot be reduced by the state because these transgressions constitute violations of the rights of God (*haq ul-Allah*) or the rights of the aggrieved individual or their legal heirs (*haq ul-abd*), rather than the rights of the state.²²⁷

As discussed earlier, according to the Afghan government, the crimes of the Taliban ex-prisoners included rape and homicide.²²⁸ These crimes may constitute *Hadd* (in case of rape)²²⁹ or *Qisas* (in case of homicide or bodily injury).²³⁰ If the requisite Shari'a conditions for *Hadd* or *Qisas* are met, the state lacks the authority to pardon or commute the penalties. In the case of *Qisas* crimes, it is also highly unlikely that most victims or their families would waive their private rights against the perpetrators.²³¹

Sixth, a valid pardon of criminal punishment does not extinguish any civil liability that may be owed by the convict.²³² Aggrieved parties are therefore legally entitled to their private right claims (*haq ul-abd*)—such as financial rights—against pardoned convicts.²³³ Despite de jure assurances, however, it remains unclear

225. Under the Afghan constitution, no law may contravene the tenets of Islam. CONSTITUTION, *supra* note 212, art. 3.

226. See QANOON-E EJRAAT-E JAZAYEE [CRIMINAL PROCEDURE CODE], Official Gazette no. 1132, art. 350(1) (2014) (Afg.) [hereinafter CRIMINAL PROCEDURE CODE]. Perpetrators of these crimes must be punished in accordance with the Hanafi jurisprudence of Islamic Shari'a. PENAL CODE, *supra* note 96, art. 2(2).

227. In the case of *Qisas*, for instance, only the victim or the victim's family may waive their private cause of action against the perpetrator; the state has no say in the matter. See, e.g., Robert Postawko, *Towards an Islamic Critique of Capital Punishment*, 1 UCLA J. ISLAMIC & NEAR E.L. 269, 301–02 (2002).

228. Mashal & Faizi, *supra* note 190.

229. See PENAL CODE, *supra* note 96, art. 636(2).

230. *Id.* art. 546(2).

231. According to the OTP, the victims strongly support the investigation into war crimes and crimes against humanity in Afghanistan. OTP Request, *supra* note 101, ¶¶ 365–72; see also, e.g., Naser Ahmad Salehi, *Mother of Killed Sons 'Will Not Forgive' Taliban*, TOLONews (Aug. 20, 2020), <https://tolonews.com/afghanistan/mother-killed-sons-will-not-forgive-taliban> [https://perma.cc/8L6U-HE4D].

232. See, e.g., CRIMINAL PROCEDURE CODE, *supra* note 226, art. 79(4) (a pardon shall not violate others' rights).

233. *Id.* art. 349. The civil case must be heard separately and independently from the criminal matter. *Id.* art. 297.

how individual claimants would practically seek redress against the freed Taliban prisoners, many of whom rejoined the Taliban on the battlefield.²³⁴

Seventh, considering the foregoing legality concerns, it appears that political considerations may have trumped legal constraints in the decision to release the Taliban convicts. Interestingly, President Ghani's reversal of his stance on this issue took place only two days after his controversial inauguration which, unlike his rival Abdullah Abdullah's parallel ceremony, was attended by senior foreign diplomats.²³⁵ According to President Ghani, he convened a consultative assembly to decide the fate of the most dangerous Taliban detainees in order "to enable the government of the Islamic Republic of Afghanistan to remove *all* obstacles to the peace."²³⁶ In reference to the release of Taliban inmates several months later, Vice President Saleh stated that "this *trust was blind* and *without a strategy*, we will not repeat it again."²³⁷

(ii) *The Consultative Loya Jirga*

Besides the legality issues outlined above, there were additional deficiencies in the approval process of releasing the Taliban inmates which cast further doubt on the government's willingness or ability to discharge its primary responsibility to prosecute international crimes. These deficiencies concerned the consultative Loya Jirga—the mechanism used by the Afghan government to approve the release of the most serious Taliban offenders.²³⁸

First, despite President Ghani's recourse to the Loya Jirga to authorize the government's actions, the Loya Jirga was also hogtied by the legal obstacles constraining the release of the Taliban prisoners discussed in the preceding section.²³⁹ As such, just like President Ghani, the Loya Jirga likely lacked the legal authority to sanction the release.

234. See *infra* Section III.B.3.

235. Mashal et al., *supra* note 182. President Ghani, according to Afghan politician Abdul Karim Khurram, "crossed his own red line in exchange for the inauguration." *Ghani Signs Decree to Release Taliban Prisoners*, *supra* note 204.

236. President Ghani's Speech, *supra* note 147 (emphasis added).

237. Anisa Shaheed, *Saleh Blames Released Taliban for Violence, No More 'Blind Trust'*, TOLONews (Feb. 11, 2021), <https://tolonews.com/afghanistan-169934> [<https://perma.cc/7WVB-PYXQ>] (emphasis added).

238. Gannon, *supra* note 180; see also Qaane, *supra* note 211.

239. See *supra* Section III.B.1.i.

Second, besides doubts over the Loya Jirga's power to approve the release, there were serious related questions concerning the legality of the Loya Jirga itself. The consultative assembly that, according to President Ghani, sanctioned the release did not meet the Afghan constitution's requirements for a Loya Jirga.²⁴⁰ Pursuant to the constitution, a proper Loya Jirga consists of, *inter alia*, the heads of district assemblies. District assembly elections, however, have not been held in Afghanistan.²⁴¹ As such, there are serious legitimacy questions as to whether the Loya Jirga met the necessary legal basis to perform its constitutional functions. Indeed, the speaker of the lower house of the parliament also objected to President Ghani's decision to convene the consultative Loya Jirga and deemed it "illegal."²⁴²

Third, the consultation process of the assembly was beset by additional problems. Despite being asked by the government to decide the fate of the most serious Taliban convicts, various delegates criticized the government's obdurate lack of transparency—for instance, its decision to withhold information regarding the Taliban prisoners' identities—during the proceedings.²⁴³ The Loya Jirga was also mired by other controversies such as the violent removal of a female parliamentarian critical of the release.²⁴⁴

Fourth, the August 2020 consultative Loya Jirga that purportedly approved the release was largely a repeat of another recent assembly—comprising the same delegates and dealing with the same topic—held in May 2019.²⁴⁵ The May 2019 assembly provided President Ghani with practically the same advice on the issue of

240. CONSTITUTION, *supra* note 212, art. 110.

241. See, e.g., Ali Yawar Adili, *Afghanistan's 2019 Elections (1): The Countdown to the Presidential Election Has Kicked Off*, AFG. ANALYSTS NETWORK (Jan. 23, 2019), <https://www.afghanistan-analysts.org/en/reports/political-landscape/afghanistans-election-conundrum-the-countdown-to-the-presidential-election-has-kicked-off> [<https://perma.cc/A39C-LRL6>]; see also Anisa Shaheed, *Very Few Willing to Run for District Council Elections*, TOLONews (June 13, 2018), <https://tolonews.com/afghanistan/very-few-willing-run-district-council-elections> [<https://perma.cc/UB5T-RMNR>].

242. Khwaja Basir Fitri, *Loya Jirga Illegal in Parliament Presence: Rahmani*, PAJHWOK AFG. NEWS (Aug. 5, 2020, 5:52 PM), <https://www.pajhwok.com/en/2020/08/05/loya-jirga-illegal-parliament-presence-rahmani> [<https://perma.cc/8PRJ-3UUQ>].

243. See, e.g., Shaheed, *supra* note 173; see also Ghubar, *supra* note 173.

244. Zahra Rahimi, *Protesters at Jirga Claim Mistreatment*, TOLONews (Aug. 8, 2020), <https://tolonews.com/afghanistan/protesters-jirga-claim-mistreatment> [<https://perma.cc/VEU4-A6J8>].

245. See Tamim Hamid, *Govt Yet to Disclose Jirga Attendees' Details*, TOLONews (May 5, 2019), <https://tolonews.com/afghanistan/govt-yet-disclose-jirga-attendees'-details> [<https://perma.cc/3X8K-PXQR>]; see also Qaane, *supra* note 211.

Taliban inmates: release the prisoners as a “goodwill gesture.”²⁴⁶ Accordingly, President Ghani ordered the release of nearly 890 prisoners in 2019.²⁴⁷

In defending that decision, President Ghani emphasized that his order was “made in line with the demand of the [2019] Peace Jirga in Kabul.”²⁴⁸ He further stated that there was no objection by the assembly members; in fact, according to the president, “there [was] a call for [even] more of them to be freed.”²⁴⁹ In addressing the May 2019 consultative Loya Jirga, President Ghani vowed that the assembly’s “resolution will change into an action plan for the Afghan government.”²⁵⁰ As with many other unanswered questions, however, it is unclear why the Afghan government decided to re-deploy the same flawed consultative Loya Jirga for a second time to approve the same matter. Given the aforementioned legal and procedural issues, the redundant do-over may have been driven by political calculations.²⁵¹

The deficiencies outlined above concerning the approval process of the prisoner release likely demonstrated unwillingness to genuinely carry out proceedings and hold perpetrators of grave crimes to account.²⁵² The potential irregularities and political interference impugned the independence and impartiality of the proceedings as well as the government’s intent to bring the alleged perpetrators to justice.²⁵³

246. Karim Amini, *Critics Lash Out at Ghani over Prisoners Release Decision*, TOLONNEWS (June 5, 2019), <https://tolonews.com/afghanistan/critics-lash-out-ghani-over-prisoners-release-decision> [<https://perma.cc/E5MW-YUA9>].

247. *Id.*

248. *Id.*

249. *Id.*

250. Hamid, *supra* note 245. The 2019 consultative Loya Jirga was buffeted with similar criticisms, such as lack of transparency and inclusiveness, and boycotted by nearly all mainstream political parties. *See id.*

251. It has been argued, for instance, that repeating the consultative Loya Jirga was a delaying tactic by President Ghani to retain power. Peace negotiations were expected to seek a neutral interim government. *See, e.g., Afghan Loya Jirga Meeting to Decide Fate of Remaining 400 Taliban Prisoners*, RADIO FREE EUR./RADIO LIBERTY (Aug. 7, 2020, 3:06 PM), <https://www.rferl.org/a/afghanistan-loya-jirga-taliban-prisoners/30770715.html> [<https://perma.cc/9ZE7-2SRJ>].

252. *See also* Qaane, *supra* note 211.

253. Rome Statute, *supra* note 4, art. 17(2)(c).

3. Broken Pledges: Freed Inmates Returned to the Battlefield

The conditions for the release, as reflected in the presidential decree, required the Taliban prisoners to make a written commitment not to return to the battlefield.²⁵⁴ Following the issuance of the release order, President Ghani's spokesman stated that "[t]he Taliban prisoners will not be released without a guarantee," and that "[Afghans] should be assured that these individuals do not return to the war to fuel Taliban's war machine."²⁵⁵

Freeing the 5,600 Taliban detainees and senior Haqqani commanders did not produce the impact the Afghan government had hoped for. According to President Ghani, rather than reducing hostilities and moving towards a comprehensive ceasefire, the Taliban violence increased substantially.²⁵⁶ This surge in violence, according to Afghan authorities, was driven in key part by scores of Taliban detainees freed by the government. Vice President Amrullah Saleh, for instance, stated that the government was "ready to prove case-by-case that the 5,500 Taliban prisoners that we released for peace—they are somehow *involved in the surge in violence and murders of the people—this trust was blind and without a strategy, we will not repeat it again.*"²⁵⁷

In direct violation of the Taliban's pledge,²⁵⁸ many of the freed prisoners were "redeployed" to the battlefields as Taliban soldiers and commanders.²⁵⁹ Within a few months of the release, hundreds of these ex-prisoners took up arms against Afghan forces.²⁶⁰ According to the

254. TOLONews, *supra* note 204.

255. *Id.*

256. Ghani: Taliban Violence Has Increased 'Substantially', TOLONews (Nov. 10, 2020), <https://tolonews.com/afghanistan-167664> [<https://perma.cc/EGP2-TMCT>].

257. Shaheed, *supra* note 237 (emphasis added).

258. See, e.g., Sharif Amiry, *Afghan Govt Resumes Release of 'Hardcore' Taliban Prisoners*, TOLONews (Sept. 2, 2020), <https://tolonews.com/afghanistan/afghan-govt-resumes-release-hardcore-taliban-prisoners> [<https://perma.cc/R4AP-RPYW>].

259. Anisa Shaheed, *Taliban Prisoners Have Returned to Battlefields: Govt*, TOLONews (Nov. 10, 2020), <https://tolonews.com/afghanistan-167667> [<https://perma.cc/SD8J-SDFW>]; see also *Released Taliban Prisoners Rejoin Battleground, Afghan Officials Say*, KABUL NOW (Sept. 27, 2020), <https://kabalnow.af/2020/09/released-taliban-prisoners-rejoin-battleground-afghan-officials-say> [<https://perma.cc/2YUV-XWHU>] (according to Abdullah Abdullah, chairperson of Afghanistan's High Council for National Reconciliation, and Asadullah Khalid, the acting defense minister, more than half of the freed inmates have rejoined the Taliban insurgency).

260. Sayed Salahuddin, *Freed Taliban Prisoners 'Returning to Battlefield'*, ARAB NEWS (Nov. 11, 2020), <https://www.arabnews.com/node/1761726/world> [<https://perma.cc/SYP3-VJ58>].

Afghan military, the released inmates were behind most of the attacks in the western part of the country.²⁶¹ Similarly, in the northern Faryab province, 70 percent of the ex-prisoners resumed violence.²⁶² Overall, according to the Ministry of Foreign Affairs, approximately 90 percent of the freed ex-detainees returned to the battlefield as of February 2021.²⁶³

While the Taliban denied Kabul's claims,²⁶⁴ other sources also confirmed that many of the freed inmates rejoined the insurgency as commanders and fighters.²⁶⁵ According to a study by Queen's University in Northern Ireland, 68 percent of the Taliban ex-prisoners resumed supporting the Taliban's war effort.²⁶⁶

The government's lack of transparency and due diligence in the release process were likely factors in the unimpeded return of the ex-inmates to the battlefield. For instance, some Loya Jirga delegates who were asked by the government to decide on the release criticized the government's withholding of information regarding the prisoners' identities.²⁶⁷ Moreover, lawmakers also bemoaned the government's

261. Shaheed, *supra* note 259.

262. *70pc Freed Taliban Prisoners Have Returned to Battlefield*, AFG. TIMES (Dec. 26, 2020), <http://www.afghanistantimes.af/70pc-freed-taliban-prisoners-have-returned-to-battlefield> [https://perma.cc/Y8VG-7DU9]; *see also* Mohammad Haroon Alim, *Saleh: Daesh-Taliban Threatened to Turn Kabul into Shia Slaughterhouse*, KHAAMA PRESS (Dec. 12, 2020, 11:25 AM), <https://www.khaama.com/saleh-daesh-taliban-threatened-to-turn-kabul-into-shia-slaughterhouse-8768699/> [https://perma.cc/4DVU-NE5U] (one of the pardoned Taliban ex-prisoners "returned on a killing spree").

263. *Amar: 90 Percent of Freed Taliban Prisoners Have Returned to Battlefield*, VOICE OF AM. DARI (Feb. 4, 2021), <https://www.darivoa.com/a/ninety-percent-of-taliban-fighters-return-to-battle-field-afghan-foriegne-minister-said/5764828.html> [https://perma.cc/4BWK-E9DA].

264. Salahuddin, *supra* note 260. According to a former Taliban official, the released Taliban fighters have gone to the battlefields to visit their friends rather than actually resuming combat. *Released Taliban Prisoners Rejoin Battleground, Afghan Officials Say*, *supra* note 259.

265. Lynne O'Donnell, *Defying Peace Deal, Freed Taliban Return to Battlefield*, FOREIGN POL'Y. (Sept. 3, 2020, 12:20 PM), <https://foreignpolicy.com/2020/09/03/defying-peace-deal-freed-taliban-prisoners-return-battlefield-afghanistan> [https://perma.cc/WW2B-PTTA].

266. *Id.* Other sources have also confirmed that released Taliban fighters were killed in combat. *See, e.g.*, Franz J. Marty, *What the Fate of Freed Taliban Prisoners Means for the Afghan Peace Process*, THE DIPLOMAT (Oct. 20, 2020), <https://thediplomat.com/2020/10/the-fate-of-freed-taliban-prisoners-and-afghanistans-peace-process> [https://perma.cc/BH9S-UAK5].

267. *See, e.g.*, Shaheed, *supra* note 173; *see also* Ghubar, *supra* note 173.

failure to consult with the legislature on freeing the prisoners.²⁶⁸ Crucially, parliamentarians disapproved of the government's lack of explanation of guarantees or other assurances to minimize the likelihood of the ex-prisoners rejoining the insurgency.²⁶⁹

The swift reintegration of the released prisoners into the Taliban fighting force in violation of their pledge and the Afghan government's blatant failure to provide satisfactory assurances against such reintegration, which escalated violence across the country, laid bare the rampant culture of impunity and the government's unwillingness and inability to carry out proceedings and hold perpetrators of ICC crimes accountable.

C. A Consistent Policy of Releasing Dangerous Detainees

President Ghani's decision to release the 5,000 Taliban prisoners pursuant to the Doha Agreement did not represent an isolated case or a policy shift, but rather the continuation of an established practice by the Afghan government. Afghan authorities under both Presidents Hamid Karzai and Ghani consistently released dangerous members of anti-government armed groups allegedly involved in grave crimes for several years.

For instance, in 2014, then-President Karzai released sixty-five high-profile Taliban prisoners allegedly responsible for killing Afghan civilians.²⁷⁰ President Karzai's controversial decision elicited strong objections from Afghans and the international community. According to the U.S. military, "these individuals should [have been] prosecuted under Afghan law But the evidence against them was never seriously considered, including by the attorney general."²⁷¹ The U.S. military deemed the release "a major step backward for the rule of law in Afghanistan" and confirmed that "previously-released individuals [had] already returned to the fight, and this subsequent release will allow dangerous insurgents back into Afghan cities and villages."²⁷²

268. *Released Taliban Prisoners Rejoin Battleground, Afghan Officials Say*, *supra* note 259.

269. *Id.*

270. See Mark Memmott, *Afghans Release 65 Prisoners the U.S. Deems Dangerous*, NPR (Feb. 13, 2014, 7:55 AM), <https://www.npr.org/sections/thetwo-way/2014/02/13/276388819/afghans-release-65-prisoners-the-u-s-deems-dangerous> [<https://perma.cc/WF62-J8GT>]. The released prisoners included, for instance, an alleged Taliban explosives expert. *Id.*

271. *Id.*

272. *Id.*

Another example is President Ghani's May 2019 order to release nearly 890 prisoners, with the majority being Taliban members.²⁷³ In freeing these dangerous detainees, President Ghani deployed a familiar tool: a consultative Loya Jirga—beset by the same legal and procedural defects that afflicted the August 2020 assembly.²⁷⁴

The Afghan government's practice of releasing dangerous prisoners resulted repeatedly in deadly consequences. As observed in the case of Taliban detainees freed in 2020, the government's prior decisions to release dangerous inmates similarly failed to reduce violence levels.²⁷⁵ Indeed, in many cases, the released prisoners were directly involved in perpetrating major deadly attacks.²⁷⁶

The recurring pattern of releasing serious offenders underscores the entrenched culture of impunity as well as Afghanistan's unwillingness to genuinely carry out proceedings. In light of the likely irregularities and political interference, such enduring official practice impugned the independence and impartiality of the proceedings which is inconsistent with an intent to bring the persons concerned to justice (Article 17(2)(c)).²⁷⁷ Moreover, the repeated national decisions to release dangerous detainees, ordered at the highest levels of the government, despite the mounting evidence of ex-inmates' return to the battlefield, were arguably undertaken for the purpose of shielding them from criminal responsibility (Article 17(2)(a)).²⁷⁸

In the *Gaddafi* case, the Appeals Chamber held that a case would still be admissible before the Court even if domestic first-instance proceedings had been completed genuinely.²⁷⁹ That is because subsequent proceedings at the appellate level, *inter alia*, could

273. Amini, *supra* note 246.

274. *Id.*

275. See, e.g., *Past and Current Govt Blasted for Releasing Prisoners*, TOLONews (Apr. 28, 2016), <https://tolonews.com/afghanistan/past-and-current-govt-blasted-releasing-prisoners> [<https://perma.cc/4VV4-XSPM>].

276. See *id.* For example, according to the Afghan government, one of the released detainees carried out an attack on the secret service unit, which killed 64 people in 2016. *Id.*

277. Rome Statute, *supra* note 4, art. 17(2)(c).

278. *Id.* art. 17(2)(a).

279. Prosecutor v. Gaddafi, ICC-01/11-01/11-695, "Judgment on the Appeal of Mr Saif Al-Islam Gaddafi Against the Decision of Pre-Trial Chamber I Entitled 'Decision on the Admissibility Challenge by Dr. Saif Al-Islam Gaddafi Pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute,'" ¶ 59 (Mar. 9, 2020).

still be used to shield the person concerned from accountability.²⁸⁰ In Afghanistan's case, the release of senior Taliban commanders and many other dangerous prisoners renders the question of genuine proceedings largely a moot point. The Taliban's control of the country further demonstrates the admissibility of potential cases arising from the ICC probe.

IV. THE TALIBAN'S TAKEOVER OF AFGHANISTAN

The Taliban seized Kabul on August 15, 2021, and currently maintain de facto control over the country.²⁸¹ Their takeover of Afghanistan has important implications for the question of complementarity. Crucially, the Taliban's control of the country further underscores the case that Afghanistan is unwilling and unable to genuinely carry out the requisite investigations and prosecutions, as required under the second step of the complementarity analysis.

The Taliban's military takeover has created uncertainty as to which entity—the Taliban, the deposed government, or some other authority—constitutes the state authorities of Afghanistan. As such, the Pre-Trial Chamber of the Court, in response to the OTP's request to resume the investigation, has asked the Secretary-General of the United Nations and the Bureau of the Assembly of States Parties of the ICC to submit information on the identification of the authorities currently representing the state of Afghanistan by November 8, 2021.²⁸²

However, the question of which entity is ultimately deemed to properly represent the state authorities of Afghanistan does not alter the fact that the ICC must still conduct the complementarity analysis under Article 17 of the Statute with respect to the situation of

280. *Id.*

281. Scott Neuman, *Afghanistan Falls to the Taliban Again as the U.S.-Backed Government Collapses*, NPR (Aug. 15, 2021, 5:51 PM), <https://www.npr.org/2021/08/15/1027860324/the-taliban-win-control-of-afghanistan-as-the-u-s-backed-government-collapses> [<https://perma.cc/B682-PZMC>]. There have been small pockets of resistance—mainly in the Panjshir province—which pose a marginal threat to the Taliban's control over the country. See, e.g., Jim Huylebroek & Victor J. Blue, *In Panjshir, Few Signs of an Active Resistance, or Any Fight at All*, N.Y. TIMES (Sept. 17, 2021), <https://www.nytimes.com/2021/09/17/world/asia/panjshir-resistance-taliban-massoud.html> [<https://perma.cc/Z5HD-HGEW>].

282. Situation in the Islamic Republic of Afghanistan, ICC-02/17-165, Decision Setting the Procedure Pursuant to Rule 55(1) of the Rules of Procedure and Evidence Following the Prosecutor's 'Request to Authorise Resumption of Investigation under Article 18(2) of the Statute', at 9 (Oct. 8, 2021).

Afghanistan. As argued in this Article, under the current circumstances, no Afghan entity—whether the Taliban, the deposed government, or some other authority—is able to discharge the state’s obligation to conduct genuine proceedings under the two-pronged test laid down in Article 17(1)(a) of the Statute.²⁸³

The Taliban are still in the preliminary stages of establishing their rule in the country, which they now call the Islamic Emirate of Afghanistan.²⁸⁴ While they have begun the process of appointing ministers to cabinet positions, there is uncertainty regarding their plans for other core institutions which existed under the prior administration such as the parliament and the judicial system.²⁸⁵ Further compounding this uncertainty has been the Taliban’s stance on establishing an “Islamic” or “Shari’a” system without explaining precisely what their interpretation of Islam entails.²⁸⁶

The Taliban and their affiliated Haqqani Network have allegedly committed the most serious crimes of any anti-government armed group.²⁸⁷ There has also been no indication whatsoever that the Taliban will even attempt to bring those most responsible for the alleged crimes to justice. Indeed, the Taliban’s conduct post-takeover suggests that impunity will continue to be the norm in Afghanistan.

The Taliban’s recently announced interim government is filled with hardliners including individuals alleged to be behind numerous deadly attacks.²⁸⁸ Their cabinet is led by prime minister Mullah

283. Rome Statute, *supra* note 4, art. 17(1)(a).

284. Ahmad Seir et al., *Taliban Sweep into Afghan Capital after Government Collapses*, ASSOCIATED PRESS (Aug. 15, 2021), <https://apnews.com/article/afghanistan-taliban-kabul-bagram-e1ed33fe0c665ee67ba132c51b8e32a5> [<https://perma.cc/PNT6-U9A4>].

285. See, e.g., Ron Synovitz, *Judge, Jury, and Executioner: Taliban Brings Afghanistan’s Justice System Under Its Thumb*, RADIO FREE EUR./RADIO LIBERTY (Dec. 1, 2021), <https://gandhara.rferl.org/a/taliban-afghanistan-justice-system/31588972.html> [<https://perma.cc/F4N6-L8L3>].

286. See, e.g., Arwa Ibrahim, *Explainer: The Taliban and Islamic Law in Afghanistan*, AL JAZEERA (Aug. 23, 2021), <https://www.aljazeera.com/news/2021/8/23/hold-the-taliban-and-sharia-law-in-afghanistan> [<https://perma.cc/FR4Q-5RJB>]. “Taliban officials remain vague on rules and restrictions, and how Islamic law will be implemented. It is, therefore, unclear what life will be like in the ‘Islamic Emirate of Afghanistan’ – the name the Taliban refers to the country by.” *Id.*

287. OTP Request, *supra* note 101, ¶ 53.

288. Rachel Pannett, *Who Leads Afghanistan’s New Government? Here’s What We Know About the Taliban’s Top Officials.*, WASH. POST (Sept. 8, 2021, 5:54 AM), <https://www.washingtonpost.com/world/2021/09/08/taliban-leaders-afghanistan-government-women/> [<https://perma.cc/YH8S-2GSA>].

Mohammad Hassan Akhund.²⁸⁹ Akhund, a co-founder of the movement, is one of several cabinet members on a United Nations sanctions list.²⁹⁰ The interior minister, Sirajuddin Haqqani, is the head of the notorious Haqqani Network.²⁹¹ The Haqqani Network, which maintains close ties to al-Qaeda, is designated a foreign terrorist organization by the United States.²⁹² The F.B.I. has offered \$10 million for information leading to Sirajuddin Haqqani's arrest.²⁹³ Several senior members of the new government were also detained at Guantánamo Bay.²⁹⁴

The Taliban's systematic release of dangerous prisoners is particularly illustrative of the group's disinterest in genuinely carrying out proceedings. The Taliban have freed thousands of inmates, including many senior al-Qaeda operatives.²⁹⁵ The released prisoners also include thousands of Daesh/ISIS-K militants.²⁹⁶ Many of these released individuals were "some of the Taliban's most hardened fighters" and could pose threats to Afghan civilians and the international community.²⁹⁷

Prospects for accountability and justice are further curtailed by the Taliban's recent declaration of a general amnesty.²⁹⁸ The details of their amnesty policy are still unclear, as they have not issued any specific law or amended the existing Amnesty Law. Their vague and broad statements regarding clemency suggest an indifference on the Taliban's part to conducting genuine proceedings concerning grave international crimes.²⁹⁹

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. *See, e.g.,* Saric, *supra* note 108.

296. Garcia, *supra* note 108.

297. Saric, *supra* note 108.

298. Yogita Limaye, *Amid Violent Reprisals, Afghans Fear the Taliban's 'Amnesty' Was Empty*, BBC NEWS (Aug. 31, 2021), <https://www.bbc.com/news/world-asia-58395954> [<https://perma.cc/9EKA-5T6R>].

299. *See, e.g.,* *Taliban Announces 'Amnesty,' Reaches Out to Women*, AL JAZEERA (Aug. 17, 2021), <https://www.aljazeera.com/news/2021/8/17/taliban-announces-amnesty-urges-women-to-join-government> [<https://perma.cc/MT9U-X86G>] (noting that "the Taliban has announced a 'general amnesty' for government workers across Afghanistan" and that "[the Taliban official] remained vague on other details, however, implying people already knew the rules of Islamic law the Taliban expected them to follow."); *see also* Zeerak Khurram et al.,

Moreover, contrary to their pledge of amnesty, there is mounting evidence that the Taliban are seeking retribution against perceived enemies. According to a confidential threat assessment for the United Nations, the Taliban have been intensifying their hunt for former Afghan security officials and people who may have worked with U.S. or NATO forces.³⁰⁰ The Taliban have reportedly executed the brother of former Vice President Amrullah Saleh.³⁰¹ Multiple sources have also confirmed that the Taliban have begun executing security officials associated with the former government.³⁰² Even former civil servants who did not work in the security sector are reportedly being targeted.³⁰³ The Taliban are also harassing the family members and relatives of those officials who have fled the country³⁰⁴ and have been targeting Afghan journalists and their relatives.³⁰⁵

The Taliban's violation of their own so-called "amnesty" policy is not a new phenomenon. The insurgent group declared a similar clemency pledge when they first captured Kabul back in

Taliban Spokesman Says U.S. Will Not Be Harmed from Afghan Soil, NBC NEWS (Aug. 17, 2021, 6:14 PM), <https://www.nbcnews.com/news/world/taliban-announces-amnesty-urges-women-join-government-n1276945> [<https://perma.cc/3WH7-PUZT>] (noting that "[the Taliban spokesman] reassured those who had fought against the Taliban, as well as all interpreters and contractors, that they had been 'pardoned.'").

300. Erin Cunningham & Claire Parker, *Taliban Hunting for 'Collaborators' in Major Cities, Threat Assessment Prepared for United Nations Warns*, WASH. POST (Aug. 20, 2021, 10:54 AM), <https://www.washingtonpost.com/world/2021/08/20/taliban-hunt-collaborators-united-nations> [<https://perma.cc/EQ39-2X7A>].

301. *Brother of Former Afghan VP Killed by Taliban*, DW (Sept. 11, 2021), <https://www.dw.com/en/brother-of-former-afghan-vp-killed-by-taliban/a-59152335> [<https://perma.cc/LQD8-G76N>].

302. Limaye, *supra* note 298. For instance, the Taliban recently executed Haji Mullah Achakzai, the security director of Badghis province, and Ghulam Sakhi Akbari, security director of Farah province. The Taliban are also executing former members of the special forces. *Id.*

303. *Id.* According to Zarifa Ghafari, a former mayor in Wardak province who fled to Germany, the Taliban took her car and beat her guards. *Id.*

304. *Id.*

305. See e.g., Cunningham & Parker, *supra* note 300 (the Taliban killed a relative of an Afghan journalist who worked with a German broadcaster); see also Anna Coren et al., *'I Thought This Was the End of My Life: Afghan Journalists Describe Savage Beatings by Taliban*, CNN (Sept. 12, 2021, 8:41 AM), <https://www.cnn.com/2021/09/12/asia/afghanistan-journalists-beaten-by-taliban-intl/index.html> [<https://perma.cc/PZZ4-XWT4>] (highlighting that Afghan journalists were detained and severely beaten by the Taliban for covering a protest in Kabul).

1996.³⁰⁶ That pledge, however, did not stop the group from committing grave atrocities including the massacre of historically-persecuted Hazara civilians in Mazar-i Sharif in 1998.³⁰⁷

This time around, the Taliban have already commenced their persecution and killing sprees of Hazaras.³⁰⁸ The extent of the Taliban's atrocities is likely more widespread than current reports suggest considering their policy of cutting off power and telecommunication services, apparently to conceal evidence of crimes, in various areas under their control.³⁰⁹ The Taliban's takeover of the country, including its full control of the judicial system, further evidences that Afghanistan is unwilling and unable to genuinely carry out proceedings consistent with its obligations as a state party to the Rome Statute.

Like the Taliban, the former Afghan government had also adopted a general amnesty policy. Indeed, pardoning belligerent actors was a core issue in the Afghan peace talks. As such, besides the Taliban's recent clemency pledge, Afghanistan has the legislative framework to provide broad legal immunity to parties and individuals who have committed atrocities, including international crimes, at various periods in the country's history. The next Part examines this key obstacle in holding perpetrators of Rome Statute crimes accountable in Afghanistan.

306. Kathy Gannon, *Taliban Rebels Take Hold as Streets of Kabul Revive*, WASH. POST (Sept. 28, 1996), <https://www.washingtonpost.com/archive/politics/1996/09/28/taliban-rebels-take-hold-as-streets-of-kabul-revive/63dba67d-cdbf-452e-9821-7d2913e3f09f> [https://perma.cc/QFD2-JKXC] ("A Taliban commander named Musa said an amnesty had been declared for all government soldiers and officers who surrendered.").

307. *Afghanistan: The Massacre in Mazar-i Sharif*, HUM. RTS. WATCH (Nov. 1998), <https://www.hrw.org/legacy/reports98/afghan/Afrep00.htm> [https://perma.cc/KC7R-PQHJ].

308. *Afghanistan: Taliban Responsible for Brutal Massacre of Hazara Men – New Investigation*, AMNESTY INT'L (Aug. 19, 2021, 9:29 PM), <https://www.amnesty.org/en/latest/news/2021/08/afghanistan-taliban-responsible-for-brutal-massacre-of-hazara-men-new-investigation> [https://perma.cc/D4XC-VF8X].

309. *Id.* ("The brutal killings likely represent a tiny fraction of the total death toll inflicted by the Taliban to date, as the group have cut mobile phone service in many of the areas they have recently captured, controlling which photographs and videos are then shared from these regions."); see also Ben Doherty, *Civilians in Afghanistan's Panjshir Valley Face Humanitarian Crisis as Taliban Attack*, THE GUARDIAN (Sept. 7, 2021, 1:30 PM), <https://www.theguardian.com/world/2021/sep/08/civilians-in-afghanistans-panjshir-valley-face-humanitarian-crisis-as-taliban-attack> [https://perma.cc/KM4U-6EK3] (noting that the Taliban have cut internet and phone connections and set up road checkpoints in Panjshir).

V. THE AFGHAN AMNESTY LAW

The Afghan government's transitional justice action plan, adopted in 2005 and shelved shortly thereafter,³¹⁰ stated that "no amnesty should be provided for war crimes, crimes against humanity and other gross violations of human rights."³¹¹ Yet, in 2007, the Afghan parliament passed the Law on National Reconciliation, General Amnesty, and National Stability ("Amnesty Law") which entered into force in 2008.³¹²

The Amnesty Law grants legal immunity to (1) all parties involved in hostilities before the establishment of Afghanistan's interim administration in 2001;³¹³ and (2) individuals and parties who remain in opposition to the Afghan government.³¹⁴

Pursuant to the Amnesty Law, these individuals and parties shall not be prosecuted for crimes committed in the context of such conflicts if they "join the national reconciliation process" and "abide by Afghanistan's constitution and other laws."³¹⁵

The scope of the legal immunity is very broad. International crimes—such as war crimes and crimes against humanity—are not excluded from this general amnesty.³¹⁶ Moreover, the Amnesty Law provides no temporal limitation to the legal immunity, thereby effectively leaving the door open for future atrocities with the guarantee of amnesty whenever the perpetrators decide to "cease enmity" and start respecting Afghan laws.³¹⁷ In addition, the law makes no distinction between persons most responsible and lower-ranked offenders.³¹⁸ The law also provides a mechanism for pardoning and reducing the punishment of individuals convicted of crimes

310. GOSSMAN & KOUVO, *supra* note 22, at 32.

311. Gov't Islamic Rep. Afg., *Peace, Reconciliation and Justice in Afghanistan Action Plan of the Government of the Islamic Republic of Afghanistan*, 6-7 June, 2005, at 4, <https://www.legal-tools.org/doc/17033d/pdf> [<https://perma.cc/R2TE-JK3Q>].

312. Amnesty Law, *supra* note 220; *see also* OTP Request, *supra* note 101, ¶ 272.

313. Amnesty Law, *supra* note 220, art. 3(1).

314. *Id.* art. 3(2).

315. *Id.*

316. *See generally id.*

317. *Id.*

318. While alternative measures for lesser offenders may be justifiable especially where the number of perpetrators is substantial, it is more concerning when persons most responsible obtain lenient treatment. *See, e.g.*, ICC Expert Paper, *supra* note 18, at 73.

against the internal and external security of the country.³¹⁹ While the law grants an exception to the general immunity for claims by individual victims—pertaining to civil or criminal matters—against other individuals,³²⁰ there has been no evidence of victims successfully obtaining redress against the perpetrators for past abuses.

Besides the substance of the Amnesty Law, the process of enacting the law also raised concerns about the government's sincerity in combatting impunity. Notably, the government's secrecy in promulgating the law was criticized.³²¹ Human rights groups, for instance, became aware of the law nearly two years after it was passed by the parliament.³²² Moreover, the Afghan government misrepresented details about the Amnesty Law to the U.N. Human Rights Council.³²³ The government's lack of transparency evinced its bad faith in complying with its obligations to help fight impunity and warrants an adverse inference on the issue of genuineness.

The Amnesty Law was most recently invoked in the 2016 peace deal with Hezb-e-Islami, which had previously been designated a terrorist group.³²⁴ Under the deal, authorities granted immunity to the group—including its leader Gulbuddin Hekmatyar, a notorious warlord accused of numerous atrocities—in exchange for ceasing violence and accepting the Afghan constitution.³²⁵ As part of the deal, Hekmatyar was taken off the U.N. sanctions list, and his fighters were released from prison.³²⁶ Unfortunately, as with the case of Taliban ex-detainees, despite promising to cease hostilities, several released Hezb-e-Islami prisoners reportedly joined the Taliban and resumed

319. Amnesty Law, *supra* note 220, art. 4(2). The mechanism entails separate decrees issued for convicted individuals based on the recommendation of the Commission for the Consolidation of Peace. *Id.*

320. *Id.* art. 3(3).

321. Ron Synovitz, *Afghanistan: Amnesty Law Draws Criticism, Praise*, RADIO FREE EUR./RADIO LIBERTY (Mar. 14, 2007, 5:08 PM), <https://www.rferl.org/a/1075272.html> [<https://perma.cc/894P-DCR2>].

322. Sari Kouvo, *After Two Years in Legal Limbo: A First Glance at the Approved 'Amnesty Law'*, AFG. ANALYSTS NETWORK (Feb. 22, 2010), <https://www.afghanistan-analysts.org/en/reports/rights-freedom/after-two-years-in-legal-limbo-a-first-glance-at-the-approved-amnesty-law> [<https://perma.cc/XE89-PL5B>].

323. *Id.* The government of Afghanistan “apparently lied to the UN Human Rights Council” about the actual date on which the law came into force. *Id.*

324. *Afghanistan Signs Deal with Militant Hekmatyar*, BBC NEWS (Sept. 22, 2016), <https://www.bbc.com/news/world-asia-37438674> [<https://perma.cc/6T8B-3VZM>].

325. *See id.*

326. *Afghan Warlord Hekmatyar Sanctions Dropped by UN*, BBC NEWS (Feb. 4, 2017), <https://www.bbc.com/news/world-asia-38867280> [<https://perma.cc/8R2Z-AFNY>].

violence including suicide attacks that killed civilians.³²⁷ Since returning to Kabul, Hekmatyar has raised further controversies and has even appeared to endorse suicide attacks.³²⁸

As discussed in Part IV, the Taliban also declared a general amnesty since capturing Kabul in August 2021.³²⁹ However, the details of their amnesty program remain unclear and the evidence on the ground indicates that the Taliban are engaged in retributory acts across the country including summary executions.³³⁰

In the case of *Gaddafi*, the Pre-Trial Chamber held that “granting amnesties and pardons for serious acts such as murder constituting crimes against humanity is incompatible with internationally recognized human rights.”³³¹ Such amnesties conflict with states’ Rome Statute obligations to hold perpetrators of core crimes accountable, and deny victims the rights to truth and justice.³³² The ICC thus found that Libya’s amnesty law was incompatible with international law.³³³

Considering the gravity of crimes committed in Afghanistan, the existing amnesty framework—encompassing the 2008 Amnesty Law and the Taliban’s recent proclamation of general amnesty—is incompatible with Afghanistan’s Rome Statute duties and the international community’s interest in the repression of such crimes.³³⁴ Far from providing a sense of justice for victims, the current amnesty regime has practically ensured that there will be full exoneration for

327. See, e.g., *Hezb-e-Islami Ex-Prisoners Fighting in Taliban Ranks, Claims Gen. Raziq*, KHAAMA PRESS (May 8, 2018, 1:53 PM), <https://www.khaama.com/hezb-e-islami-ex-prisoners-fighting-in-taliban-ranks-claims-gen-raziq-05104> [<https://perma.cc/DG9C-HXUT>].

328. See, e.g., *Hekmatyar Describes Suicide Attacks as Holy Islamic Act*, ARIANA NEWS (Feb. 10, 2018), <https://ariananews.af/hekmatyar-describes-suicide-raids-as-martyrdom-operations-in-sacred-causes> [<https://perma.cc/MFK9-WA25>].

329. See, e.g., *Taliban Defense Minister Admits to Revenge Killings Despite Amnesty*, RADIO FREE EUR./RADIO LIBERTY (Sept. 23, 2021), <https://gandhara.rferl.org/a/taliban-revenge-killings/31475124.html> [<https://perma.cc/D4ZL-42YM>]; Zoe Strozewski, *Taliban Reportedly Engaging in Revenge Kills of Afghan Security Forces, U.N. Official Says*, NEWSWEEK (Sept. 13, 2021, 9:40 AM), <https://www.newsweek.com/taliban-reportedly-engaging-revenge-kills-afghan-security-forces-un-official-says-1628429> [<https://perma.cc/2ASJ-5SBC>].

330. See *supra* note 300 and accompanying text.

331. Prosecutor v. Gaddafi, ICC-01/11-01/11-662, Decision on the ‘Admissibility Challenge by Dr. Saif Al-Islam Gaddafi Pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute’, ¶ 77 (Apr. 5, 2019).

332. *Id.*

333. *Id.* ¶ 78.

334. *Id.* ¶ 77; see also Rome Statute *supra* note 4, pmbl.

the perpetrators. With many warlords and alleged perpetrators still wielding substantial power, the current amnesty framework is compelling evidence of the prevailing culture of impunity in the country.

The amnesty regime's broad scope of immunity, which does not exempt ICC crimes or impose any temporal limitations, effectively shields the persons most responsible from criminal responsibility and, thereby, demonstrates an unwillingness to genuinely investigate or prosecute (Article 17(2)(a)).³³⁵ In addition, the amnesty framework renders the national judicial system unavailable to address core crimes and, thus, impugns the Afghan government's ability to otherwise carry out genuine proceedings (Article 17(3)).³³⁶

VI. OTHER INDICIA OF UNWILLINGNESS OR INABILITY TO GENUINELY CARRY OUT PROCEEDINGS

Besides the problematic amnesty regime, the flawed peace process, and the Taliban's return to power, there are additional indicia of Afghanistan's unwillingness or inability to genuinely carry out proceedings. These include the overall poor state of the rule of law; the weak criminal justice system and rampant culture of impunity; the practice of establishing largely inconclusive fact-finding commissions following major incidents; the symbolic legal regime of access to information and evidence; the lack of independence and impartiality of the judicial system; the lack of security for judges, prosecutors, investigators, witnesses, and victims; the substantial collapse or unavailability of the judicial system; the systemic deficiencies in formal legal proceedings which are inconsistent with internationally recognized fair trial standards and norms; Afghanistan's longstanding knowledge of crimes without action and non-cooperation with the ICC; and the Afghan government's low credibility. This Part discusses each of these indicia of unwillingness and inability in turn.

Contextual factors help inform the complementarity analysis.³³⁷ An important overarching consideration is the extremely

335. Rome Statute, *supra* note 4, art. 17(2)(a).

336. See ICC Expert Paper, *supra* note 18, ¶ 50; see also *id.* ¶¶ 48–50 (under the “inability” assessment, amnesties and immunities are relevant to demonstrating that the national judicial system is unavailable).

337. *Id.* ¶ 35. It may be necessary to draw inferences from the general context—such as the independence and impartiality of the system—to a particular case. *Id.*

poor state of the rule of law in Afghanistan.³³⁸ While laws are technically in effect, non-compliance runs rampant. Disdain for the rule of law is rife at the highest levels of the government.³³⁹ For instance, despite the Afghan constitution's separation of powers framework, the executive branch has regularly undermined both the legislature and the judiciary.³⁴⁰ Moreover, the Afghan government has been increasingly functioning as an authoritarian regime.³⁴¹ The Taliban's return to power will likely further undermine the rule of law in the country.

Afghanistan's weak criminal justice system reinforces the rampant culture of impunity in the country.³⁴² The implementation of criminal laws is particularly lax and in many situations non-existent, especially when they are applied to powerful actors.³⁴³ According to the former Interior Minister Barmak, for instance, Afghan parliamentarians have pressured the police to release insurgents who entered Kabul in black-tinted vehicles.³⁴⁴ Minister Barmak did not disclose the names of these lawmakers or whether the police took any actions against them.³⁴⁵ Similarly, the government failed to investigate alleged crimes involving other high-profile figures

338. See generally Mehdi J. Hakimi, *The Rule of Law Crisis in Afghanistan*, GEO. J. INT'L L. BLOG (Sept. 7, 2020) <https://www.law.georgetown.edu/international-law-journal/blog/the-rule-of-law-crisis-in-afghanistan> [<https://perma.cc/9EU7-WDYR>].

339. See, e.g., *Violations of Constitution Rampant, CMIC Can't Stop Them*, TOLONews (July 10, 2013), <https://tolonews.com/afghanistan/violations-constitution-rampant-cmic-cant-stop-them> [<https://perma.cc/E2CL-YK8F>] (according to the Constitution Monitoring and Implementation Commission, the executive and the judiciary have been the most persistent violators of the constitution).

340. See Hakimi, *supra* note 338.

341. See, e.g., *Democracy Index 2020: In Sickness and in Health?*, THE ECONOMIST, 12 (2021), <https://www.eiu.com/n/campaigns/democracy-index-2020/> [<https://perma.cc/ZY69-C2TZ>] (Afghanistan is classified as an "authoritarian regime" based on various indicators relating to electoral process and pluralism, the functioning of government, political participation, political culture, and civil liberties).

342. See, e.g., WORLD JUSTICE PROJECT, *THE RULE OF LAW IN AFGHANISTAN: KEY FINDINGS FROM 2019*, at 6 (2020), <https://worldjusticeproject.org/sites/default/files/documents/Final-Afghanistan-Report-2019.pdf> [<https://perma.cc/SV5W-MRMG>] [hereinafter WJP REPORT].

343. See *id.* at 6 (noting the high perception of impunity in the country).

344. See Massoud Ansar, *Insurgents Enter Kabul in Black-Tinted Cars: Barmak*, TOLONews (May 6, 2018), <https://tolonews.com/afghanistan/insurgents-enter-kabul-black-tinted-cars-barmak> [<https://perma.cc/GGL4-9NTY>].

345. See *id.*

including, inter alia, former President Ghani's deputy,³⁴⁶ close aide,³⁴⁷ and senior advisor.³⁴⁸ Some lawmakers also criticized the government's repeated failures to investigate wrongdoing by strongmen and public officials.³⁴⁹ According to a parliamentary commission tasked with investigating land grabbing crimes, for instance, it was impossible to ascertain the identities of the most serious offenders due to the executive branch's non-cooperation.³⁵⁰ Moreover, despite endemic corruption in the country, influential individuals tend to be exempt from even basic oversight.³⁵¹ In some cases, the government has targeted human rights advocates who have exposed widespread abuse by public officials.³⁵²

346. See Gulabuddin Ghubar, *Taped Remarks Allegedly of Saleh Condemned as 'Illegal'*, TOLONews (June 25, 2020), <https://tolonews.com/afghanistan/taped-remarks-allegedly-saleh-condemned-illegal> [<https://perma.cc/A5LU-VJB5>]. Vice President Saleh, when previously serving as Minister of Interior, is alleged to have ordered an officer to kill and behead those who defy the police. See *id.*

347. According to Vice President Saleh, the former head of the Administrative Office of the President, Fazl Fazli, committed electoral crimes during the last parliamentary polls. See *IEC to Recount Votes from 11 Provinces*, TOLONews (Nov. 6, 2018), <https://tolonews.com/elections-2018/iec-recount-votes-11-provinces> [<https://perma.cc/FDM3-ELFB>].

348. Khaled Nikzad, *Murder Case Against Son of Ghani's Adviser Not Pursued*, TOLONews (Aug. 6, 2020), <https://tolonews.com/afghanistan/murder-case-against-son-ghani%E2%80%99s-adviser-not-pursued> [<https://perma.cc/6PV2-X9WE>] (noting the government's failure to pursue a murder case against the son of President Ghani's senior advisor).

349. See *id.*

350. *Parliament Report Names Land Grabbers, but Omits Major Offenders*, TOLONews (Oct. 21, 2013), <https://tolonews.com/afghanistan/parliament-report-names-land-grabbers-omits-major-offenders> [<https://perma.cc/PNM3-M7WK>].

351. According to a report examining cash smuggling in Afghanistan, for instance, while ordinary Afghans must go through five checkpoints and six inspection sites at Kabul's airport, passengers designated as very, very important persons ("VVIPs") bypass all security procedures and go directly to their planes on the tarmac. SPECIAL INSPECTOR GEN. FOR AFG. RECONSTRUCTION, HAMID KARZAI INTERNATIONAL AIRPORT: DESPITE IMPROVEMENTS, CONTROLS TO DETECT CASH SMUGGLING STILL NEED STRENGTHENING 8 (Jan. 2021), <https://www.sigar.mil/pdf/special%20projects/SIGAR-21-15-SP.pdf> [<https://perma.cc/6FX9-AMFQ>]. This policy is endorsed by the Afghan president himself. See *id.* at 5. According to the Special Inspector General for Afghanistan Reconstruction, in August 2020, a member of parliament attempted to smuggle nearly 200,000 Euros in cash out of the airport. *Id.* at 6.

352. See, e.g., Bede Sheppard, *Afghan Activists Exposing Child Abuse Detained*, HUM. RTS. WATCH (Nov. 27, 2019, 11:55 AM), <https://www.hrw.org/news/2019/11/27/afghan-activists-exposing-child-abuse-detained> [<https://perma.cc/63CG-XEE3>] (the Afghan intelligence agency detained and threatened two activists who reported widespread sexual abuse of children by government officials in Logar).

Even President Ghani has allegedly committed acts that may constitute crimes under Afghan law. For instance, according to the former Kunduz governor Assadullah Omarkhil, President Ghani ordered him to pay death benefits to the families of Taliban fighters killed in clashes with Afghan security forces in Kunduz.³⁵³ Governor Omarkhil accordingly distributed the funds to the Taliban families.³⁵⁴ The Afghan Ministry of Defense also confirmed that such financial transfer had taken place.³⁵⁵ Afghan lawmakers declared the distribution of funds an act of “treason” and called for the prosecution of Omarkhil “as a person who supported the enemy.”³⁵⁶ Such blatant financial support to Taliban families may violate Afghan criminal law concerning terrorism-related offenses, and is particularly shocking in light of the hardship faced by the widows and families of fallen Afghan soldiers (some of whom have been forced to perform sexual favors) in receiving their legally mandated pension benefits.³⁵⁷ Moreover, one of the indicia of unwillingness to genuinely carry out proceedings is rapport between authorities and suspected perpetrators which is evidenced through, inter alia, financial support.³⁵⁸

The government’s inability and unwillingness to carry out genuine proceedings is further illustrated through its numerous, largely inconclusive fact-finding commissions tasked with investigating major deadly incidents. These official probes, generally launched in response to public outrage over high-profile attacks, have not served as serious accountability measures. For example, a member of the commission mandated to investigate the fall of the city of Kunduz to the Taliban in 2015 labeled such inquiries as “symbolic” and primarily

353. Samim Faramarz, *Governor Claims Ghani Issued Orders to Pay Death Benefits*, TOLONews (Apr. 15, 2017), <https://tolonews.com/afghanistan/governor-claims-ghani-issued-orders-pay-death-benefits> [<https://perma.cc/4CD6-BP6L>].

354. *Id.*

355. *Id.*

356. Karim Amini, *MPs Call for Dismissal of Kunduz Governor*, TOLONews (Apr. 11, 2017), <https://tolonews.com/afghanistan/mps-call-dismissal-kunduz-governor> [<https://perma.cc/G35Z-DJ7W>].

357. See *Widows of Afghan Soldiers Forced to Perform ‘Sexual Favors’*: SIGAR, ARIANA NEWS (Sept. 24, 2017), <https://ariananews.af/widows-of-afghan-soldiers-forced-to-perform-sexual-favors-sigar/> [<https://perma.cc/U95Z-JYFR>]; see also Sahibdad Hamdard, *Anger Over Payment Delays to Families of Fallen Afghans*, IWPR (Mar. 8, 2018), <https://iwpr.net/global-voices/anger-over-payment-delays-families-fallen> [<https://perma.cc/84SA-GZEU>].

358. ICC Expert Paper, *supra* note 18, at 30. Such support, coupled with other contextual factors such as the likely unlawful release of numerous dangerous Taliban detainees, may impugn the impartiality of proceedings (Article 17(2)(c) of Rome Statute). See, e.g., *id.* at 29–30.

designed to “cool public outrage.”³⁵⁹ The committee member also bemoaned the government’s failure to implement the fact-finding commission’s recommendations.³⁶⁰ Moreover, the government has been pilloried for lack of transparency in these investigations.³⁶¹ The Afghanistan Independent Human Rights Commission has strongly criticized the lack of public disclosure of such committees’ findings.³⁶² With the Taliban back in power, the likelihood of any meaningful investigations into deadly incidents has fallen substantially.

Another example of the gulf between de jure rules and de facto reality concerns Afghanistan’s legal regime of access to information and evidence. The Afghan government has been frequently criticized for its failure to comply with the Access to Information Law.³⁶³ Afghan media has expressed deep concerns about the government’s “severe restriction on access to information.”³⁶⁴ These concerns have been echoed by the international community as well.³⁶⁵ Institutions that have been particularly non-cooperative in sharing information include the Attorney General’s Office, the National Directorate for Security, the Ministry of Defense, and the Supreme Court.³⁶⁶ These official bodies have unlawfully withheld information in various cases

359. *Ghani Under Fire for Withholding Results of Task Teams*, TOLONews (Jan. 13, 2016), <https://tolonews.com/afghanistan/ghani-under-fire-withholding-results-task-teams> [<https://perma.cc/AJE2-E5YA>].

360. *Id.*; see also Sharif Amiry, *Govt Keeping Mum on Kandahar Explosion Findings*, TOLONews (Jan. 29, 2017), <https://tolonews.com/afghanistan/govt-keeping-mum-kandahar-explosion-findings> [<https://perma.cc/8BHW-7VC4>] (according to Afghan legal experts, establishing such commissions “has become a trend” and is often “a waste of time”).

361. See, e.g., *MPs Slam Kunduz Fact-Finding Team Over ‘Secrecy’*, TOLONews (Oct. 19, 2016), <https://tolonews.com/afghanistan/mps-slam-kunduz-fact-finding-team-over-secrecy> [<https://perma.cc/23PG-S5JG>] (lawmakers and others criticized the Kunduz fact-finding committee, which was led by Amrullah Saleh (the former Vice-President of Afghanistan), for deliberately withholding key facts).

362. See, e.g., Masoud Ansar, *AHRC Criticizes Fact-Finding Commissions*, TOLONews (Feb. 5, 2020), <https://tolonews.com/afghanistan/aihr-criticizes-fact-finding-commissions> [<https://perma.cc/AW4E-EK99>].

363. See, e.g., Zahra Rahimi, *IWA: Govt Fails to Comply With Access to Information Law*, TOLONews (Feb. 6, 2020), <https://tolonews.com/afghanistan/iwa-govt-fails-comply-access-information-law> [<https://perma.cc/Z9YN-3NWS>].

364. *Id.*

365. See *id.*

366. See *Afghanistan: Implement Access to Information Law*, AMNESTY INT’L (Feb. 5, 2020, 5:12 PM), <https://www.amnesty.org/en/latest/news/2020/02/afghanistan-implement-access-to-information-law> [<https://perma.cc/YE6X-U5SJ>].

involving corruption and human rights violations.³⁶⁷ In addition to substantially disregarding the Access to Information Law, government officials have at times abused and beaten Afghan journalists.³⁶⁸ President Ghani has been criticized for censoring the press as well.³⁶⁹ The Taliban have also further constrained the freedom of press, waging violent attacks on journalists.³⁷⁰

Moreover, there are serious concerns about the independence and impartiality of the judicial system.³⁷¹ To begin, the judiciary is notorious for corruption³⁷² and is viewed as one of the most untrustworthy³⁷³ and least transparent institutions in Afghanistan.³⁷⁴ Less than half of Afghans believe that criminal courts guarantee a fair trial.³⁷⁵ In addition, there is substantial concern regarding the undue proximity of the bench to executive organs, particularly the Office of the President.³⁷⁶ According to some legislators, the Supreme Court

367. *See id.* Examples of cases include military operations causing civilian casualties, sexual abuse allegations involving government officials, and the abduction of human rights advocates. *Id.*

368. *See id.*

369. *See, e.g.,* Sharif Amiry, *Ghani Accused of Censorship After Cutting Off Journalist*, TOLONews (Apr. 9, 2017), <https://tolonews.com/afghanistan/ghani-accused-censorship-after-cutting-journalist> [<https://perma.cc/JV2X-ELWF>]; *see also* Sharif Amiry, *Nai Blasts Ghani For Excluding Journalists on Official Trips*, TOLONews (Oct. 24, 2017), <https://tolonews.com/afghanistan/nai-blasts-ghani-excluding-journalists-official-trips> [<https://perma.cc/V9MG-KY8V>].

370. *See, e.g.,* Emma Graham-Harrison & Peter Beaumont, *Violent Attacks on Afghan Journalists by Taliban Prompt Growing Alarm*, THE GUARDIAN (Sept. 9, 2021, 12:44 AM), <https://www.theguardian.com/world/2021/sep/09/violent-attacks-on-afghan-journalists-by-taliban-prompt-growing-alarm> [<https://perma.cc/U93H-Y73W>]; *see also* Roshan Noorzai, *Taliban Return Signals 'End to Press Freedom,' Afghan Journalists Say*, VOICE OF AM. (Sept. 3, 2021, 3:32 PM), <https://www.voanews.com/press-freedom/taliban-return-signals-end-press-freedom-afghan-journalists-say> [<https://perma.cc/UN9Q-QSVA>].

371. *See generally* Mehdi J. Hakimi, *The Judiciary and the Rule of Law in Afghanistan*, 105 JUDICATURE 3, 25–29 (2021).

372. *See, e.g.,* WJP REPORT, *supra* note 342, at 6 (Afghans view judges as the most corrupt authority).

373. *See id.* at 7 (across institutions, Afghans have the least trust in the bench).

374. *See, e.g.,* Mehdi J. Hakimi & Erik G. Jensen, *Rethinking Legal Education in Afghanistan: The Law Program at the American University of Afghanistan*, 55 STAN. J. INT'L L. 83, 85 (2019) (noting that graft is particularly rife in the Afghan justice sector); *see also* Zahra Rahimi, *Afghan Supreme Court Called Out for Lack of Transparency*, TOLONews (July 16, 2020), <https://tolonews.com/afghanistan/afghan-supreme-court-called-out-lack-transparency> [<https://perma.cc/R3AG-MU86>].

375. WJP REPORT, *supra* note 342, at 6.

376. *See, e.g.,* Mehdi J. Hakimi, *Rule of Law from the Ground Up: Legal Curriculum Reform in Afghanistan*, 11 CAL. L. REV. ONLINE 249, 276 (2020).

has been influenced by political pressure.³⁷⁷ President Ghani and his presidential rival, Abdullah Abdullah, even reportedly discussed allocating various state institutions—including the Supreme Court and the Attorney General's Office—between themselves while negotiating a power-sharing scheme.³⁷⁸ The President and the Supreme Court have engaged in a quid pro quo practice of extending each other's terms extra-constitutionally.³⁷⁹ The judiciary is further hampered by the executive branch's interference in judicial sanctions as well as the non-enforcement of sentences in major cases.³⁸⁰ The prospects for accountability are particularly dim now that the Taliban control the judicial system.

Like the bench, the Attorney General's Office ("AGO") is afflicted by similar concerns regarding independence and impartiality. As discussed earlier, the investigative and prosecutorial agencies have tended to shy away from cases involving powerful individuals.³⁸¹ The international community has also criticized the Afghan judicial and prosecutorial bodies for their failure to carry out genuine proceedings. For example, according to the U.S. military, the Afghan AGO "never seriously considered" the evidence against 65 high-profile Taliban detainees who were ordered released by then-President Karzai in 2014.³⁸² U.S. officials deemed the summary release "a major step backward for the rule of law in Afghanistan."³⁸³ The national judicial system's lack of independence and impartiality demonstrates the government's unwillingness to carry out genuine proceedings under Article 17(2)(c).

The security of judicial personnel and organs is another major challenge, especially under Taliban rule. Judicial and prosecutorial personnel are regularly targeted and killed by insurgents and crime syndicates.³⁸⁴ In 2019, there were seventeen documented attacks

377. See, e.g., Khaled Nikzad, *Journalists Call Supreme Court Press Brief "Evasive"*, TOLONews (Mar. 3, 2020), <https://tolonews.com/afghanistan/journalists-call-supreme-court-press-brief-evasive> [<https://perma.cc/FE5B-YKVL>].

378. Hakimi, *supra* note 338.

379. *Id.*

380. *Id.* Afghanistan's former election commission chief, for instance, easily managed to flee the country as a convicted felon despite travel bans for criminals. *Id.*

381. See Nikzad, *supra* note 348 and accompanying text.

382. Memmott, *supra* note 270.

383. *Id.*

384. See U.N. ASSISTANCE MISSION IN AFG., *AFGHANISTAN'S FIGHT AGAINST CORRUPTION: CRUCIAL FOR PEACE AND PROSPERITY* 40 (June 2020), https://unama.unmissions.org/sites/default/files/afghanistans_fight_against_corruption_cruci

against judicial personnel resulting in thirty-one civilian casualties.³⁸⁵ In the same year, nineteen prosecutors were killed in targeted attacks.³⁸⁶ Notwithstanding, no case of an attack against the courts resulted in an indictment in that year—laying bare the rampant impunity and acute vulnerability of judicial institutions.³⁸⁷

Poor security is rife even in major urban centers, like Kabul, where the government should wield substantially more influence. In December 2020, a member of the Supreme Court³⁸⁸ and two prosecutors were brazenly assassinated in Kabul.³⁸⁹ A few weeks later, two Supreme Court judges were also assassinated by unknown gunmen in the capital.³⁹⁰ The Taliban have regularly threatened and claimed responsibility for attacks against judicial institutions.³⁹¹ Safety concerns and threats have made judges reluctant to work, especially in remote areas.³⁹² The Taliban's return to power has sent many Afghan judges into hiding.³⁹³

The security of witnesses and victims is also an acute concern.³⁹⁴ The existing protection mechanism for witnesses and

al_for_peace_and_prosperity_english.pdf [https://perma.cc/39MG-AVRU] [hereinafter UNAMA REPORT].

385. *Id.*

386. *Id.* According to the Attorney General's Office, during the past 15 years, approximately 136 prosecutors have been killed in terrorist and criminal incidents. *See Du qazi-e zan dar Kabul teror shodand [Two Female Judges Were Assassinated in Kabul]*, BBC PERSIAN (Jan. 17, 2021), <https://www.bbc.com/persian/afghanistan-55693772> [https://perma.cc/4ULV-M8UK].

387. UNAMA REPORT, *supra* note 384, at 41.

388. Khaled Nikzad, *Four Killed in Kabul Security Incidents in Last 24 Hours*, TOLONews (Dec. 5, 2020), <https://tolonews.com/afghanistan-168273> [https://perma.cc/U65D-K425].

389. Mohammad Haroon Alim, *Local Prosecutor Shot Dead in Kabul*, KHAAMA PRESS (Dec. 13, 2020, 2:17 PM), <https://www.khaama.com/prosecutor-assassinated-in-unknown-gunmen-shootout-68688> [https://perma.cc/6DKV-PJRA].

390. Khaled Nikzad, *Families of Slain Judges See Political Motive Behind Attack*, TOLONews (Jan. 18, 2021), <https://tolonews.com/afghanistan-169341> [https://perma.cc/ER92-A62Z].

391. *See, e.g.*, Roggio, *supra* note 155.

392. *See, e.g.*, UNAMA REPORT, *supra* note 384, at 41.

393. *See, e.g.*, Claire Press, *Female Afghan Judges Hunted by the Murderers They Convicted*, BBC NEWS (Sept. 28, 2021), <https://www.bbc.com/news/world-asia-58709353> [https://perma.cc/9EYD-BG34].

394. In the cases of *Gaddafi* and *Al-Senussi*, in evaluating Libya's "ability" to conduct genuine proceedings, the Pre-Trial Chamber considered, *inter alia*, the availability of witness protection programs and the government's control over detention facilities. *See Prosecutor v. Al-Senussi*, *supra* note 51, ¶¶ 294–301.

victims in Afghanistan is inadequate.³⁹⁵ In addition, while the Rome Statute requires states parties to protect both witnesses and victims,³⁹⁶ Afghan criminal law does not address victim protection measures.³⁹⁷ Moreover, as a practical matter, the conspicuous absence of investigations concerning numerous influential individuals reflects, in key part, the grave danger and fear associated with testifying in such cases—a reality confirmed all too frequently by attacks against judicial and prosecutorial authorities.³⁹⁸ The lack of security for judges, prosecutors, investigators, witnesses, and victims underscores the Afghan government's inability or unwillingness to carry out genuine proceedings.

In addition, there are various indicia of a substantial collapse or unavailability of the national judicial system, which further impugn the government's ability to genuinely carry out proceedings. Importantly, the Taliban now control the country and administer the justice system. Even before the Taliban seized Kabul in August 2021, the absence of judicial institutions and necessary personnel compelled many Afghans to turn to the Taliban or other non-state actors to resolve disputes.³⁹⁹

Large segments of the population thus unsurprisingly believe that the criminal justice system is unavailable to them.⁴⁰⁰ Access to the civil justice system is similarly limited. During 2017–2019, only 38 percent of Afghans were able to access *any* form of help to address their civil disputes—with the vast majority opting for informal processes.⁴⁰¹ The disproportionate concentration of formal justice sector officials in certain urban centers—such as the presence of 43 percent of Afghanistan's prosecutors in Kabul—further highlights the concomitant unavailability of the judicial system elsewhere in the

395. See, e.g., WJP REPORT, *supra* note 342, at 18 (highlighting “inadequate witness protection” as one of the key problems impacting criminal investigations in Afghanistan).

396. Rome Statute, *supra* note 4, art. 93(1)(j).

397. See, Abdul Mahir Hazim, *Toward Cooperation between Afghanistan and the International Criminal Court*, 49 GEO. WASH. INT'L L. REV. 615, 659 (2017).

398. See *UN in Afghanistan Condemns Taliban's Deadly Attack on Judges and Prosecutors*, UN NEWS (May 11, 2015), <https://news.un.org/en/story/2015/05/498302-un-afghanistan-condemns-talibans-deadly-attack-judges-and-prosecutors> [<https://perma.cc/3QUQ-P9UV>].

399. See Abdulhaq Omeri, *Residents Protest Lack of Courts in Rural Nangarhar*, TOLONews (Jan. 25, 2020), <https://tolonews.com/afghanistan/residents-protest-lack-courts-rural-nangarhar> [<https://perma.cc/KU88-XDRD>].

400. See, e.g., WJP REPORT, *supra* note 342, at 6 (only about 55% of Afghans believe that the justice system is accessible to everyone).

401. WJP REPORT, *supra* note 342, at 22.

country.⁴⁰² Pursuant to Article 17(3) of the Rome Statute, the Taliban's return to power and control of the judicial system effectively render Afghanistan "unable to obtain [certain alleged perpetrators] or the necessary evidence and testimony or otherwise unable to carry out its proceedings."⁴⁰³

Moreover, in the limited areas where the state judicial system *is* present, formal proceedings are beset by systemic deficiencies which are inconsistent with internationally recognized fair trial standards and norms. For instance, despite statutory requirements on legal representation in criminal cases, less than one-third of Afghan inmates were represented by a defense attorney during interrogation in 2017–2019.⁴⁰⁴ Most inmates meet their lawyer for the first time at the trial.⁴⁰⁵ In addition, there is widespread underutilization of evidence during court proceedings.⁴⁰⁶ The poor legal training of defense lawyers, prosecutors, and judges is another systemic defect.⁴⁰⁷

Afghanistan's unwillingness to genuinely prosecute is also evident from other factors, such as longstanding knowledge of crimes without action and non-cooperation with the ICC.⁴⁰⁸ The government's deficient March 2020 deferral request comes nearly seventeen years after Afghanistan's Rome Statute obligations came into force.⁴⁰⁹ The purported domestic proceedings referenced in the deferral request are shared with the Court—in a grossly inadequate manner—only *after* the Appeals Chamber authorized the

402. UNAMA REPORT, *supra* note 384, at 41 (as of March 2020, 1,512 of the country's 3,533 prosecutors and administrative personnel served in Kabul).

403. Rome Statute, *supra* note 4, art. 17(3).

404. See WJP REPORT, *supra* note 342, at 8.

405. *Id.* Only 27 percent of inmates arrested between 2017–2019 had met their attorney before the trial. *Id.*

406. WJP REPORT, *supra* note 342, at 8 (only 63 percent of inmates detained in 2017–2019 reported that evidence was introduced by the prosecutor during the trial).

407. For a discussion of the Afghan legal education system and related challenges, see generally Hakimi, *supra* note 376 (describing issues in the state of legal education in Afghanistan and presenting an extant solution); see also Hakimi & Jensen, *supra* note 374, at 83.

408. ICC Expert Paper, *supra* note 18, at 28–31. These factors relate to "shielding" the person concerned (Article 17(2)(a) of the Statute) and "delay" which is inconsistent with the intent to bring the person concerned to justice (Article 17(2)(b) of the Statute). *Id.* ¶ 44.

409. See generally COALITION FOR THE ICC, AFGHANISTAN AND THE INTERNATIONAL CRIMINAL COURT, (2017) https://www.coalitionfortheicc.org/sites/default/files/cicc_https://www.coalitionfortheicc.org/sites/default/files/cicc_documents/ciccfactsheet_afghanist_an_icc_0.pdf [<https://perma.cc/F4MB-HCLZ>].

investigation.⁴¹⁰ Moreover, Afghanistan's last-minute scramble to avert the ICC's investigation unfolded against a historical backdrop of disregarding its Rome Statute obligations to cooperate with the Court particularly in sharing information on national proceedings.⁴¹¹ Such non-cooperation undermines the presumption of good faith and may well necessitate drawing an adverse inference.⁴¹² These facts, along with other important indicia such as the Amnesty Law, the release of numerous individuals allegedly responsible for ICC crimes, and the Taliban's return to power, further evince Afghanistan's unwillingness to genuinely carry out proceedings.

The Afghan government also has long suffered from low credibility domestically and internationally. Despite recently claiming that it "remains fully committed to fulfilling all of its obligations . . . and cooperating with the OTP and the Court,"⁴¹³ Afghanistan has routinely ignored the OTP's requests for information in the past.⁴¹⁴ Afghan authorities also allegedly misrepresented details about the Amnesty Law to the U.N. Human Rights Council⁴¹⁵ and surreptitiously manipulated anti-graft legislation for self-serving reasons.⁴¹⁶ Moreover, the Afghan government has a track record of brazenly misleading the public. In 2021, the government falsely claimed that the protestors who were attacked by official security forces in the Maidan Wardak province, including the forty-two casualties, were illegally armed militia members.⁴¹⁷ Investigations,

410. See *supra* notes 1, 5 and accompanying text.

411. See *supra* notes 114–117 and accompanying text.

412. See, e.g., ICC Expert Paper, *supra* note 18, ¶¶ 30, 57.

413. Afghan Deferral Request, *supra* note 5, at 4.

414. See, e.g., OTP Report 2016, *supra* note 117, ¶ 217.

415. Kouvo, *supra* note 322. The Afghan government "apparently lied to the UN Human Rights Council" about the actual date on which the law came into force. *Id.*

416. See Hakimi, *supra* note 338.

417. See *Ruydade Behsud: "Qorbaniyan Ghayre Nezami Budehand"; Wazifaye Farmandehe Polis be Ta'liq dar Amad [The Behsud Incident: "The Victims Were Civilians"; The Police Chief Has Been Suspended]* BBC PERSIAN (Feb. 8, 2021), <https://www.bbc.com/persian/afghanistan-55976869> [<https://perma.cc/B5JY-EC6G>] (the Ministry of Interior Affairs spokesman, Tariq Arian, for instance, falsely claimed that the protestors were illegally armed militiamen who had opened fired on the security forces and, as a consequence of the ensuing clash, several illegally armed militiamen were killed and wounded); see also *Namayande Maidan Wardak dar Majles: Hokumat dar Talash ast keh Jenayat Behsud ra beh Hashiye Bebarad [Maidan Wardak Member of Parliament: The Government is Trying to Marginalize the Behsud Crime]*, HASHTE SUBH (Feb. 8, 2021), <https://8am.af/maidan-wardak-mp-the-government-is-trying-to-marginalize-behsuds-crime> [<https://perma.cc/9MSK-5RMG>] (the Ministry of Interior Affairs had falsely claimed that the victims were all illegally armed militiamen).

however, revealed that all protestors, including the victims, were in fact unarmed civilians.⁴¹⁸ In 2017, the Office of the President of Afghanistan published false information and even doctored photos about a meeting between President Ghani and U.S. Secretary of State Rex Tillerson.⁴¹⁹ Afghan authorities also falsely depicted the domestic war by disseminating misleading photos from foreign conflicts⁴²⁰ and mischaracterized the Taliban's control in urban district centers.⁴²¹ The Afghan government's general disdain for the rule of law, as discussed throughout this Article, also fails to inspire confidence. The Taliban's record on bringing perpetrators of grave international crimes to justice further erodes trust in the state's willingness to genuinely investigate and prosecute core crimes.

CONCLUSION

The *raison d'être* of the Rome Statute is to “to put an end to impunity”⁴²² and to ensure that “the most serious crimes of concern to

418. See *Reports of Civilian Casualties in Behsud*, AFG. INDEP. HUM. RTS. COMM'N (Feb. 8, 2021), https://www.aihrc.org.af/home/research_report/9066 [<https://perma.cc/2G7X-62YN>]; *Maidan Wardak Police Chief Suspended Over Behsud Incident*, TOLONNEWS (Feb. 8, 2021), 8, 2021), <https://tolonews.com/afghanistan-169852> [<https://perma.cc/NZA6-E2RF>].

419. See *Tillerson in Afghanistan: Photo of Meeting Apparently Doctored*, BBC NEWS (Oct. 24, 2017), <https://www.bbc.com/news/world-asia-41734559> [<https://perma.cc/83CV-FAU5>]; see also Mujib Mashal, *Tillerson in Kabul? Two Photos Lead to Many Questions*, N.Y. TIMES (Oct. 23, 2017), <https://www.nytimes.com/2017/10/23/world/asia/afghanistan-kabul-bagram-photographs-tillerson.html> [<https://perma.cc/38JP-4RTG>]. The Office of the President of Afghanistan manipulated the photos to misrepresent the venue as Kabul when, in fact, the meeting was held at Bagram Airfield, the largest American military base in Afghanistan. The government's official press release also misleadingly stated that President Ghani “received” Secretary Tillerson when, more accurately, it was the Afghan leadership that flew from Kabul to the U.S. military base to visit Secretary Tillerson. *Id.*

420. See, e.g., *Televisione Melli az Nashre “Eshtebahiy” Akse Amaliyati dar Araq be Name Niroohaye Afghan Ma'zerat Khast* [*The National TV Apologized for Publishing the Erroneous Photo of an Operation in Iraq under the Name of Afghan Forces*], HASHTE SUBH (Dec. 15, 2020), <https://8am.af/national-television-apologized-for-publishing-a-wrong-photo-of-an-operation-in-iraq-called-afghan-forces> [<https://perma.cc/T99Q-JFX7>]. After widespread criticism, the state-controlled media apologized for the “human error” in publishing a photo from the Iraq war in a story about the Afghan conflict. *Id.*

421. For instance, “when the Taliban have overrun the center of a district, the government has relocated the local administration compound to another area so it can say ‘no, the district has not fallen.’” Mashal, *supra* note 419.

422. Rome Statute, *supra* note 4, pmbl.

the international community as a whole [do] not go unpunished.”⁴²³ The principle of complementarity strikes a balance between that overarching aim on the one hand, and the primacy of national criminal jurisdictions on the other hand.⁴²⁴ If states do not fulfill their primary responsibility to genuinely carry out proceedings, the ICC must step in.⁴²⁵ The complementarity doctrine must be construed and applied in light of that central goal of ending impunity.⁴²⁶

President Ghani confessed that “[t]he cost of releasing these 5,000 [Taliban] prisoners meant, among other things, denying justice and healing for the families of those they murdered.”⁴²⁷ The government’s legally dubious release of thousands of dangerous Taliban detainees, including senior commanders and individuals likely involved in committing international crimes, failed to stem the bloodshed. Rather, like prior episodes of similar official decisions, many ex-inmates returned to the battlefield.⁴²⁸ As a consequence of these and other political decisions, the Taliban once again rule Afghanistan. Simply put, there has been no political will to bring perpetrators of grave crimes to justice.⁴²⁹

This vicious cycle of denying justice and rewarding impunity has been underway for far too long. Afghanistan’s accession to the Rome Statute in 2003 has not changed this reality—so far. The prospect of an ICC investigation into alleged war crimes and crimes against humanity prompted the Afghan government to make a last-ditch and highly suspect attempt at claiming to be carrying out its own domestic proceedings. Assuming, *arguendo*, that Afghanistan is carrying out the requisite proceedings under the first step of the complementarity analysis, the potential cases arising from the OTP’s

423. *Id.*

424. See *Prosecutor v. Katanga*, *supra* note 51, ¶ 85.

425. See *id.*

426. See *id.* ¶ 83.

427. Ghani, *supra* note 208.

428. See *supra* Section III.B.

429. The government’s contempt for accountability is further illustrated, *inter alia*, by its lack of support to the Afghanistan Independent Human Rights Commission that prevented the publication of the Conflict-Mapping Report (the Commission’s in-depth documentation of human rights violations and war crimes in Afghanistan during 1978-2001). See, e.g., Ehsan Qaane & Sari Kouvo, *Peace in The Air, But Where Is Justice? Efforts to Get Transitional Justice on the Table*, AFG. ANALYSTS NETWORK (Feb. 28, 2019), <https://www.afghanistan-analysts.org/en/reports/rights-freedom/peace-in-the-air-but-where-is-justice-efforts-to-get-transitional-justice-on-the-table> [<https://perma.cc/ZZ4F-FNGN>]. It is difficult to imagine how the Afghan government could claim to be serious about fighting impunity while failing to support the release of such a critical report on human rights violations in the country.

probe would nonetheless still likely be admissible under the second step of the test. In particular, Afghanistan remains unwilling and unable to genuinely carry out such proceedings in light of the Taliban's return to power, the flawed Afghan peace process, the amnesty framework, and an array of other factors pertinent to the issue of admissibility. Considering the deeply ineffective domestic accountability mechanism, it is time for the Court to step in and ensure that impunity is no longer guaranteed in Afghanistan.