

CREATING A HIERARCHY OF VICTIMS? AFGHANISTAN AND INTERNATIONAL CRIMINAL COURT INVESTIGATIONS

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Since Afghanistan became a state party to the Rome Statute of the International Criminal Court in 2003, the International Criminal Court has had the potential to investigate war crimes and crimes against humanity occurring from that date in the territory of Afghanistan. This process culminated in a request from the ICC Prosecutor in 2017 for the Court to authorise a formal investigation, which was approved by the Court on appeal in 2020 and then deferred by the former government of Kabul. After the Afghan Government fell, the new Prosecutor requested in September 2021 that the investigation resume and that it focus exclusively on alleged crimes committed by the Taliban and Islamic State in Khorasan Province, implicitly excluding investigation into alleged war crimes committed by the pre-Taliban Afghan National Security Forces, United States armed forces, and the Central Intelligence Agency. The Court's Pre-Trial Chamber II agreed to the request in October 2022, but in turn wanted to limit the temporal scope of the investigation, which the Prosecutor since appealed. This article presents the history of the Court's engagement with the situation in Afghanistan, examines the gravity of, and prospects of accountability for, alleged crimes committed by Afghan and United States forces, and argues that the Prosecutor's investigatory strategy risks undermining the aim of providing for accountability as a means of transitional justice by creating a de facto hierarchy

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of victims wherein substantial access to justice varies according to which entity perpetrated the alleged crimes.[†]

I INTRODUCTION

Afghanistan became a state party to the Rome Statute of the International Criminal Court in May 2003.¹ This was at a point when war crimes and crimes against humanity had been perpetrated in the country for a quarter of a century.² Many of those facing allegations were again in power, as ministers, generals and governors in the new post-2001 government, while others from the recently toppled Taliban regime (1996–2001) would go on to lead an insurgency. Foreign military forces from the United States and its North Atlantic Treaty Organization (NATO) and non-NATO allies were also in Afghanistan.

In 2007, the Office of the Prosecutor of the International Criminal Court (ICC) launched a preliminary investigation into the Afghanistan situation. Its annual preliminary examination reports (which began in 2011 and ended in 2017), from 2013 onwards, named the Afghan National Security Forces, United States military forces and the Central Intelligence Agency (CIA), the Taliban and a grouping within the Taliban, the Haqqani network,³ as meriting investigation, and it eventually produced a request in 2017 for the ICC's Pre-Trial Chamber to authorise an investigation. The Pre-Trial Chamber initially declined, then authorised the investigation on appeal. The investigation,

[†] This article has been adapted from, and builds upon, reports originally produced by the authors for the Afghanistan Analysts Network. For the reportage on which this article is based, see Kate Clark "Creating a Hierarchy of Victims? ICC may drop investigations into US forces to focus on Taleban and ISKP" (1 October 2021) Afghanistan Analysts Network <www.afghanistan-analysts.org>. See also Ehsan Qaane "Afghan Victims of War Crimes Want Investigation: Hundreds of thousands apply to ICC" (8 February 2018) Afghanistan Analysts Network <www.afghanistan-analysts.org>; Kate Clark "ICC reports: 'Victims Overwhelmingly Support' Investigation into War Crimes in Afghanistan" (26 February 2018) Afghanistan Analysts Network <www.afghanistan-analysts.org>; Ehsan Qaane and Kate Clark "War Crimes Investigation in Afghanistan by the ICC: It's happening. What will it mean?" (5 March 2020) Afghanistan Analysts Network <www.afghanistan-analysts.org>; and Ehsan Qaane "ICC Afghanistan Investigation Re-Authorised: But will it cover the CIA, ISKP and the forces of the Islamic Republic, as well as the Taleban?" (11 November 2022) Afghanistan Analysts Network <www.afghanistan-analysts.org>.

- 1 Rome Statute of the International Criminal Court 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002) [Rome Statute].
- 2 For details, see Patricia Gossman *Casting Shadows: War Crimes and Crimes Against Humanity: 1978-2001* (Afghanistan Justice Project, July 2005). See also a report commissioned by the United Nations Office of the High Commission for Human Rights which mapped war crimes and crimes against humanity from 1978 to 2001 and was briefly published online in 2005 by the United Nations Assistance Mission in Afghanistan before being taken down. The report remains available online.
- 3 The Haqqani network is often treated as a separate entity, not only by the ICC, but also, for example, in United Nations Security Council resolutions imposing sanctions. Both those in the network and the Taliban view it as part of the Taliban. The Taliban is a movement made up of many such networks which all enjoy a good measure of decentralisation of command and control.

finally authorised in March 2020, was held up by the then-Afghan Government, which made a deferral request that same month to give it time, it said, to demonstrate that it could and was investigating war crimes itself. That Government has been overthrown and, since 15 August 2021, the Taliban are again in power.

On 27 September 2021, the new Prosecutor of the ICC, Karim Khan, said he only wanted to investigate the Taliban and the Islamic State in Khorasan Province (IS-K), an offshoot of the Iraqi-Syrian group, the Islamic State, which operates in Afghanistan and Pakistan. Other "aspects of the investigation," he said, should be "deprioritise[d]" because of limited resources.⁴ These other aspects were unnamed by Khan, but were presumed to be war crimes allegedly carried out by the former government's security forces, the CIA and United States military forces.

On 31 October 2022, the Judges of the Pre-Trial Chamber II authorised the resumption of the Afghanistan investigation.⁵ However, they were concerned that Khan's deprioritisation of some aspects of the investigation could harm the interests of "certain victims", referring to the overwhelming assertion by victims that they wanted an ICC investigation.⁶ At the same time, the Judges also said the scope of the investigation should be limited to the alleged incidents and actors that "existed at the time of the decision [that authorised] ... the investigation [March 2020] and based on the [2017] request to open it".⁷ The Judges also referred to the IS-K as a new actor. Believing otherwise, on 7 November 2022, Khan requested the Appeals Chamber to reverse the part of the Judges' authorisation which limited the scope of his investigation. Then, on 16 January 2023, he withdrew his request pursuant to rule 157 of the Rules and Procedures of Evidence, saying:⁸

4 Karim Khan "Statement of the Prosecutor of the International Criminal Court, Karim A A Khan QC, following the application for an expedited order under article 18(2) seeking authorisation to resume investigations in the Situation in Afghanistan" (media statement, 27 September 2021).

5 *Situation in the Islamic Republic of Afghanistan (Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation)* ICC Pre-Trial Chamber II ICC-02/17-196, 31 October 2022 [Article 18(2) decision].

6 The ICC's Victims Participation and Reparation Section asked victims for their experiences and opinions on two occasions: 20 November 2017 to 31 January 2018 when 11,150 individual victims and 130 families responded (see *Situation in the Islamic Republic of Afghanistan (Annex I-Red to the Final Consolidated Registry Report on Victims' Representations Pursuant to the Pre-Trial Chamber's Order ICC-02/17-6 of 9 November 2017)* ICC Pre-Trial Chamber III ICC-02/17-29-Anxl-Red, 20 February 2018 at [24]) and 8 November 2021 to 8 April 2022 when 6,220 individual victims and 1,690 families responded (see *Situation in the Islamic Republic of Afghanistan (Annex I-Red to the Final consolidated report on Article 18(2) Victim Representations)* ICC Pre-Trial Chamber II, ICC-02/17-190-Anxl-Red, 25 April 2022 at [28]).

7 *Article 18(2) decision*, above n 5, at [59].

8 *Situation in the Islamic Republic of Afghanistan (Notice of discontinuance of the appeal of the Prosecutor against the "Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation")* ICC Appeals Chamber ICC-02/17-207, 16 January 2023 (citation omitted).

3. While the Prosecution respectfully maintains its position that the investigation is not limited in the way described in paragraph 59 of the Decision – in light of the fact that the issue was definitively settled by the Appeals Chamber in its judgement of 5 March 2020 – the Prosecutor has decided not to proceed with the appeal in the interests of judicial economy, and mindful of the Court's limited resources.

On 16 March 2023, the Appeals Chamber, based on the victims' legal representatives' observations,⁹ determined Khan's notice to discontinue the appeal "invalid" and decided to proceed to address the merits of the appeal.¹⁰ The Appeals Chamber ruled that the Prosecutor may not "withdraw the appeal in a manner that in essence disregards the decision of a chamber".¹¹ In the same ruling, however, the Appeals Chamber granted Khan the opportunity to respond to this ruling.¹² He responded on 17 March 2023, urging the Appeals Chamber "to grant the appeal for the reasons and in the terms previously requested",¹³ but stressed that they should dismiss the "unrelated portions" of the victims' legal representatives' observations "concerning the Prosecution's exercise of discretion in managing investigations", which he said, "fall outside the confined scope of these appeal proceedings – which solely relates to the Pre-Trial Chamber's apparent redefinition of the scope of the Court's jurisdiction in the *Afghanistan* situation".¹⁴

At the time of writing, the Appeals Chamber was reviewing Khan's response,¹⁵ even as his team began working on their investigatory strategy for the part of the investigation that has been authorised by the judges.

9 The Appeals Chamber had called, on 23 November 2022, for victims' legal representatives to submit their observations on Khan's appeal request. Those who responded supported his appeal. A new round of observations was called for on 24 January 2023 after Khan withdrew his appeal, and those who responded (again relatively few in number) opposed his withdrawal. One of the observations, which was collectively submitted by four victims' legal representatives and to which the Appeals Chamber referred, argued that Khan had "empowered himself to reverse and amend paragraph 59 of the Pre-Trial Chamber decision and confirm the scope of the Court's jurisdiction. The use of rule 157 in this manner is not foreseen either in the Statute or the Rules of Procedure and Evidence". See *Situation in the Islamic Republic of Afghanistan (Response to 'Notice of discontinuance of the appeal of the Prosecutor against the "Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation" (OA5)') ICC Appeals Chamber ICC-02/17-209, 24 January 2023* at [18].

10 *Situation in the Islamic Republic of Afghanistan (Decision on Prosecutor's notice of discontinuance of the appeal)* ICC Appeals Chamber ICC-02/17-216, 16 March 2023 at [39].

11 At [37].

12 At [40].

13 *Situation in the Islamic Republic of Afghanistan (Prosecution reply to "Response to 'Prosecution appeal of 'Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation'")* ICC Appeals Chamber ICC-02/17-217, 17 March 2023 at [6].

14 At [1] (citation omitted; italics in original).

15 Since the time of writing, the Appeals Chamber issued its judgment allowing the Prosecutor's appeal, amending the October 2022 decision of Pre-Trial Chamber II to align with the scope of the Prosecutor's

For many Afghans, the 2003 cut-off date for the ICC to investigate war crimes already seemed grossly unfair, given the long history of abuses dating back to 1978, by mujahedin and communists, by Taliban during their first time in power, and by the Soviet army. Now, Khan's decision to only focus on some of the parties facing allegations of war crimes since 2003, and the Pre-Trial Chamber's attempt to restrict the scope of the investigation in other ways, threaten to worsen what appears to be a hierarchy of victims.

II TWO PROSECUTORS' REQUESTS FOR ONE INVESTIGATION

Karim Khan's September 2022 public statement that he wanted to focus exclusively on the Taliban and IS-K and, by implication, drop, at least temporarily, investigations into alleged United States and former Afghan government war crimes was a bombshell. His statement read:¹⁶

... I am cognizant of the limited resources available to my Office relative to the scale and nature of crimes within the jurisdiction of the Court that are being or have been committed in various parts of the world. I have therefore decided to focus my Office's investigations in Afghanistan on crimes allegedly committed by the Taliban and the Islamic State – Khorasan Province ("IS-K") and to deprioritise other aspects of this investigation.

Khan's predecessor as ICC Prosecutor, Fatou Bensouda, had wanted to investigate not only the Taliban and IS-K, but also United States military forces and the CIA, and the former government's Afghan National Security Forces.¹⁷ Khan nowhere referred to these parties, but implicit in his argument was that the Taliban and IS-K's alleged war crimes were graver, and therefore worthier of investigation.¹⁸

The gravity, scale and continuing nature of alleged crimes by the Taliban and the Islamic State, which include allegations of indiscriminate attacks on civilians, targeted extrajudicial executions, persecution of women and girls, crimes against children and other crimes affecting the civilian population at large, demand focus and proper resources from my Office, if we are to construct credible cases capable of being proved beyond reasonable doubt in the courtroom.

investigation in the Afghanistan situation as previously determined by the Appeals Chamber in its 2020 decision. See *Situation in the Islamic Republic of Afghanistan (Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber II entitled "Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation")* ICC Appeals Chamber ICC-02/17-218, 4 April 2023.

¹⁶ Khan, above n 4.

¹⁷ Fatou Bensouda "The Prosecutor of the International Criminal Court, Fatou Bensouda, requests judicial authorisation to commence an investigation into the Situation in the Islamic Republic of Afghanistan" (media statement, 20 November 2017).

¹⁸ Khan, above n 4.

Bensouda, in the Office of the Prosecutor's 2016 Preliminary Examination Report, had detailed the various alleged perpetrators, and assessed the gravity and scale of the crimes ascribed to them and whether there was a possibility of recourse for victims in domestic courts.¹⁹ This report formed the basis of her request to the judges of the Pre-Trial Chamber in 2017 to authorise a formal investigation into the "Afghanistan situation". At a minimum, it said, the following crimes within the Court's jurisdiction had occurred:²⁰

- a. Crimes against humanity and war crimes by the Taliban and their affiliated Haqqani Network;
- b. War crimes of torture and related ill-treatment by Afghan government forces, in particular the intelligence agency (National Directorate for Security), and the Afghan National Police;
- c. War crimes of torture and related ill-treatment, by US military forces deployed to Afghanistan and in secret detention facilities operated by the Central Intelligence Agency, principally in the 2003-2004 period, although allegedly continuing in some cases until 2014.

The Preliminary Examination said that thresholds of admissibility had been reached: that is, the alleged crimes are under ICC jurisdiction are sufficiently grave, are not being addressed by domestic or other legal bodies (although this is "subject to further information that could be provided by the relevant national authorities in the course of the preliminary examination or any subsequent investigation"²¹), and there are "no substantial reasons to believe that the opening of an investigation would not be in the interests of justice."²²

As to the detail of the potential crimes, the 2016 Preliminary Examination Report found there was "a reasonable basis" to believe that the Taliban and the Haqqani network had allegedly committed war crimes – murder, intentionally directing attacks against the civilian population, humanitarian personnel and protected objects, conscripting children, and killing or wounding treacherously a combatant adversary – all of which, it said, "were committed on a large scale and as part of a plan or policy", and crimes against humanity – murder, imprisonment or other severe deprivation of physical liberty, and persecution against any identifiable group or collectivity on political grounds and on gender grounds – all of which were "allegedly committed as part of a widespread and/or systematic attack".²³

19 Office of the Prosecutor *Report on Preliminary Examination Activities (2016)* (International Criminal Court, 14 November 2016) at 43–52. See also Ehsan Qaane and Kate Clark "One Step Closer to War Crime Trials? New ICC report on Afghanistan" (17 November 2016) Afghanistan Analysts Network <www.afghanistan-analysts.org>.

20 Office of the Prosecutor, above n 19, at [198].

21 At [214].

22 At [225].

23 At [206]–[207].

The Preliminary Examination also found reasonable grounds for investigating the CIA and United States military forces, namely, that during the interrogations of detainees and in conduct supporting those interrogations, they had:²⁴

... resorted to techniques amounting to the commission of the war crimes of torture, cruel treatment, outrages upon personal dignity, and rape. ... Specifically:

- Members of US armed forces appear to have subjected at least 61 detained persons to torture, cruel treatment, outrages upon personal dignity on the territory of Afghanistan between 1 May 2003 and 31 December 2014. The majority of the abuses are alleged to have occurred in 2003–2004.
- Members of the CIA appear to have subjected at least 27 detained persons to torture, cruel treatment, outrages upon personal dignity and/or rape on the territory of Afghanistan and other States Parties to the Statute (namely Poland, Romania and Lithuania) between December 2002 and March 2008. The majority of the abuses are alleged to have occurred in 2003–2004.

Poland, Romania and Lithuania all hosted CIA "black sites" to which the CIA allegedly rendered individuals related to the Afghan conflict for interrogation which used torture. These countries were state parties to the ICC at an earlier date than Afghanistan, so the starting date for war crimes to be investigated on their soil is also, necessarily, earlier.

Finally, the Preliminary Examination also found grounds for investigating the forces of the former Afghan government, for the war crimes of torture and cruel treatment, outrages upon personal dignity and sexual violence. It named the Afghan intelligence agency, the National Directorate of Security, the Afghan National Police, Afghan National Army, Afghan National Border Police and the Afghan Local Police as alleged perpetrators, saying 35 to 50 per cent of all conflict-related detainees "may be subjected to torture" carried out in a "state of total impunity."²⁵

Since 2015, the IS-K has also established itself as meriting investigation by the ICC by attacks on purely civilian objects, including hospitals, mosques, schools, sports clubs and election facilities, with a focus on those belonging to Hazaras, an ethnic group which is overwhelmingly Shia Muslim. The attacks have caused, and continue to cause, mass casualties.²⁶

The Pre-Trial Chamber II's October 2022 decision to limit the temporal scope of an investigation discriminates against recent and future victims. It would only allow the investigation of the alleged

24 At [211].

25 At [208]–[209].

26 See Bensouda's request to investigate the "Afghanistan situation", in which she said the Islamic State in Khorasan Province was "held responsible (or claimed responsibility) for a number of attacks against civilians in Kabul as well in Nangarhar province": see *Situation in the Islamic Republic of Afghanistan (Public redacted version of "Request for authorisation of an investigation pursuant to article 15")* ICC Pre-Trial Chamber III ICC-02/17-7-Red, 20 November 2017 at [19].

crimes and perpetrators that "existed at the time of the decision authorising the investigation [March 2020] and based on the [November 2017] request to open it ".²⁷ The decision elaborated:²⁸

Alleged crimes unrelated to such situation and conflicts or related to any new armed conflict(s) ... and new parties to such a conflict, fall outside the scope of the investigation as authorised ...

In this paragraph, the Judges footnoted their reference to "new parties": "Compare, e.g., the Prosecutor's reference to the 'Islamic State – Khorasan Province' in his 27 September 2021 press statement."²⁹

The Judges suggested that if the Prosecutor wanted to investigate any alleged crimes and actors as well as new crimes related to new conflicts, which they believe fall outside the scope of the investigation, he should file a new request for authorisation.

III VICTIMS CONSULTED (TWICE), AN INVESTIGATION REFUSED AND AUTHORISED ON APPEAL, A DEFERRAL, A CHANGE OF GOVERNMENT AND A PARTIAL RESUMPTION

Following the Prosecutor Bensouda's November 2017 request to launch an investigation, the ICC's Victims Participation and Reparations Section of the Registry sought the views of victims to see whether an investigation would be in the "interests of justice", which is understood by the Court as including the "interests of victims".³⁰ Those who responded listed many more alleged crimes than the Office of the Prosecutor had previously noted. Without naming any alleged perpetrators, the Final Consolidated Report on Victims' Representations included the following "non-exhaustive" list of reported crimes:³¹

... murder; attempted murder; imprisonment or other severe deprivation of liberty; torture; rape; sexual violence; persecution; enforced disappearance of persons; other inhumane acts; attack against civilian population; attack against protected objects; destruction of property; pillage; forced displacement; outrages upon personal dignity; and denying a fair trial.

²⁷ Article 18(2) decision, above n 5, at [59].

²⁸ At [59] (citations omitted).

²⁹ At [59], n 109.

³⁰ Office of the Prosecutor *Policy Paper on the Interests of Justice* (International Criminal Court, September 2007) at 5.

³¹ *Situation in the Islamic Republic of Afghanistan (Annex I-Red to the Final Consolidated Registry Report on Victims' Representations Pursuant to the Pre-Trial Chamber's Order ICC-02/17-6 of 9 November 2017)* ICC Pre-Trial Chamber III ICC-02/17-29-AnxI-Red, 20 February 2018 at [44].

Out of a total of 695 submissions – which could be from individuals or collectives, such as villages or families, and which included Afghan and non-Afghan victims – 680 submissions indicated support for an investigation, while just 15 stated otherwise.³²

The ICC said those who did not want an investigation cited: "Security concerns and doubts as to the likelihood that the Prosecutor's investigation would result in the perpetrators being brought to justice ... for this refusal."³³ Those who thought an investigation necessary said it was because they wanted:³⁴

... investigation by an impartial and respected international court; bringing the perceived perpetrators of crimes to justice; ending impunity; preventing future crimes; knowing the truth about what happened to victims of enforced disappearance; allowing for victims' voices to be heard; and protecting the freedom of speech and freedom of the press in Afghanistan.

Two years later, in April 2019, the Pre-Trial Chamber finally responded to Bensouda's request to open an investigation. The judges believed that "notwithstanding the fact all the relevant requirements are met as regards both jurisdiction and admissibility", Afghanistan's current circumstances are such as to "make the prospects for a successful investigation and prosecution extremely limited".³⁵ They felt that pursuing an investigation would not meet "the objectives listed by the victims favouring the investigation",³⁶ and therefore concluded that an investigation "at this stage would not serve the interests of justice".³⁷

In other words, the problem was not that war crimes had not happened, nor that they were insufficiently grave to merit the Court's attention or were inadmissible, nor that there was a lack of evidence. The problem, it seemed, lay in the prospect of carrying out an investigation in a country where lack of cooperation would make a successful prosecution unlikely.

The difficulties of conducting an investigation could not be underestimated: the investigation would be into parties which were then engaged in armed conflict. The Pre-Trial Chamber also noted:³⁸

32 At [39]–[40].

33 At [40].

34 At [39].

35 *Situation in the Islamic Republic of Afghanistan (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan)* ICC Pre-Trial Chamber II ICC-02/17-33, 12 April 2019, at [96].

36 At [96].

37 At *dispositif*.

38 International Criminal Court "ICC judges reject opening of an investigation regarding Afghanistan situation" (press release, PR1448, 12 April 2019).

... the lack of cooperation that the Prosecutor has received and which is likely to go scarcer should an investigation be authorized hampering the chances of successful investigation and prosecution, as well as the need for the Court to use its resources prioritizing activities that would have better chances to succeed.

The Afghan Government by then, while bound as a signatory to the Rome Statute to work with the Court, was opposed to the investigation and offered no active cooperation.³⁹ The United States, which is not a party to the Rome Statute, objected ferociously to its citizens being scrutinised by the ICC. For example, in September 2018, John Bolton, then-president Donald Trump's National Security Advisor, threatened to ban the ICC "judges and prosecutors from entering the United States", and even to prosecute "them in the US criminal system" and sanction "their funds in the US financial system".⁴⁰ Later in December 2020, after the ICC Appeals Chamber finally authorised Bensouda's investigation, President Trump did impose sanctions on Bensouda and other Court officials in a bid to pressure it to drop any investigation into the actions of the CIA and United States military forces in relation to the Afghan conflict.⁴¹ Notwithstanding the very real difficulties of conducting an investigation, the fear was that the Court had been bullied into dropping this case. This was what Sima Samar, by then the former chair of the Afghanistan Independent Human Rights Commission, in an interview with the Afghanistan Analysts Network, thought might have happened.⁴² Param-Preet Singh from Human Rights Watch also spoke about pressure on the Court.⁴³

The judges' logic effectively allows states to opt out on their obligation to cooperate with the court's investigation. This sends a dangerous message to perpetrators that can put themselves beyond the reach of the law just by being uncooperative.

39 On the particular question of prosecuting alleged American perpetrators, the Kabul government's hands were always tied anyway by a clause in its Bilateral Security Agreement with the United States which gave United States courts the right to try any American national suspected of a crime and specifically banned the Afghan state from handing over any United States citizen to its own or a foreign court: see Kate Clark and Thomas Ruttig "Three Birds with One Stone: Signing the BSA and NATO SOFA to project reliability" (6 October 2014) Afghanistan Analysts Network <www.afghanistan-analysts.org>.

40 John Bolton, United States National Security Advisor (speech to the Federalist Society, Washington DC, 10 September 2018). A transcript of the speech can be found at "Full text of John Bolton's speech to the Federalist Society" (10 September 2018) Al Jazeera <www.aljazeera.com>.

41 Kate Clark "Ferocious Attack on ICC: Washington threatens court if it investigates alleged US war crimes in Afghanistan" (12 September 2018) Afghanistan Analysts Network <www.afghanistan-analysts.org>; and Human Rights Watch "US Sanctions on the International Criminal Court: Questions and Answers" (14 December 2020) <www.hrw.org>.

42 Kate Clark "ICC rejects war crimes investigation in Afghanistan: Continuing impunity for perpetrators, no voice yet for victims" (13 April 2019) Afghanistan Analysts Network <www.afghanistan-analysts.org>.

43 Clark, above n 42. See also Param-Preet Singh "In Afghanistan, the ICC abandons the field" (23 April 2019) Open Global Rights <www.openglobalrights.org>.

However, Bensouda appealed the decision and there was a three-day public hearing held in December 2019. On 5 March 2020, the Judges of the Appeals Chamber reversed the Pre-Trial Chamber's decision and authorised a full investigation.⁴⁴ The Appeals Chamber, in its judgment, argued that the Pre-Trial Chamber did not have the power to assess the interests of justice.

The start of the ICC investigation was then held up by a deferral request by the Afghan government, which asserted that it was investigating and prosecuting war crimes itself and should be given time to demonstrate this.⁴⁵ This assertion was always highly questionable,⁴⁶ but, in any event, had not been ruled on by the time that Government had fallen and the Taliban regained power. The ball was then back in the Prosecutor's court.

When Khan assumed the role of ICC Prosecutor in June 2021, he could have requested the Pre-Trial Chamber to authorise the resumption of the investigation or postpone it. Nobody was expecting him to ask for a resumption *with a narrower focus*. His decision to single out just two parties to the Afghan conflict for investigation raised multiple questions. Dropping an investigation into the potential atrocity crimes ascribed to United States forces was especially contentious given how the United States government had pressured the ICC to drop any cases against its citizens, with the Trump administration's excoriating attacks culminating in sanctions against Bensouda and other ICC staff,⁴⁷ which were only rescinded after Joe Biden took office.

The authors read the Pre-Trial Chamber II's October 2022 decision, which authorised the resumption of the investigation, as a signal to the Prosecutor that he should not deprioritise investigations into the personnel of the United States or Afghanistan, which were authorised in 2020. The Judges also indicated that the Prosecutor was not under any obligation to pursue either a narrower

44 *Situation in the Islamic Republic of Afghanistan (Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan)* ICC Appeals Chamber ICC-02/17-138, 5 March 2020.

45 *Situation in the Islamic Republic of Afghanistan (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)* Pre-Trial Chamber II ICC-02/17-139-Anx1, 15 April 2020.

46 The former government had done everything to stymie an ICC investigation. It changed laws, published translated Dari and Pashto versions of the Rome Statute and set up new bodies and institutions, but did very little actual war crime investigating or convicting; see Kate Clark "Creating a Hierarchy of Victims? ICC may drop investigations into US forces to focus on Taleban and ISKP" (1 October 2021) Afghanistan Analysts Network <www.afghanistan-analysts.org>; and Ehsan Qaane "A Request to Delay: Another Afghan government attempt to prevent an ICC war crimes investigation?" (13 May 2020) Afghanistan Analysts Network <www.afghanistan-analysts.org>. The former Afghan government sent two packages of information to the ICC after March 2020 and the Court had been close to concluding its consideration of the material when the Kabul government fell on 15 August 2021. The authors understand that there was nothing in the material to justify Kabul's assertion that it was seriously dealing with war crimes through the domestic courts, but the material had required a lot of translation – possibly the aim was to slow the Court down.

47 Human Rights Watch, above n 41.

or a broader investigation. However, they highlighted the concerns of "certain victims" who "fear that this focus may result in the Prosecution overlooking crimes allegedly committed by others, including members of armed forces or security and intelligence services of non-States parties [to the ICC like the United States]".⁴⁸ The Pre-Trial Chamber II had collected the views of victims for a second time from 8 November 2021 to April 2022, although, at the time of publication, had released no public report about their comments. As the result, 11,150 individual victims and 130 families participated in the consultation process.⁴⁹ The Judges, in highlighting the concerns of "certain victims" might have been indirectly reminding the Prosecutor of his obligation to fulfil "the interests of justice" which would be achieved, among other ways, by fulfilling the interest of all victims.

For the authors, questions raised by Khan's 2021 request to narrow the focus of the investigation include:

- Are alleged crimes perpetrated by the United States in the Afghan context actually lesser in terms of gravity and scale than those perpetrated by the Taliban or IS-K?
- Are alleged victims of these crimes any likelier to see justice in domestic courts than victims of the Taliban and IS-K?
- Is it more resource efficient to concentrate on the Taliban and the IS-K than on United States forces or former government forces?
- Should resources be allowed to determine which war crimes are prosecuted by the ICC (if indeed resources are a key reason for this decision)?

These questions will be looked at in turn.

IV THE GRAVITY OF THE ALLEGED CRIMES

The Taliban's alleged crimes are certainly more varied in nature than either those of the previous government's armed forces or United States forces or the CIA. They have been perpetrated over a longer period of time and, as the Prosecutor says, are "continuing". The IS-K's alleged crimes, while fewer in absolute numbers – it is a more recently formed group – are certainly grave. They include the deliberate murder of civilians in mass attacks, and the targeting of Shia Muslims/ethnic Hazaras. The pace of IS-K attacks has ebbed, but never stopped: on 26 August 2021, it claimed responsibility

⁴⁸ *Article 18(2) decision*, above n 5, at [33].

⁴⁹ The Appeals Chamber asked for the views of victims' legal representatives on 23 December, with deadline of 15 December, to help it decide on the appeal made by the Prosecutor. See *Situation in the Islamic Republic of Afghanistan (Order on the conduct of the appeal proceedings)* ICC Appeals Chamber ICC-02/17-200, 23 November 2022.

for an attack at Kabul airport which killed 170 people.⁵⁰ Since August 2021, at least, 18 IS-K's attacks targeted Afghanistan's Hazara community.⁵¹

The United States, in contrast, allegedly perpetrated torture in multiple countries, four of which would come under the purview of the ICC in relation to the Afghan context (Afghanistan itself, Poland, Romania and Lithuania) as they are parties to the ICC. Most of the United States' alleged crimes date from 2001–2004, with the last documented victim of the CIA's rendition and torture programme, Muhammad Rahim, an Afghan who remains in Guantanamo, having been detained in 2007.⁵² However, the torture was authorised from the very top of the United States' democratically elected government,⁵³ which, in the view of the authors, makes them appear particularly grave – and arguably suitable for ICC investigation in which individual command responsibility is the ultimate target of the Court.

Khan's description of Taliban and IS-K crimes as continuing could justify sequencing if resources are limited – that is, dealing with the Taliban first as they are now in power. Investigating their alleged war crimes might act as a deterrent now. The argument would be that investigating American crimes can wait as there are no new victims of its now defunct state-authorised torture programme; similarly, investigations into the former Afghan government's use of torture could also wait. The concern would be that justice delayed would, in effect, be justice denied. Prospects of obtaining evidence and witnesses would inevitably degrade over time. Moreover, without the deterrent of an ICC investigation, the risk would remain of a future United States administration again arguing that the threats against it were so exceptional as to justify torture or other breaches of international humanitarian law.⁵⁴

50 See Martine van Bijlert "The Moment in Between: After the Americans, before the new regime" (1 September 2021) Afghanistan Analysts Network <www.afghanistan-analysts.org>.

51 See Ali Yawar Adili "A Community Under Attack: How successive governments failed west Kabul and the Hazaras who live there" (17 January 2022) Afghanistan Analysts Network <www.afghanistan-analysts.org>.

52 The torture of Rahim was documented in Senate Select Committee on Intelligence *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program* (12 December 2014) at 165–167. See also Kate Clark *Kafka in Cuba: The Afghan Experience in Guantánamo* (Afghan Analysts Network, November 2016) at 57–60.

53 Alex J Bellamy "No pain, no gain? Torture and ethics in the war on terror" (2006) 82 *International Affairs* 121 at 122–123; Human Rights Watch *Getting Away with Torture: The Bush Administration and Mistreatment of Detainees* (July 2011); and *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson* UN Doc A/HRC/22/52 (17 April 2013) at [14]–[15].

54 See for example President George Bush's memo on 7 February 2002 that "the war against terrorism ushers in a new paradigm" that required "new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva". The memo went on to assert that it was legal for the US to not give al-Qaeda and Taliban detainees prisoners of war protection under the Geneva Conventions rules, not even the minimum protections prescribed in common article 3 of the Geneva Conventions, including banning the use

V **WOULD ALLEGED WAR CRIMES BE PROSECUTED IN DOMESTIC COURTS?**

As to whether allegations of war crimes or crimes against humanity would be dealt with in domestic courts, the Prosecutor is correct to say that the Taliban are unlikely to prosecute their own. Taliban action against the IS-K and former government officials can be expected, but it is debateable whether that would be through their courts, which are even further from reaching international fair trial standards than those of the previous government, or as summary executions or punishment beatings. Reprisal killings and forced disappearances of members of the former Afghan security services occur, despite a general amnesty, as well as of rights activists and those accused of being members of IS-K and their Salafist sympathisers. These are outlined, for example, in allegations from the United Nations Assistance Mission in Afghanistan (UNAMA) of killings of members of former Afghan security forces contained in a briefing to the United Nations Security Council,⁵⁵ and in a November 2021 report of Human Rights Watch which documented the summary execution and forced disappearance of security sector personnel from 15 August up to 31 October 2021.⁵⁶ Furthermore, a December 2021 report by Amnesty International alleged that the Taliban had carried out killings in Spin Boldak in Kandahar province in July 2021, along with the denial of medical treatment to wounded male civilians and government soldiers;⁵⁷ in Malestan in Ghazni province, also in July, including three men allegedly tortured to death;⁵⁸ in Khedir district of Daikundi province in August, which included the alleged killing of a 17-year-old girl;⁵⁹ and in Panjshir province in September, alongside the torture and mistreatment of detainees.⁶⁰

Nada al-Nashif, United Nations Deputy High Commissioner for Human Rights, also said, on 14 December 2021, that they had documented more than 100 Afghans killed since the Taliban took power, including former Afghan National Security Forces personnel; at least 50 men suspected by the Taliban to be members of IS-K, who were beheaded or hanged; and at least eight activists and two

of torture. See The White House "Humane Treatment of al-Qaida and Taliban detainees" (Presidential memorandum, 7 February 2002).

55 Deborah Lyons "Briefing by Special Representative Deborah Lyons to the Security Council" (9 September 2021) United Nations Assistance Mission in Afghanistan <unama.unmissions.org>.

56 Patricia Gossman *"No Forgiveness for People Like You": Executions and Enforced Disappearances under the Taliban in Afghanistan* (Human Rights Watch, November 2021).

57 Amnesty International *No Escape: War Crimes and Civilian Harm during the Fall of Afghanistan to the Taliban* (ASA 11/5025/2021, 15 December 2021) at 14–15.

58 At 15–17.

59 At 17–18.

60 At 18–20.

journalists. The United Nations, al-Nashif said, was particularly alarmed about the "safety of Afghan judges, prosecutors, and lawyers – particularly women legal professionals".⁶¹

The other form of violence suffered by some Afghans in the wake of the Taliban victory has been forced displacement. Human Rights Watch in a press release from 22 October 2021 alleged that former officials, as well as Hazara communities, have been targeted.⁶² Earlier that month, Human Rights Watch said:⁶³

... the Taliban and associated militias forcibly evicted hundreds of Hazara families from the southern Helmand province and the northern Balkh province. These followed earlier evictions from Daikundi, Uruzgan, and Kandahar provinces. Since the Taliban came to power in August, the Taliban have told many Hazaras and other residents in these five provinces to leave their homes and farms, in many cases with only a few days' notice and without any opportunity to present their legal claims to the land.

Comparing the possibility of such domestic prosecutions with the situation of the United States forces, Khan has said that the court would continue to "promote accountability efforts within the framework of the principle of complementarity".⁶⁴ Yet, it is also difficult to imagine the United States' domestic courts prosecuting crimes allegedly perpetrated by American citizens. Successive governments in the United States have decided against prosecuting those who ordered state forces' use of torture and the CIA's secret renditions programme. President George Bush himself authorised the programme and although President Obama banned torture as soon as he took office in 2009, his administration decided not to prosecute.⁶⁵

We tortured some folks.

...

You know, it is important for us not to feel too sanctimonious in retrospect about the tough job that those folks had. And a lot of those folks were working hard under enormous pressure and are real patriots.

61 Stephanie Nebehey and Emma Farge "Taliban rule marked by killings, denial of women's rights - UN" (15 December 2021) Reuters <www.reuters.com>.

62 Human Rights Watch "Afghanistan: Taliban Forcibly Evict Minority Shia – Hazaras, Former Civil Servants Targets of Collective Punishment, Land-Grabbing" (22 October 2021) <www.hrw.org>.

63 Human Rights Watch, above n 62.

64 Khan, above n 4.

65 See Kathleen Hennessey "Obama: 'We tortured some folks'" *Los Angeles Times* (online ed, Los Angeles, 1 August 2014).

President Trump supported the expansion of the "war on terror" detention camp at Guantanamo and spoke in favour of the use of torture, including waterboarding.⁶⁶

The previous ICC Prosecutor, Fatou Bensouda, highlighted the dearth of United States accountability in her 2016 Preliminary Examination Report.⁶⁷ She pointed out, for example, that the scope of the United States Department of Justice's preliminary review (August 2009 to June 2011) of allegations of CIA abuse of detainees "appears to have been limited to investigating whether any *unauthorised* interrogation techniques were used by CIA interrogators, and if so, whether such conduct could constitute violations of any applicable criminal statutes".⁶⁸ In other words, there had been no United States criminal investigation into the use of *authorised* torture techniques. Bensouda also quoted the United States Attorney General: "the Department of Justice (DOJ) will not prosecute anyone who acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees".⁶⁹

The only criminal investigations conducted by the Attorney General were of two cases where detainees had died in CIA custody, but these were dropped because, in the words of the Attorney General: "the admissible evidence would not be sufficient to obtain and sustain a conviction beyond a reasonable doubt".⁷⁰ One of those cases related to Gul Rahman, an Afghan who died of hypothermia after being left semi-naked on a bare concrete floor in the CIA Salt Pit black site near Kabul in November 2002. The United States never informed Gul Rahman's family of his death. Nor did they return his body. (In other words, this was also a forced disappearance, itself a war crime.)⁷¹

The manner in which those responsible for Gul Rahman's death were treated was testament to the unwillingness of the United States authorities to punish alleged perpetrators, even with reprimands or demotions. According to a 2014 Senate inquiry into the CIA renditions programme: "in March 2003, just four months after the death of Gul Rahman, the CIA Station in Country [redacted] recommended that [redacted] [CIA OFFICER 1] receive a 'cash award' of \$2,500 for his 'consistently superior

66 See Kate Clark and Thomas Ruttig "'People That Hate Us': What can Afghans expect from President Trump?" (11 November 2016) Afghanistan Analysts Network <www.afghanistan-analysts.org>.

67 Office of the Prosecutor, above n **Error! Bookmark not defined.**9, at [221].

68 At [221] (emphasis added).

69 See Office of Public Affairs "Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees" (24 August 2009) United States Department of Justice <www.justice.gov> as quoted in Office of the Prosecutor, above n 19, at [221].

70 Office of Public Affairs "Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees" (press release, 30 August 2012) as quoted in Office of the Prosecutor, above n **Error! Bookmark not defined.**, at [221].

71 Rome Statute, art 7(1)(i).

work".⁷² The manager of the detention site stayed in position and "was formally certified as a CIA interrogator in April 2003 after the practical portion of his training requirement was waived because of his past experience with interrogations" at the site.⁷³

VI THE QUESTION OF RESOURCES AND EASE OF INVESTIGATIONS

Alleged crimes committed by the CIA and the United States military are exceptionally well-documented through investigations by human rights groups, the media and United States government bodies. They include the 2014 United States Senate Intelligence Committee report into the CIA's rendition and torture programme, referred to previously;⁷⁴ the 2008 United States Senate Committee on Armed Services' report, *Inquiry into the Treatment of Detainees in US Custody*;⁷⁵ the Open Society Foundations' 2012 report, *Globalizing Torture*;⁷⁶ and a 2004 Human Rights Watch report, *"Enduring Freedom": Abuses by US Forces in Afghanistan*.⁷⁷ Survivors' and victims' families are represented by lawyers ready to pursue cases. If resource limitation were the question, there is a body of publicly available evidence already gathered, including the detailing of command and control: nothing suggests that an investigation into United States forces would be prohibitively resource intensive.

Before the Taliban takeover, there would have been multiple practical obstacles for the ICC trying to investigate crimes in a country caught up in violent civil conflict, where the Taliban and the IS-K were prepared to use violence against those they considered their enemies, including presumably ICC staff and any witnesses with whom they sought to work. The former Afghan government would have been unable to protect ICC staff. That government, while always saying it would cooperate with the ICC in any investigation – as it was duty-bound to do under the Rome Statute setting up the Court – was, in practice, reluctant to offer practical support. Indeed, it sought to block the Court's work, as the

72 Senate Select Committee on Intelligence *Report of the Senate Select Committee on Intelligence Committee Study of the Central Intelligence Agency's Detention and Interrogation Program* (United States Senate, S Report 113-288, 9 December 2014) [*Senate Torture Report*] at 55 (redactions in blank ink noted in square brackets, other square brackets present in the original).

73 At 55. For more on attempts by survivors and families of alleged victims of CIA torture to get justice, including compensation, see Kate Clark "Held Accountable for Torture: CIA psychologists compensate family of dead Afghan" (29 August 2017) Afghanistan Analysts Network <www.afghanistan-analysts.org>.

74 *Senate Torture Report*, above n 72. See also Kate Clark "The 'Other Guantanamo' 12: Bagram closes, CIA torture revealed, US to be held to account?" (12 December 2014) Afghanistan Analysts Network <www.afghanistan-analysts.org>.

75 Committee on Armed Services *Inquiry into the Treatment of Detainees in US Custody* (United States Senate, 20 November 2008).

76 Amrit Singh *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (Open Society Foundations, 2013).

77 Human Rights Watch *"Enduring Freedom": Abuses by U.S. Forces in Afghanistan* (Vol 16, No 3(C), March 2004).

Afghanistan Analysts Network reported repeatedly.⁷⁸ Now, even that difficult-to-imagine prospect of an on-the-ground investigation is no longer possible. As the Prosecutor has said: "there is no longer the prospect of genuine and effective domestic investigations".⁷⁹

However, investigations would still be possible into the alleged crimes of the various conflict actors. Refugees carry their experiences with them and there are now many Afghans in exile. Some material providing documentary evidence of war crimes is also now outside the country and would also be available to investigators. Clarifying command and control within the Taliban may have become more straightforward since the movement named its government on 7 September 2021.⁸⁰ Information about which National Directorate of Security and Afghan National Police facilities typically practiced torture is also well-documented, especially in UNAMA reports on the treatment of security detainees from 2011 onwards.⁸¹ The Taliban themselves may now have access to files that would be of interest to the ICC if they could be persuaded to share them.

The Court could investigate the alleged war crimes and make cases without access to the country. The real problem might come when and if arrest warrants were issued and indictments made, if the alleged perpetrators were in Afghanistan.

VII THE POLITICS OF PRIORITISATION

Prosecutor Khan's decision to single out the Taliban and IS-K for investigation does not follow from the reasons he has given or implied. Their crimes are certainly graver and on a greater scale than the torture carried out by Afghan state forces, but the CIA's rendition and torture programme, and the use of torture authorised by the United States military are, arguably, of a comparable gravity and scale. The ability and willingness of domestic courts to prosecute is also as unlikely in the United States as in today's Afghanistan. The ICC's resources are certainly limited, but Khan's rationale for a narrower focus, being unconvincing, opens him up to the charge that he has given in to bullying of the Court by the United States. It was noticeable that the United States Department of State spokesperson has said the United States was "pleased" by Khan's decision "to focus on the greatest of allegations and

78 This makes the Prosecutor's commendation of the previous government for its "constructive engagement" with his office particularly disingenuous.

79 Khan, above n 4.

80 See Martine van Bijlert "The Focus of the Taleban's New Government: Internal cohesion, external dominance" (12 September 2021) Afghanistan Analysts Network <www.afghanistan-analysts.org>.

81 For detail, see the Afghanistan Analysts Network's dossier on torture and detention in Afghanistan, covering allegations against both US and Afghan government forces: Kate Clark "Thematic Dossier VII: Detentions in Afghanistan – Bagram, Transfer and Torture" (20 December 2014) Afghanistan Analysts Network <www.afghanistan-analysts.org>. See also the *Treatment of Conflict-Related Detainees in Afghan Custody* reports produced jointly, every two years from 2011 to 2021, by the United Nations Office of the High Commissioner of Human Rights and United Nations Assistance Mission to Afghanistan (UNAMA) on this page of the UNAMA website: <unama.unmissions.org/treatment-conflict-related-detainees-afghan-custody>.

atrocities crimes".⁸² For many Afghans, as well, it may not be clear why the alleged crimes of the Taliban should be considered "worse" than those of the former government's armed forces. It is worth noting that Khan faced earlier criticism, for example from Human Rights Watch, for the selective United Nations Security Council-mandated investigation that he led into the Islamic State in Iraq, which also ignored other perpetrators.⁸³

Khan's deprioritisation investigatory strategy once again makes the Court vulnerable to accusations that it deals with powerful and weak countries differently, creating a hierarchy of victims: those who have allegedly suffered abuses by weaker nations or armed groups are far more likely to see action from the ICC. For a court which has been repeatedly accused of focusing on weaker perpetrators, particularly from states in the Global South, Khan's statement is another reputational blow. There is a particular irony in Khan citing the United Nations Security Council's statements about the IS-K being a global threat to security as a reason for focusing on the IS-K, while choosing to sideline investigations into war crimes allegedly committed by one of the Security Council's own permanent members.

VIII WHAT HAPPENS NEXT?

Among both Afghan and international human rights groups who have been pushing for accountability for war crimes allegedly committed during the Afghan conflict, including since the Taliban return to power, there are different views of what should happen. Some believe it is right that the Taliban are the focus of investigations. A letter to the Office of the Prosecutor written before the fall of the last government by a lawyer representing some Afghan human rights and civil society groups (seen by the Afghanistan Analysts Network), for example, expressed this view. It urged Khan to focus on the Taliban and Afghan government forces and may have helped swing Karim Khan's decision to drop the investigation into United States forces. The letter said:⁸⁴

Deprioritize the investigation of the U.S. No one disputes that crimes by international forces are not heinous or worthy of prosecution. However if the goal of the Court is to stop impunity for the worst crimes with the hopes of preventing such crimes in the future, then the helpful use of prosecutorial discretion would be to focus on crimes against Afghans by the Taleban and other internal armed groups, and by the Afghan government. Holding even a handful of individuals from these groups accountable would be the first time war crimes for the killings of Afghans would be a reality. This reality will in turn shift the calculus for war crimes violators in Afghanistan. Until today it has been the case that Taliban leaders and Afghan government leaders could operate with effectively complete impunity. Afghan lives and limbs

82 Jalina Porter "Department Press Briefing – September 27, 2021" (press release, 27 September 2021) US Department of State <www.state.gov>.

83 See Human Rights Watch "Iraq: Missed Opportunity for Comprehensive Justice" (21 September 2017) <www.hrw.org>.

84 Clark, above n 466.

have been cheap. The calculus will change if the Court steps in and fulfils its promise to the Afghan people, and the world.

The letter also argued that such an approach would help the ICC by rendering United States hostility to it a thing of the past:⁸⁵

Deprioritising investigation of U.S. will also reduce intense pressure on the Court which in the last several years brought sanctions against the former Prosecutor and the director of JCCD [Jurisdiction, Complementarity and Cooperation Division]. ... The [Office of the Prosecutor] will be deemed pragmatic by making this choice and we believe the decision will have support amongst stakeholders in Afghanistan. And it will be a choice that will allow you to build a stronger Court in the long-run.

This is not the only approach advocated by Afghan and international human rights activists who have been pressing the ICC to act in regard to the Afghanistan situation. It may not even be the approach favoured by the majority. Others argue that focusing on only some parties to the conflict creates a hierarchy of victims determined by the identity of the alleged perpetrator, rather than the scale and gravity of the crimes or whether victims have recourse to justice in their own courts. This, they argue, is antithetical to the cause of justice itself and would further harm the reputation of the ICC.

Despite the decision of the Pre-Trial Chamber II emphasising no deprioritisation of any aspects of the investigation as requested in 2017 and authorised in 2020, one clear limitation was that the investigation scope would not include the IS-K, which was prioritised by the Prosecutor. The Prosecutor has appealed to regain his investigatory power over the IS-K's alleged crimes and regarding temporal limitations. It is not clear when the Appeals Chamber will make its decision, but based on its March 2020 decision it could be argued that the Prosecutor would regain his jurisdiction over the IS-K's alleged atrocities. The March 2020 decision of the Appeals Chamber illustrated that the scope of the investigation cannot be restricted to the alleged conduct and actors, which were named in the 2017 request of the Prosecutor.⁸⁶

IX CONCLUSION

Afghan and other nationals seeking justice for crimes that have allegedly taken place since Afghanistan became a party to the Rome Statute in 2003 can only watch and wonder at the speed,

⁸⁵ Clark, above n 6. The Jurisdiction, Complementarity and Cooperation Division of the ICC has analysts and lawyers who advise the Prosecutor on issues of jurisdiction and admissibility.

⁸⁶ As mentioned above, since the time of writing, the Appeals Chamber indeed accepted the Prosecutor's appeal, amending the October 2022 decision of Pre-Trial Chamber II to align with the scope of the Prosecutor's investigation in the Afghanistan situation as previously determined by the Appeals Chamber in its 2020 decision. See *Situation in the Islamic Republic of Afghanistan (Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber II entitled "Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation")* Appeals Chamber ICC-02/17-218, 4 April 2023 at [62].

urgency, and resources available to the Court in its investigations of war crimes and crimes against humanity that have allegedly taken place in Ukraine since its invasion by Russia on 24 February 2022. Only a little over one year on from that invasion, on 17 March 2023, the ICC issued its first arrest warrants against Russia's president, Vladimir Putin, and his Presidential Commissioner for Children's Rights, Maria Lvova-Belova, for the "unlawful deportation of population (children) and unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation".⁸⁷

The comparison with the ICC's sluggish, poorly resourced and faltering record in Afghanistan is striking. It is 16 years since the Court began its preliminary examination of the Afghanistan situation in 2007 and seven years since the previous Prosecutor requested an investigation in 2017. As this article has set out, the current Prosecutor is only now beginning an investigation, which is partial in scope. Khan's decision to restrict his investigation into only some alleged perpetrators is apparently rooted in the Court's limited resources. That differential in funding and his choice to prioritise has, yet again, opened up the Court to questions over who is "eligible" for its justice, as it has given the impression that the Court is shying away from investigating the United States military and the CIA.⁸⁸ Although the United States is not a party to the Rome Statute (as neither Russia nor Ukraine are), the United States Government supports the ICC's work in Ukraine,⁸⁹ but has bitterly opposed its work in Afghanistan, including under former president Donald Trump who imposed sanctions on the former Prosecutor and other Court officials.⁹⁰ Yet, despite the evidence of the United States' use of torture and kidnap in Afghanistan, including that put together by the United States Senate in its own investigation into the CIA's renditions programme, and that neither the United States nor Afghan

87 See International Criminal Court "Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova" (press release, 17 March 2023).

88 In the past, the ICC has been criticised for only "going after" African countries, while avoiding the powerful nations of the world: See for example Nanjala Nyabola "Does the ICC have an Africa Problem?" (28 March 2012) Al Jazeera <www.aljazeera.com>. See also Yvonne Dutton and Milena Sterio "The War in Ukraine and the Legitimacy of the International Criminal Court" (30 August 2022) Just Security <www.justsecurity.org>.

89 See for example Matthew Lee "US backs international court for Russia's war in Ukraine" (30 March 2023) Associated Press <apnews.com>; and Ryan Goodman "How Best to Fund the International Criminal Court" (27 May 2022) Just Security <www.justsecurity.org>.

90 For detail on how the sanctions were imposed, see Haley S Anderson "Why Them? On the U.S. Sanctions Against Int'l Criminal Court Officials" (2 September 2020) Just Security <www.justsecurity.org>. For background on the United States' relationship with the Court, see Kate Clark "Ferocious Attack on ICC: Washington threatens court if it investigates alleged US war crimes in Afghanistan" (12 September 2018) Afghanistan Analysts Network <www.afghanistan-analysts.org>. The United States lifted the sanctions in April 2021 after Joe Biden became president. See the press statement from Secretary of State: Anthony J Blinken "Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court" (press statement, 2 April 2021).

domestic courts have dealt with these alleged crimes,⁹¹ the ICC apparently will not deal with them either.

In 2004, the Afghanistan Independent Human Rights Commission published a landmark report into transitional justice, the result of a nationwide consultation, which spoke of the deep desire of Afghans "that their suffering be recognized".⁹² As of yet, there has been no justice in Afghanistan itself,⁹³ or truth-telling or reconciliation. The ICC process was always going to seem arbitrary in a country where war crimes have been perpetually committed for more than 40 years, but only those taking place after 1 May 2003, the date Afghanistan became a state party, could be investigated by the Court. This had already created one hierarchy of victims where perpetrators of war crimes from the communist governments of the People's Democratic Party of Afghanistan (PDPA) from 1978 to 1992, the Soviet Union, which occupied Afghanistan from 1979 to 1989, various factions of the mujahedin fighting the PDPA and the Soviet Union and then each other, and the Taliban during their first Emirate (1996–2001) were already, by legal necessity, beyond the reach of the ICC. The ICC Prosecutor's proposal to now only focus on the Taliban and IS-K apparently places more importance on the victims of Afghan insurgents than the Afghans and other nationals who are still calling for justice for the actions of the Afghan government and the United States military and the CIA. Such restrictions amplify the impression of selective justice and a victim hierarchy.

ANNEX: CHRONOLOGY OF THE ICC'S ENGAGEMENT IN AFGHANISTAN

- In June 1998, when state representatives discussed the Rome Statute draft, a delegation of the then internationally recognised Afghan mujahedin government participated in the conference.
- In February 2003, the Afghan Government deposited its instrument of ratification to the Rome Statute, the establishment document of the ICC.
- On 1 May 2003, the Afghan Government became a state party to the Rome Statute.
- In 2007, the Office of the Prosecutor of the ICC began a preliminary investigation into the situation in Afghanistan. The aim was to find out if any Rome Statute crimes had been

91 See Section V.

92 Afghanistan Independent Human Rights Commission *A Call for Justice: A National Consultation on past Human Rights Violations in Afghanistan* (25 January 2005) at 5.

93 For details of the few individuals who have been prosecuted for crimes committed during the conflict, the few flawed trials in Afghanistan, and the few trials held under the principle of universal jurisdiction in Europe, see Patricia Gossman and Sari Kouvo *Tell Us How This Ends: Transitional Justice and Prospects for Peace in Afghanistan* (Afghanistan Analysts Network, 30 June 2013) at 39–42. For a more up-to-date list of trials of Afghans in Europe, see Ehsan Qaane "Afghan War Crimes Trials in The Netherlands: Who are the suspects and what have been the outcomes?" (25 March 2020) Afghanistan Analysts Network <www.afghanistan-analysts.org>.

committed related to the ongoing armed conflict of Afghanistan since its membership, and whether there had been domestic accountability efforts in relation to these crimes.

- In 2011, for the first time, the Office of the Prosecutor of the ICC published its first annual report about the Afghanistan situation. In its two-page report, the Office of the Prosecutor named five types of crimes (killings, torture, attacks on humanitarian targets and the United Nations, attacks on protected objects, and recruitment of child soldiers), criminalised in the Rome Statute, which allegedly occurred in relation to the Afghanistan armed conflict.
- In 2016, the Office of the Prosecutor's annual report said that its findings showed there were reasonable bases to believe war crimes and crimes against humanity were carried out by the Taliban and its affiliates, the Afghan National Security Forces, as well as the United States Army and the CIA. The Office of the Prosecutor said that it would soon make its decision to submit its request of authorisation to open a full investigation into the Situation of Afghanistan to a Pre-Trial Chamber. After the publication of this report, the Afghan Government established regular direct communication with the ICC. The Afghan Government sent at least three delegations to The Hague, arguing that while they were willing to investigate war crimes nationally, they needed at least another year to build capacity. In an attempt to demonstrate willingness, the Attorney General's Office set up a War Crimes Unit, and articles from the Rome Statute were incorporated into Afghan law.
- In November 2017, the ICC Prosecutor submitted her request to authorise an investigation into the Afghanistan situation to a Pre-Trial Chamber of the ICC. After the submission of this request, the United States government put political pressure on the ICC to not authorise the request, arguing that the ICC did not have jurisdiction over the United States as a non-party to the ICC.
- In April 2019, the Pre-Trial Chamber II of the ICC rejected the Prosecutor's request, arguing that there was no reasonable basis to believe the investigation served "the interests of justice", although they accepted that there was a reasonable basis to believe that war crimes and crimes against humanity were committed in the territory of Afghanistan by the Taliban, the Afghan National Security Forces and the United States Army and the CIA, as well as in the territory of other state parties, including Poland, Romania and Lithuania by the United States Army and the CIA. The Chamber also acknowledged that there had not been domestic prosecutions of perpetrators.
- In June 2019, the Office of the Prosecutor and three victims' legal representatives appeared before the Pre-Trial Chamber to contest their refusal to authorise an investigation. They argued that the Pre-Trial Chamber had erred in law by attempting to assess "the interests of justice" or to have a positive determination of the interests of justice.
- In December 2019, the Appeals Chamber of the ICC held a three-day public hearing where the representatives of the Office of the Prosecutor, victims' representatives, the defence lawyer of the Afghan Government and some members of civil society and academia presented their arguments against or in favour of the Pre-Trial Chamber's decision.

- On 5 March 2020, the judges of the Appeals Chamber reversed the Pre-Trial Chamber's decision and authorised a full investigation. The Appeals Chamber, in its judgment, argued that the Pre-Trial Chamber did not have the power to assess the interests of justice.
- On 26 March 2020, the Afghan Government requested a deferral.
- On 27 September 2021, the new Prosecutor of the ICC, Karim Khan, proposed a narrowing of the focus of the investigation to the Taliban and IS-K only.
- On 31 October 2022, the Pre-Trial Chamber II partially authorised the investigation by excluding alleged perpetrators like IS-K and alleged crimes which have been occurred since March 2020.
- On 7 November 2022, the Prosecutor announced that he had partially appealed the Pre-Trial Chamber decision which had restricted the scope of his investigation, but was resuming his investigation on other parts which had been authorised by the Pre-Trial Chamber. Practically, by this he meant his investigation into the alleged crimes perpetrated by the Taliban and the affiliated Haqqani network.
- On 24 November 2022, the Appeals Chamber invited the victims' legal representatives to share their views on the Prosecutor's appeal request until 15 December 2022.
- Before 15 December 2022, victims' legal representatives submitted their views with the Appeals Chamber and in their submissions supported the Prosecutor's appeal request.
- On 16 January 2023, the Prosecutor submitted his withdrawal notice to the Appeals Chamber and said that "in the interests of judicial economy, and mindful of the Court's limited resources", he had decided to not proceed with the appeal.
- On 24 January 2023, the Appeals Chamber invited the victims' legal representatives to share their observations on the Prosecutor's notice of discontinuance of appeal, giving a very tight deadline, set at 3 February 2023.
- By this deadline, only a few victims' legal representatives had submitted their observations individually and collectively. All those who submitted observations opposed the Prosecutor's decision to withdraw the appeal.
- On 16 March 2023, by referring to the victims' legal representatives' observations, the Appeals Chamber determined the Prosecutor's notice of discontinuance of appeal "invalid" and ruled it would proceed with the appeal. The Chamber granted permission to the Prosecutor to respond to this ruling if he wished to.
- On 17 March 2023, the Prosecutor responded to the Appeals Chamber's ruling and urged the Chamber to grant the appeal based on the reasons and in terms previously given. He determined the victims' legal representatives' observations "inadmissible" and "incorrect".
- On 4 April 2023, the Appeals Chamber issued its judgment on the Prosecutor's appeal, amending the decision of Pre-Trial Chamber II to align with the scope of the Prosecutor's investigation in the Afghanistan situation as previously determined by the Appeals Chamber in 2020.