

# TOWARD COOPERATION BETWEEN AFGHANISTAN AND THE INTERNATIONAL CRIMINAL COURT

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## INTRODUCTION

The Rome Statute of the International Criminal Court (Rome Statute) requires state parties to adopt procedures to facilitate cooperation with the International Criminal Court (ICC).<sup>1</sup> Afghanistan, however, has not yet done so. This failure to implement the Rome Statute has inhibited the ICC's ability to investigate and bring to justice potential criminal defendants like the Taliban and the Islamic State, warlords, and suspects among the government's troops and police officers. This Article recommends that Afghanistan move swiftly to incorporate a provision that would facilitate this important relationship, and establish and regulate cooperation between Afghan law enforcement agencies and the ICC, especially with respect to ongoing inquiries.

Under the Rome Statute, the ICC has jurisdiction over grave crimes committed within the territory of member states, including crimes of genocide, crimes against humanity, and war crimes.<sup>2</sup> Although the language of the Rome Statute gives priority to the national jurisdiction of state parties to prosecute these crimes, under the principle of complementarity, the ICC has the authority to intervene and assert its jurisdiction when a nation is unwilling or unable to prosecute.<sup>3</sup>

That said, the ICC is dependent on cooperation with state parties to carry out its mission and operations. Because of this need, the Rome Statute requires state parties to ensure that "there are procedures available under their national law for all forms of coop-

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1. Rome Statute of the International Criminal Court, art. 88, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

2. *See id.* art. 5(1).

3. *See id.* art. 17(1)(a).

eration”<sup>4</sup> with the ICC. While Afghanistan ratified the Rome Statute of the ICC on February 10, 2003, to date it has not passed a law facilitating this cooperation. The absence of the relevant required cooperation law impedes the ICC’s ability to investigate and prosecute international crimes in Afghanistan.

This lack of action has led to attention and efforts by international human rights organizations to push the Afghan government to fulfill its obligation under the Rome Statute. For example, recently the organizations Human Rights Watch and Transitional Justice Coordination published an open group letter to Ashraf Ghani, president of Afghanistan, that illustrates current concerns about Afghanistan’s lack of legislation to establish cooperation with the ICC. It read:

We urge the government [of Afghanistan] to provide consistent and meaningful cooperation with the ICC. Indeed, as a member of the ICC, Afghanistan has a legal obligation to do so. Specifically, we urge the government to facilitate meetings between the ICC and key Afghan government officials, including those in the Ministry of Foreign Affairs and the Ministry of Justice, as well as the National Security Advisor and the Attorney General. We also urge the government to facilitate the ICC’s access to important judicial officers, including prosecutors and justices on the Supreme Court.<sup>5</sup>

This Article similarly urges the Afghan government to bring its domestic law into conformity with the Rome Statute by promptly enacting a new cooperation law. To support this recommendation, Part I begins by identifying some of the major atrocities that occurred over the past four decades in Afghanistan up until Afghanistan’s ratification of the Rome Statute in 2003. It also briefly discusses the complementarity principle of the Rome Statute and its possible application to the current situation in Afghanistan. Part II analyzes those provisions of the Rome Statute that envision cooperation between the ICC and state parties. Part III examines the current relevant rules and regulations in the laws of Afghanistan, including the Afghan Constitution, penal code, criminal procedure code, and law on the organization and the jurisdiction of the Afghanistan judiciary. It highlights the absence of proper regulations that would facilitate cooperation between the

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4. *See id.* art. 88.

5. Letter from Human Rights Watch and Transitional Justice Coordination to Ashraf Ghani President of Islamic Republic of Afghanistan, Re: Afghanistan’s Cooperation with the International Criminal Court, HUM. RTS. WATCH (Apr. 14, 2016), <https://www.hrw.org/news/2016/04/21/hrw-and-tjcg-letter-president-ghani> [https://perma.cc/VF44-2T8D].

ICC and Afghanistan, and exposes a lack of adequate investigation by the ICC. Next, Part IV addresses model approaches to incorporation of cooperation laws by carefully analyzing the United Kingdom's and Australia's International Criminal Court Acts and uses those examples to assist in devising similar legislation for the Afghan context. Part V presents several recommendations for possible legislation and actual cooperation with the ICC, and anticipates certain challenges that may inhibit implementation of a cooperation law. Finally, the Article offers some concluding remarks.

## I. BACKGROUND: PAST ATROCITIES AND THE ICC IN AFGHANISTAN

Afghanistan has suffered from war and conflict since April 1978, when the communist party took power through a coup.<sup>6</sup> Since then, Afghanistan has endured various phases of conflict during which many alleged war crimes and crimes against humanity were committed by different groups and individuals. This Part gives an overview of major atrocities which have occurred during these stages of conflict, highlighting the key incidents and identifying the specific periods and responsible parties or groups involved, and situates Afghanistan's adoption of the Rome Statute within this historical context.

### A. *Major Atrocities from 1978 to 2003*

In the twenty-five year period between 1978 and 2003, all parties to conflicts in Afghanistan—including the communist regime (controlled by the People's Democratic Party of Afghanistan), regional militias, Mujahidin<sup>7</sup> groups, the Mujahidin government, and the Taliban regime—committed massive violations of human rights, horrendous war crimes, and crimes against humanity.<sup>8</sup>

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6. Patricia Gossman, *Afghanistan*, CRIMES WAR, <http://www.crimesofwar.org/a-z-guide/afghanistan/> [https://perma.cc/56UC-B5XU] (last visited Apr. 3, 2017).

7. *Mujahidin* is the plural form of *mujahid*; *mujahid* literally means "warrior of God." During the Soviet Union's invasion of Afghanistan, Mujahidin was the moniker given the people who were fighting against the Soviet troops and the then-government of Afghanistan. For more information regarding the definition of "Mujahidin," see *Mujahidin*, OXFORD ISLAMIC STUD. ONLINE, <http://www.oxfordislamicstudies.com/article/opr/t125/e1593> [https://perma.cc/76HB-THKA] (last visited Apr. 3, 2017).

8. *Casting Shadows: War Crimes and Crimes against Humanity: 1978-2001*, AFG. JUSTICE PROJ. 4 (2005) [hereinafter AJP REPORT], <http://reliefweb.int/sites/reliefweb.int/files/resources/B7C09154CD3E144EC12570430049F76A-ajp-afg-18jul.pdf> [https://perma.cc/K9NP-S8CY].

The People's Democratic Party of Afghanistan (PDPA)<sup>9</sup> was associated with many terrible atrocities, including massive arrests and torture, disappearances, summary executions, massacres, indiscriminate bombardments of civilians, and violent quelling of uprisings.<sup>10</sup> For example, after the coup by the PDPA, in an attempt to transform Afghanistan into a modern socialist state,<sup>11</sup> the PDPA began systematic arrests, detainments, and executions of people, including leaders of social, political, and religious groups, professionals, and members of the educated classes<sup>12</sup> accused of being opposed to PDPA ideas and plans.<sup>13</sup>

Because the PDPA did not have the support of a majority of Afghanistan's populace, it faced large protests throughout Afghanistan, not just in the cities but also in the countryside.<sup>14</sup> To carry out its agenda, the PDPA used harsh and violent means to suppress people.<sup>15</sup> The movement was divided into two factions, *Khalq* ("people") and *Parcham* ("flag"), which disagreed on policies and issues.<sup>16</sup> This division led to the arrest and execution by the Khalq faction of increasingly more people and leaders who were associated with the Parcham faction.<sup>17</sup>

One of the first mass executions occurred sometime around 1978–79, when Nur Muhammad Taraki (from the Khalq faction) led the PDPA.<sup>18</sup> According to a death list published by the Dutch Prosecution Office in September 2013,<sup>19</sup> almost five thousand

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9. The People's Democratic Party of Afghanistan was the factionalized Marxist-Leninist party that took control of Afghanistan after the April 1978 revolution (the coup) and overthrew and killed President Muhammad Daoud Khan. The party ruled the country until 1992. It experienced many changes in its leadership during the fourteen years of its rule. See *People's Democratic Party of Afghanistan*, ENCYCLOPEDIA.COM, <http://www.encyclopedia.com/humanities/encyclopedias-almanacs-transcripts-and-maps/peoples-democratic-party-afghanistan> [https://perma.cc/KB43-GLRL] (last visited Apr. 3, 2017).

10. See AJP REPORT, *supra* note 8, at 5.

11. See Gossman, *supra* note 6.

12. See *id.*

13. *Communist-era Mass Grave Discovered Highlights Need for Post-war Justice*, IRIN (Dec. 22, 2006), <http://www.irinnews.org/news/2006/12/22/communist-era-mass-grave-discovered-highlights-need-post-war-justice> [https://perma.cc/7U3M-DWA2].

14. See Gossman, *supra* note 6.

15. See AJP REPORT, *supra* note 8, at 10.

16. See *id.*

17. See *id.*

18. Shaheen Whyte, *Afghanistan's Forgotten War Crimes*, ABC.NET, <http://www.abc.net.au/news/2013-10-28/whyte-afghanistans-forgotten-war-crimes/5048982> [https://perma.cc/BM24-AB3W] (last updated Oct 27, 2013); see also AJP REPORT, *supra* note 8, at 12.

19. The documents were disseminated by the Dutch government after conducting an investigation against Amanullah Osman (now deceased), one of the key members of the Afghan Security Service (known as *Khad*) who was suspected of committing war crimes in

Afghan citizens were killed by the communist regime within the first twenty months of the regime.<sup>20</sup> The list shows that the executed people came from throughout Afghanistan and belonged to different groups, including students, teachers, doctors, police officers, civil servants, tailors, land owners, the unemployed, mul-lahs, and farmers.<sup>21</sup> These citizens were accused of espousing various ideologies, including *Khomeini* (in favor of Khomeini, the leader of the Islamic Revolution in Iran), *Ikhwani* (in favor of the Islamic Brotherhood Party of Egypt), *Shola* (in favor of a specific faction within the PDPA party), Maoist, and anti-Revolutionist, as well as generally acting rebelliously.<sup>22</sup> The Dutch government's report presents only a small portion of the mass executions that were carried out by the communist regime.<sup>23</sup> Because of the secret methods that were utilized by the PDPA in implementing the executions and the isolation of Afghanistan by the world at the time, most of the atrocities were not documented.<sup>24</sup> The French scholar Olivier Roy estimated that between fifty and one hundred thousand Afghan citizens vanished through forced disappearances and mass executions when the communist regime ruled Afghanistan.<sup>25</sup>

Other crimes that occurred from 1978–79 included torture and abusive interrogations of suspects who were alleged to oppose the regime.<sup>26</sup> For example, the regime used coercive interrogation techniques, including “severe beatings, whipping, pulling out of prisoners’ nails, burning of hair and sleep deprivation. Some reports also alleged that political prisoners [were] given electric shocks.”<sup>27</sup> Most of these criminal acts were ordered and carried

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Afghanistan during the communist regime. See *Kushtarhae Sazmane “Agsa”, Efsxae Name Panj Hazar Qurbani* [Aqsa Organization’s Killings, Disclosure of The Names of Five Thousand Victims], DAILY 8AM (Afg.) (2013), <http://8am.af/1392/06/27/revealed-agsa-mass-killing-names/> [https://perma.cc/EVP2-6Y4W].

20. Kate Clark, *Death List Published: Families of Disappeared End a 30 Year Wait for News*, AFG. ANALYSTS NETWORK (Sept. 26, 2013), <https://www.afghanistan-analysts.org/death-list-published-families-of-disappeared-end-a-30-year-wait-for-news/> [https://perma.cc/UXG4-GBLJ].

21. See Clark, *supra* note 20.

22. For the complete, detailed list of those executed, see *Death List*, DAILY 8AM, [http://www.8am.af/Files/Translation\\_Death\\_List\\_Internetversion\\_English.pdf](http://www.8am.af/Files/Translation_Death_List_Internetversion_English.pdf) [https://perma.cc/U6WX-9PFE].

23. David Loyn, *The Death List That Names 5,000 Victims*, BBC (Aug. 26, 2014) [hereinafter BBC REPORT], <http://www.bbc.com/news/magazine-28645671> [https://perma.cc/XV9V-EQL4].

24. See AJP REPORT, *supra* note 8, at 12.

25. See Clark, *supra* note 20 (quoting the U.N. Mapping Report and Olivier Roy).

26. See AJP REPORT, *supra* note 8, at 28.

27. See *id.*

out by the Afghan Security Service, formally known as *Khad*.<sup>28</sup> Khad had the responsibility to arrest and interrogate anyone who might be deemed a threat to the regime.<sup>29</sup>

With time, the PDPA's treatment of citizens grew even harsher, and as a result, there was an increase in uprisings and protests throughout Afghanistan. The PDPA did not hesitate to use any tool to suppress and stifle these protestors' voices. For example, on March 15, 1979, according to one estimate, more than twenty-four thousand protestors were massacred by the communist government's troops.<sup>30</sup> Similar incidents happened during 1979 in many other cities and provinces, including Kabul and Hazarajat,<sup>31</sup> albeit with fewer casualties. Some commentators argue that the expansion of such protests and uprisings around the country, especially the Herat massacre, convinced the Soviet Union to invade Afghanistan to keep the PDPA in power.<sup>32</sup>

The Soviet invasion on December 25, 1979,<sup>33</sup> precipitated armed resistance by many people, including the Mujahidin, resulting in additional human tragedy.<sup>34</sup> Together, the forces of the Soviet Union and the communist regime murdered tens of thousands of civilians.<sup>35</sup> In addition to detaining, torturing, and executing civilians who were accused of supporting the resistance,<sup>36</sup> the Soviet Union's forces also conducted massive and indiscriminate bombardments of villages in the countryside, destroying and capturing members of the Mujahidin<sup>37</sup> and dissuading people from supporting the resistance.<sup>38</sup> As a result, countless civilians were killed and many villages were demolished.<sup>39</sup>

28. See Whyte, *supra* note 18.

29. See *id.*

30. Charlie Gammell, *Failings of Inclusivity: The Herat Uprising of March 1979*, AFG. ANALYSTS NETWORK (Mar. 15, 2015), <https://www.afghanistan-analysts.org/failings-of-inclusivity-the-herat-uprising-of-march-1979/> [<https://perma.cc/54FQ-DV4J>].

31. See AJP REPORT, *supra* note 8, at 23–27. Hazarajat is the place where the Hazara ethnic group lives; see also *Who Are the Hazaras?*, WORLD HAZARA COUNCIL, <http://worldhazaracouncil.org/en/who-are-the-hazaras/> [<https://perma.cc/R7GY-SCN2>] (last visited Apr. 3, 2017).

32. See Gammell, *supra* note 30.

33. See AJP REPORT, *supra* note 8, at 31.

34. See Gossman, *supra* note 6.

35. See *id.*

36. See *id.*

37. *The Cost of War: Afghan Experience of Conflict, 1978-2009*, OXFAM 7 (Nov. 2009) [hereinafter OXFAM REPORT], <https://www.oxfam.org/sites/www.oxfam.org/files/afghanistan-the-cost-of-war.pdf> [<https://perma.cc/7CAL-SDLL>].

38. See AJP REPORT, *supra* note 8, at 41–45.

39. See Gossman, *supra* note 6.

After the complete withdrawal of Soviet forces in February 1989,<sup>40</sup> Najibullah, the last Soviet-backed leader of Afghanistan, created and supported militias around Afghanistan to defend his government.<sup>41</sup> These militias committed massive violations of human rights and humanitarian law; in most cases, the militias were autonomous and acted outside of the military chain of command.<sup>42</sup> These militias attacked civilians and plundered their property, placing mines indiscriminately.<sup>43</sup> The *Afghanistan Justice Report* indicates that “[m]ilitia forces were responsible for waylaying travelers to rob them, including returning refugees, extorting money from traders, looting property, forcibly taking land, and planting mines without mapping or marking them. Militia groups also fought each other.”<sup>44</sup>

Upon the collapse of Najibullah’s regime in April 1992,<sup>45</sup> Afghanistan entered a new phase of conflict and civil war among different factions of the Mujahidin. The major Mujahidin groups who had fought against the Soviet Union invasions began fighting against one another.<sup>46</sup> During the civil war (1992–96),<sup>47</sup> tremendous violations of human rights and humanitarian law were committed by the parties to the conflict, including indiscriminate rocketing and bombardments of civilians and residential areas in Kabul city,<sup>48</sup> as well as “executions, abduction, imprisonment, sexual violence and other forms of torture.”<sup>49</sup> Although it is difficult to specify the overall number of killings and summary executions during the civil war, according to one estimate, about ten thousand people were killed in one year alone, 1993.<sup>50</sup>

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40. Mark N. Katz, *Lessons of the Soviet Withdrawal from Afghanistan*, MIDDLE E. POL’Y COUNCIL, <http://www.mepc.org/articles-commentary/commentary/lessons-soviet-withdrawal-afghanistan?print> [<https://perma.cc/A5UC-E9CN>] (last visited Apr. 3, 2017).

41. See Gossman, *supra* note 6.

42. See AJP REPORT, *supra* note 8, at 48.

43. See *id.*

44. See *id.*

45. See Gossman, *supra* note 6.

46. The Mujahidin groups included *Jamiat-e Islami-yi Afghanistan*, *Hezb-e Islami*, *Ittihad-i Islami Bara-yi Azadi Afghanistan*, *Hezb-e Wahdat-e Islami-yi Afghanistan*, *Junbish-e Milli-yi Islami-yi Afghanistan*, and *Harakat-e Islami-yi Afghanistan*. See *Blood-Stained Hands Past Atrocities in Kabul and Afghanistan’s Legacy of Impunity*, HUM. RTS. WATCH 5 (2005) [hereinafter HRW REPORT 2005], <https://www.hrw.org/sites/default/files/reports/afghanistan0605.pdf> [<https://perma.cc/5GGL-4222>].

47. See OXFAM REPORT, *supra* note 37, at 9.

48. See AJP REPORT, *supra* note 8, at 64.

49. See OXFAM REPORT, *supra* note 37, at 10.

50. See *id.*

Afghanistan entered another dark period in its history when the Taliban took control of Kabul in 1996 and announced their government, the "Islamic Emirate of Afghanistan," in 1997.<sup>51</sup> During the Taliban regime (1996–2001), in addition to the suppression of women and application of rules and laws based on extremist interpretations of Islam, the Taliban committed major atrocities including massacres, summary executions, targeting and killing civilians, forced displacement of civilians, indiscriminate rocketing and bombardments of predominately civilian areas, torture, and arrest and detention of civilians as prisoners of war.<sup>52</sup> As an example, according to the Human Rights Watch's report, after it took control of the city of Mazar-i-Sharif in August 1998, the Taliban summarily executed over two thousand civilians, mostly from the Hazara ethnic group.<sup>53</sup>

### B. *Ratification of the Rome Statute*

After more than two decades of war and atrocities, Afghanistan strongly supported the establishment of the International Criminal Court at the Rome Conference, which was held from June 15 to July 17 in 1998.<sup>54</sup> The Afghan delegate<sup>55</sup> to the Rome Conference affirmed that war crimes and crimes against humanity had been perpetrated over the previous twenty years in Afghanistan, demonstrating the need for a neutral and independent court that would investigate such serious crimes and prevent their re-occurrence.<sup>56</sup> In his statement, he suggested that at the outset, the court should be allowed to prosecute and consider only gross crimes such as genocide, war crimes, and crimes against humanity, and its jurisdiction should be supplementary to national jurisdiction. He asserted:

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51. *Afghanistan Civil Wars*, HUM. RTS. WATCH (2001) [hereinafter HRW REPORT 2001], <https://www.hrw.org/reports/2001/afghan2/Afghan0701-01.htm> [<https://perma.cc/BXD7-49WQ>].

52. See AJP REPORT, *supra* note 8, at 118–53.

53. See HRW REPORT 2001, *supra* note 51.

54. See U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole 87, U.N. Doc A/CONF.183/13 (Vol. II) (2002).

55. Abdullah Abdullah (the current chief executive of the Islamic Republic of Afghanistan) was the Afghanistan delegate to the Rome Conference. See U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. GAOR, 53d Sess. 4th pln. mtg. ¶ 59, U.N. Doc A/Conf.183/Sr.4 (June 16, 1998) 2 [hereinafter UNDC CONFERENCE], [http://legal.un.org/diplomaticconferences/icc-1998/docs/english/vol2/a\\_conf\\_183\\_sr4.pdf#page=](http://legal.un.org/diplomaticconferences/icc-1998/docs/english/vol2/a_conf_183_sr4.pdf#page=) [<https://perma.cc/LA88-2FUY>].

56. See *id.*

The court should conduct its work independently of the Security Council. Any impediment to the independent exercise of justice would damage the credibility of the Court, especially in the eyes of victims . . . . The jurisdiction of the Court should be limited to the core crimes of aggression, genocide, war crimes, and crimes against humanity, while leaving open the possibility of broadening the scope of its jurisdiction through periodic amendment of the [Rome] Statute. The Court should play a complementary role in relation to national courts, and the unavailability and inefficacy of national courts should be properly defined in order to avoid conflicts of competence and infringement of the sovereign rights of independent States.<sup>57</sup>

As the delegate made clear in this statement, in addition to reaffirming the independence of the court, the court's supplementary jurisdiction was identified as a requirement for the court's establishment, which raised some concerns about ambiguity in the draft Rome Statute regarding complementary jurisdiction. Overall, the Afghan delegate's support of the Rome Conference demonstrated how strongly Afghans felt about creating the ICC.

After the fall of the Taliban in 2001 and the establishment of the new government, Afghanistan's support for the ICC resulted in its ratification of the Rome Statute on February 10, 2003, becoming the eighty-ninth member of the Assembly of State Parties to the ICC.<sup>58</sup> Mr. Sayed Fazel Adkbar, spokesperson for then-President Hamid Karzai, made a statement after the approval of Afghanistan's accession emphasizing cooperation of Afghanistan with the ICC and the whole international community.<sup>59</sup>

Afghanistan's accession to the Rome Statute was widely welcomed among the Afghan people, as well as national and international human rights and nongovernmental organizations. Richard Dicker, Director of the International Justice Program at Human Rights Watch, called Afghanistan's accession to the Rome Statute "a historic day for Afghanistan,"<sup>60</sup> and hoped that all perpetrators of the past massive crimes against humanity and crimes of war

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57. *See id.*

58. *Afghanistan*, INT'L CRIM. CT. (ICC) (Jul. 11, 2011) [hereinafter ICC WEB], [https://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/afghanistan/Pages/afghanistan.aspx](https://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/afghanistan/Pages/afghanistan.aspx) [https://perma.cc/9CX4-2EYA] (last visited Apr. 3, 2016); *see also Afghanistan Signs Up for the International Criminal Court: War Crimes in Afghanistan May Now Be Tried Before the ICC*, COALITION INT'L CRIM. CT. (2003) [hereinafter *Afghanistan Signs Up for the International Criminal Court*], <http://www.iccnw.org/documents/02.10.2003-Afghanistan.pdf> [https://perma.cc/PS4T-LZKU].

59. *See Afghanistan Signs Up for the International Criminal Court*, *supra* note 58, at 1.

60. *See id.*

would be held accountable.<sup>61</sup> According to the latest report by the ICC's Office of the Prosecutor (OTP), since May 1, 2003, the ICC has received more than 112 communications regarding the Afghan atrocity situation,<sup>62</sup> and the ICC's preliminary examination of Afghanistan was made public in 2007.<sup>63</sup>

C. *Alleged War Crimes and Crimes Against Humanity from 2003 to Present*

When the Taliban collapsed, Afghanistan established a new government and ratified the Rome Statute.<sup>64</sup> Afghans were very optimistic about the prospect of bringing to justice those criminals who had committed grave crimes in past decades.<sup>65</sup> However, despite this enthusiasm, no alleged criminals were prosecuted; in fact, those same persons rose to the highest government positions.<sup>66</sup> Because there were neither prosecutions nor any ad hoc tribunal established, as in countries like Yugoslavia and Rwanda, the leaders and commanders who were involved in the prior three decades of atrocities continued to dominate the government, making it ever more challenging to hold them accountable for their past dreadful actions. These leaders, including commanders and leaders of the communist regime, Mujahidin groups, and warlords, stand accused of war crimes and crimes against humanity.<sup>67</sup> It is no surprise that those same leaders sought to evade accusations and sidestep punishment for their past offenses.<sup>68</sup>

Despite advocacy and pressure by international human rights organizations and civil and human rights activists, in 2008 the Afghan National Assembly (Parliament), which is dominated by many warlords and former leaders accused of human rights viola-

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61. *See id.*

62. ICC, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 26 (2015) [hereinafter OTP REPORT 2015].

63. *See* ICC WEB, *supra* note 58.

64. *See Afghanistan*, ABA-ICC PROJECT (2014), <https://www.aba-icc.org/country/afghanistan/> [<https://perma.cc/83AS-2K45>] (last visited Apr. 3, 2017).

65. *See* Gossman, *supra* note 6.

66. *Afghanistan: Repeal Amnesty Law*, HUM. RTS. WATCH (Mar. 10, 2010) [hereinafter HRW STATEMENT], <https://www.hrw.org/news/2010/03/10/afghanistan-repeal-amnesty-law> [<https://perma.cc/8TNL-K2QA>].

67. *See* Declan Walsh, *Warlords and Women Take Seats in Afghan Parliament*, GUARDIAN (Dec. 19, 2005), <https://www.theguardian.com/world/2005/dec/19/afghanistan.declan-walsh> [<https://perma.cc/G56L-BYAR>].

68. *See id.*

tions,<sup>69</sup> passed an amnesty law called the Law on National Reconciliation, Public Amnesty and National Stability (Amnesty Law).<sup>70</sup> This law grants amnesty to those who have committed even massive violations of human rights and war crimes.<sup>71</sup> It also provides amnesty to perpetrators of ongoing crimes who are presently embroiled in conflict, provided they reconcile with the government.<sup>72</sup> According to the law, anyone who enters into peace negotiations with the government of Afghanistan will not be prosecuted because of what he or she did in the past.<sup>73</sup> Although the legislature passed the Amnesty Law, a study conducted by the Afghanistan Independent Human Rights Commission in 2005<sup>74</sup> shows that the overwhelming majority of Afghan people support the prosecution of the alleged perpetrators of past atrocities.<sup>75</sup>

Furthermore, despite Afghanistan's ratification of the Rome Statute, the Taliban, government troops, police, warlords, U.S. forces, and, more recently, Islamic State groups have continued to engage in conduct potentially deemed criminal under Articles 7 and 8 of the Rome Statute.<sup>76</sup> Not only are there reports from the OTP<sup>77</sup>

69. See Katherine Iliopoulos, *Afghan Amnesty Law a Setback for Peace*, CRIMES WAR, <http://www.crimesofwar.org/commentary/afghan-amnesty-law-a-setback-for-peace/> [https://perma.cc/B2M8-3H3H] (last visited Apr. 3, 2016).

70. *Qanooni Mosaleha Meli Afewe Aomomi Wa Subate Meli* [Law on National Reconciliation, Public Amnesty and National Stability], Official Gazette, Dec. 2008, No. 965 [hereinafter *Afg. Amnesty Law*], translated in Sarwar Danish, *National Reconciliation, General Amnesty and Stability Bill*, PAJHWOK AFGHAN NEWS: AFGHAN PEACE PROCESS SPECIAL PAGE (May 18, 2015), <http://peace.pajhwok.com/en/laws-and-decrees/national-reconciliation-general-amnesty-and-stability-bill> [https://perma.cc/3A6P-NHME].

71. See *id.* art. 3 (1).

72. See *id.* art. 3 (2).

73. See *id.*

74. See HRW STATEMENT, *supra* note 66.

75. See *id.*

76. See Rebecca Leaf, *Preliminary Examination in Afghanistan*, AM. NON-GOVERNMENTAL ORGS. COALITION INT'L CRIM. CT. 1–3 (June 10, 2015), <http://amicc.org/docs/Preliminary%20Examination%20in%20Afghanistan.pdf> [https://perma.cc/3HVN-6AQQ].

77. See, e.g., Off. of the Prosecutor, *Report on Preliminary Examination Activities (2015)*, INT'L CRIM. CT. 26–31 (Nov. 12, 2015), <https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf> [https://perma.cc/3HVN-6AQQ]; Off. of the Prosecutor, *Report on Preliminary Examination Activities 2014*, INT'L CRIM. CT. 18–24 (Dec. 2, 2014), <https://www.icc-cpi.int/iccdocs/otp/OTP-Pre-Exam-2014.pdf> [https://perma.cc/PZ3J-P4LU]; Off. of the Prosecutor, *Report on Preliminary Examination Activities 2013*, INT'L CRIM. CT. 7–14 (Nov. 2013); Off. of the Prosecutor, *Report on Preliminary Examination Activities 2012*, INT'L CRIM. CT. 7–14 (Nov. 22, 2012), <https://www.icc-cpi.int/NR/rdonlyres/C433C462-7C4E-4358-8A72-8D99FD00E8CD/285209/OTP2012ReportonPreliminaryExaminations22Nov2012.pdf> [https://perma.cc/XG7T-P27J]; Off. of the Prosecutor, *Report on Preliminary Examination Activities*, INT'L CRIM. CT. 6–8 (Dec. 13, 2011), <https://www.icc-cpi.int/NR/rdonlyres/63682F4E-49C8-445D-8C13-F310A4F3AEC2/284116/OTPReportonPreliminaryExaminations13December2011.pdf> [https://perma.cc/ZU7S-SE6D].

that affirm this, there are also many corroborations from other prominent and prestigious international human rights organizations, including the United Nations Assistance Mission to Afghanistan Human Rights unit,<sup>78</sup> Human Rights Watch,<sup>79</sup> Amnesty International,<sup>80</sup> and Oxfam,<sup>81</sup> all of which maintain that over the past thirteen years many crimes have been committed that fall under the jurisdiction of the ICC.

Beginning in 2011, the OTP began compiling annual reports of the crimes allegedly committed in Afghanistan that fall under the Rome Statute. In its 2015 report, the OTP found that “the information available provides a reasonable basis to believe that crimes under Articles 7 and 8 of the [Rome] Statute have been committed in the situation in Afghanistan.”<sup>82</sup> The 2015 report enumerated the alleged crimes into two categories: crimes against humanity under Article 7, and war crimes under Article 8.<sup>83</sup>

78. See, e.g., *Afghanistan: Annual Report 2015 Protection of Civilians in Armed Conflict*, U.N. ASSISTANCE MISSION IN AFG. (Feb. 2016), [http://unama.unmissions.org/sites/default/files/poc\\_annual\\_report\\_2015\\_final\\_14\\_feb\\_2016.pdf](http://unama.unmissions.org/sites/default/files/poc_annual_report_2015_final_14_feb_2016.pdf) [https://perma.cc/LW3N-8UE6]; *Afghanistan: Annual Report 2014 Protection of Civilians in Armed Conflict*, U.N. ASSISTANCE MISSION IN AFG. (Feb. 2015), <http://unama.unmissions.org/sites/default/files/2014-annual-report-on-protection-of-civilians-final.pdf> [https://perma.cc/RK7A-67HD]; *Afghanistan: Annual Report 2013 Protection of Civilians in Armed Conflict*, U.N. ASSISTANCE MISSION IN AFG. (Feb. 2014), [http://unama.unmissions.org/sites/default/files/feb\\_8\\_2014\\_poc-report\\_2013-full-report-eng.pdf](http://unama.unmissions.org/sites/default/files/feb_8_2014_poc-report_2013-full-report-eng.pdf) [https://perma.cc/YF4G-S6W2]; *Afghanistan: Annual Report 2012 Protection of Civilians in Armed Conflict*, U.N. ASSISTANCE MISSION IN AFG. (Feb. 2013), [http://unama.unmissions.org/sites/default/files/2012\\_annual\\_report\\_eng\\_0.pdf](http://unama.unmissions.org/sites/default/files/2012_annual_report_eng_0.pdf) [https://perma.cc/K9B8-E6SE]; *Afghanistan: Annual Report 2011 Protection of Civilians in Armed Conflict*, U.N. ASSISTANCE MISSION IN AFG. (Feb. 2012), [http://unama.unmissions.org/sites/default/files/unama\\_poc\\_report\\_final\\_feb\\_2012.pdf](http://unama.unmissions.org/sites/default/files/unama_poc_report_final_feb_2012.pdf) [https://perma.cc/UXW2-9GF4]; *Afghanistan: Annual Report 2010 Protection of Civilians in Armed Conflict*, U.N. ASSISTANCE MISSION IN AFG. (Mar. 2011), [http://unama.unmissions.org/sites/default/files/engi\\_version\\_of\\_poc\\_annual\\_report\\_2011.pdf](http://unama.unmissions.org/sites/default/files/engi_version_of_poc_annual_report_2011.pdf) [https://perma.cc/E84T-XQHT]; *Afghanistan: Annual Report on Protection of Civilians in Armed Conflict, 2009*, U.N. ASSISTANCE MISSION IN AFG. (Jan. 2010), [http://unama.unmissions.org/sites/default/files/protection\\_of\\_civilian\\_2009\\_report\\_english\\_1.pdf](http://unama.unmissions.org/sites/default/files/protection_of_civilian_2009_report_english_1.pdf) [https://perma.cc/XUS7-HWNF]; *Afghanistan: Annual Report on Protection of Civilians in Armed Conflict, 2008*, U.N. ASSISTANCE MISSION IN AFG. (Jan. 2009), [http://unama.unmissions.org/sites/default/files/unama\\_09february-annual20report\\_poc202008\\_final\\_11feb09.pdf](http://unama.unmissions.org/sites/default/files/unama_09february-annual20report_poc202008_final_11feb09.pdf) [https://perma.cc/U9BU-YJMC].

79. See, e.g., *World Report 2017: Events of 2016*, HUM. RTS. WATCH 65–71 (2017), [https://www.hrw.org/sites/default/files/world\\_report\\_download/wr2017-web.pdf](https://www.hrw.org/sites/default/files/world_report_download/wr2017-web.pdf) [https://perma.cc/X68Z-3RR7].

80. See, e.g., *Amnesty International Report 2014/15: The State of the World's Human Rights*, AMNESTY INT'L 50–53 (2015), [https://www.amnestyusa.org/pdfs/AIR15\\_English.PDF](https://www.amnestyusa.org/pdfs/AIR15_English.PDF) [https://perma.cc/DJ8F-ENBQ].

81. See OXFAM REPORT, *supra* note 37, at 12–15.

82. See OTP REPORT 2015, *supra* note 62, at 27.

83. See *id.*

The report mentions only two types of crimes against humanity: murder and imprisonment or other severe deprivation of physical liberty.<sup>84</sup> Not surprisingly, the list of war crimes in the report is a bit longer, and encompasses the following: murder; cruel treatment; outrages upon personal dignity; the passing of sentences and carrying out of executions without previous judgment pronounced; intentionally directing attacks against the civilian population or against individual civilians; intentionally directing attacks against personnel, material, units, or vehicles involved in humanitarian assistance; intentionally directing attacks against buildings dedicated to education, cultural objects, or places of worship; and treacherously killing or wounding a combatant adversary.<sup>85</sup> Given the OTP reports' findings about commission of a huge number of international crimes, it is extremely important to address these crimes, either in Afghanistan's courts or in the international arena.

#### D. *Rome Statute and the Principle of Complementarity*

The Rome Statute strongly affirms the commitment of its members to the prosecution and punishment of perpetrators of genocide, crimes against humanity, and war crimes, as well as ending the culture of impunity.<sup>86</sup> The Statute gives priority and primacy to states and obliges them to investigate and prosecute a person who has committed one or more of these crimes, as defined in Article 5.<sup>87</sup> To take further steps, and to ensure that grave crimes do not remain unpunished, the Rome Statute establishes the principle of complementarity, through which the ICC can assert its jurisdiction over those states that have failed to accomplish their international obligations under the Statute.<sup>88</sup> The principle of complementarity establishes one of the most important and indispensable characteristics of the ICC<sup>89</sup>: priority to national jurisdictions, instead of to ad

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84. *See id.*

85. *See id.*

86. *See* Rome Statute, pmb. ¶¶ 4–5, art. 5, July 17, 1998, 2187 U.N.T.S. 90.

87. *See id.*

88. *See* Christopher Keith Hall, *Developing and Implementing an Effective Positive Complementarity Prosecution Strategy*, in *THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 219, 220 (Carsten Stahn & Göran Sluiter eds., 2009); *see also* Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 *MIL. L. REV.* 20, 26–27 (2001).

89. ANDREW NOVAK, *THE INTERNATIONAL CRIMINAL COURT: AN INTRODUCTION* 54 (2015).

hoc international criminal tribunals, which previously had primacy over national courts.<sup>90</sup>

The relationship between the ICC and national jurisdiction is widely understood to reflect the principle of complementarity.<sup>91</sup> Since both national courts and the ICC can assert jurisdiction on the same international crimes, the Rome Statute identifies national jurisdiction as the first resort to prosecute these crimes.<sup>92</sup> However, if national jurisdiction fails—such as when the national government is unwilling or unable to prosecute—the ICC should take over and prosecute the crimes as a last resort.<sup>93</sup> This mechanism is designed to persuade state parties to fulfill their obligations under the Rome Statute, to work to prosecute crimes on their own initiative and through their own systems of law.<sup>94</sup> If they fail to prosecute, the ICC should intervene and prosecute to ensure that grave crimes never go unpunished.<sup>95</sup>

There are few provisions addressing the principle of complementarity in the Rome Statute. However, the mandate is clear. For example, in its preamble the Rome Statute emphasizes that “the International Criminal Court established under this Statute shall be complementary to national criminal jurisdiction.”<sup>96</sup> Article 1 of the Statute also reaffirms that the ICC should be complementary to national jurisdiction.<sup>97</sup> To illustrate what “complementarity” means, Article 17(1)(a) stipulates:

Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution . . . .<sup>98</sup>

As this provision explicitly states, the Rome Statute gives the ICC jurisdiction to prosecute international crimes committed in a territory of a state party that is unwilling or unable to prosecute crimes by itself. To determine unwillingness, the ICC should take into

90. Eduardo Greppi, *Inability to Investigate and Prosecute under Article 17*, in THE INTERNATIONAL CRIMINAL COURT AND NATIONAL JURISDICTIONS 63, 63 (Mauro Politi & Federica Gioia eds., 2008) [hereinafter POLITI & GIOIA].

91. See Greppi, *supra* note 90, at 71.

92. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 187 (4th ed. 2011).

93. See SCHABAS, *supra* note 92.

94. NIDAL NABIL JURDI, THE INTERNATIONAL CRIMINAL COURT AND NATIONAL COURTS: A CONTENTIOUS RELATIONSHIP 34 (2011).

95. See JURDI, *supra* note 94.

96. See Rome Statute, pmbl. ¶ 10, July 17, 1998, 2187 U.N.T.S. 90.

97. See *id.* art. 1.

98. See *id.* art. 17(1)(a).

account different important legal issues in the national proceedings, including due process guaranteed by international law, the possibility that the national government aims to shield perpetrators from criminal responsibility,<sup>99</sup> the probability of unreasonable postponement in proceedings,<sup>100</sup> and the impartiality and independence of the proceedings.<sup>101</sup> Regarding the inability of a state, Article 17 also requires the ICC to determine “whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”<sup>102</sup> Accordingly, if the judicial system of a state party is dysfunctional and does not have the capability to prosecute and gather evidence against an alleged criminal, the state party would be deemed “unable,” and the ICC may exercise its jurisdiction to prosecute the alleged criminals.

Afghanistan’s actions after it ratified the Rome Statute appear to reflect both an unwillingness and an inability to prosecute these crimes. First, the Amnesty Law demonstrates unwillingness: the Afghan government intends to shield any potential perpetrators of international crimes in the future.<sup>103</sup> In addition, the Afghan government released many notorious high profile terrorists without prosecution,<sup>104</sup> and it has shown no willingness to prosecute alleged war criminals, implement the Rome Statute, or cooperate with the ICC.

Second, the Afghan judicial system is unable to prosecute alleged crimes because it is one of the top five most corrupt and dysfunctional judicial systems in the world.<sup>105</sup> According to the International Crisis Group Report, Afghanistan’s justice system is in “a catastrophic state of disrepair.”<sup>106</sup> The report concludes that “the majority of Afghans still have little or no access to judicial

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99. *See id.* art. 17(2)(a).

100. *See id.* art. 17(2)(b).

101. *See id.* art. 17(2)(c).

102. *See id.* art. 17(3).

103. *See* Amnesty Law, art. 3(2), Official Gazette, Dec. 2008, No. 965.

104. Paul D. Shinkman, *Why Afghanistan’s President Karzai Would Release 65 Dangerous Terrorists*, U.S. NEWS (Feb. 13, 2014), <http://www.usnews.com/news/articles/2014/02/13/why-afghanistans-president-karzai-would-release-65-dangerous-terrorists> [<https://perma.cc/8WFC-C8K8>].

105. *Corruption Perceptions Index of 2015*, TRANSPARENCY INT’L, <http://www.transparency.org/cpi2015#results-table> [<https://perma.cc/3C6Q-AZEC>] (last visited Apr. 3, 2017).

106. Nick Grono, *Rule of Law and the Justice System in Afghanistan*, INT’L CRISIS GRP. (2011), <https://www.crisisgroup.org/asia/south-asia/afghanistan/rule-law-and-justice-system-afghanistan> [<https://perma.cc/SY84-SQYU>].

institutions. Judicial institutions have withered to near non-existence and the lack of justice has destabilized the country. Many courts are inoperable, and those that do function are understaffed.”<sup>107</sup>

In light of these facts, Afghanistan can be characterized as both unwilling and unable to prosecute the perpetrators of international crimes. This is why it is so crucial for Afghanistan to enable the ICC to assert jurisdiction under the complementarity principle, to intervene and pressure the government of Afghanistan to fulfill its international obligations and prosecute the crimes defined under the Rome Statute.

## II. INTERNATIONAL COOPERATION WITH THE ICC UNDER THE ROME STATUTE

International cooperation will be key to the overall success of ICC operations,<sup>108</sup> especially if the ICC is fully dependent on the effective and timely cooperation of state parties.<sup>109</sup> Part IX of the Rome Statute is devoted to regulating international cooperation and judicial assistance and contains provisions concerning different procedural stages of cooperation.<sup>110</sup> Article 86 of the Rome Statute puts a general obligation on state parties to cooperate fully with the ICC in the investigation and prosecution of crimes within the jurisdiction of the ICC.<sup>111</sup>

But the required cooperation cannot be properly accomplished by state parties if there is no clear domestic mechanism or procedure aligned with the relevant cooperation procedure in the Rome Statute. Understanding the importance of this issue, Article 88 of the Rome Statute requires state parties to facilitate cooperation with the ICC by incorporating procedures into their domestic laws, in compliance with Part IX of the Rome Statute.<sup>112</sup> It provides, “States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation that are specified under this Part.”<sup>113</sup> In addition, Article 87 of the Rome Statute authorizes the ICC to request cooperation with state parties through diplomatic or other state party-designated channels.<sup>114</sup>

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107. See Grono, *supra* note 106.

108. See Greppi, *supra* note 90, at 85.

109. See *id.*

110. See Rome Statute, arts. 86–102, July 17, 1998, 2187 U.N.T.S. 90.

111. See *id.* art. 86.

112. See *id.* art. 88.

113. See *id.*

114. See *id.* art. 87(1)(a).

Notably, beginning in 2009, the Assembly of State Parties of the ICC has issued an annual resolution<sup>115</sup> regarding cooperation between the ICC and state parties and urging the parties to institute laws or procedures compatible with their obligation to cooperate under the Rome Statute. For instance, in its 2015 resolution, the Assembly of State Parties raised serious concerns about the outstanding arrest and surrender warrants against thirteen persons in different countries.<sup>116</sup> The resolution also emphasized the importance of effective and timely cooperation of state parties pursuant to their Rome Statute obligations and affirmed that without the required cooperation, the ICC would not be able to fulfill its mission.<sup>117</sup> The resolution stipulates:

[This resolution] [e]mphasizes the importance of timely and effective cooperation and assistance from States Parties and other States under an obligation or encouraged to cooperate fully with the Court pursuant to Part 9 of the Rome Statute or a United Nations Security Council resolution, as the failure to provide such cooperation in the context of judicial proceedings affects the efficiency of the Court and stresses that the non-execution of cooperation requests has a negative impact on the ability of the Court to execute its mandate, in particular when it concerns the arrest and surrender of individuals subject to arrest warrants.<sup>118</sup>

According to the Rome Statute, such international cooperation entails different procedures for various issues, including arrest and surrender, investigation and prosecution, protection of victims and witnesses, and enforcement of sentences. These are detailed in turn in the following Sections.

#### A. Arrest and Surrender

Arrest and surrender of an accused person constitutes one of the most crucial responsibilities of state parties.<sup>119</sup> Because the ICC does not have power to enforce arrest warrants itself within the territory of a state party,<sup>120</sup> those states bear the ultimate burden of executing an arrest warrant inside their borders.<sup>121</sup> The Rome Statute addresses this issue under its Article 89, which requires

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115. See, e.g., Resolution on Cooperation, The Assembly of State Parties-ICC, ICC-ASP/8/Res.2 (2009) [hereinafter Resolution on Cooperation 2009].

116. Resolution on Cooperation, THE ASSEMBLY OF STATE PARTIES-ICC, ICC-ASP/14/Res.3 (2) (2015) [hereinafter Resolution on Cooperation 2015].

117. See *id.*

118. See *id.*

119. See Greppi, *supra* note 90, at 89.

120. See *id.* at 90.

121. See *id.*

state parties to cooperate with the ICC in the arrest and surrender of accused persons to the ICC.<sup>122</sup> According to Article 89, the court may send a request to a state to arrest and surrender a suspect when that person lives in the state's territory. Further, the state must comply with the request and take appropriate measures for the arrest and surrender of that person. The Article stipulates further:

The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.<sup>123</sup>

As such, state parties are required to cooperate with the ICC and one another in the transport of an arrested person through their territories.<sup>124</sup> According to the Rome Statute, there is no need for cooperation during transport of an arrested person through the air unless an emergency landing happens within a state party's territory.<sup>125</sup> In this case, the state party in which the unscheduled landing occurs may need the ICC to send it a request for transition of the wanted person.<sup>126</sup>

Another important issue concerning surrender is when a state party receives two competing requests: one from the ICC for surrender, and one from a state for extradition of the same person.<sup>127</sup> When this happens, there are two possible situations. In the first, the competing state's extradition request comes from a state party to the Rome Statute. According to the Rome Statute, priority should be given to the ICC request—if the ICC determines that the case is admissible.<sup>128</sup> In the second situation, if the requesting state is not party to the Rome Statute, the state that receives the requests should still give priority to the ICC request if it is not obliged by a separate treaty to extradite the person to the requesting nonparty state.<sup>129</sup>

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122. *See* Rome Statute, art. 89(1), July 17, 1998, 2187 U.N.T.S. 90.

123. *See id.*

124. *See id.* art. 89(3)(a).

125. *See id.* arts. 89(3)(d)–(e).

126. *See id.* art. 89(3)(d).

127. *See id.* art. 90(1).

128. *See id.* art. 90(2)(a).

129. *See id.* art. 90(4).

The Rome Statute goes further and talks about the contents of a request for arrest and surrender. A request for arrest and surrender should be made in writing.<sup>130</sup> It should contain information about the wanted person as well as information about the place where the person may live.<sup>131</sup> A state party is required to seek advice from the ICC after receiving a request for arrest and surrender with respect to whether the request is compatible with the requirements of its domestic law.<sup>132</sup> As such, the state party must consult with the ICC and give information on what the specific requirements under its domestic legal system would be.<sup>133</sup>

### B. *Investigation and Prosecution*

The goal of the Rome Statute for inclusion of specific provisions on cooperation of state parties is to ensure a timely and appropriate investigation and prosecution of an international crime upon or after its occurrence.<sup>134</sup> As part of the obligation of states to fully cooperate with the ICC, Article 93 of the Rome Statute requires assistance with investigations.<sup>135</sup> It demands that “States Parties shall, in accordance with the provisions of this Part [Part 9] and under procedures of national law, comply with requests by the Court to provide . . . assistance in relation to investigations or prosecutions . . . .”<sup>136</sup>

Generally, cooperation in investigation and prosecution covers a wide variety of issues including evidence gathering, procuring testimony of witnesses, questioning of a person to be investigated or prosecuted, facilitating appearances of witnesses and experts before the ICC, examination of places or sites, exhumation, executing searches and seizures, and collection of records and documents.<sup>137</sup> State parties have a duty to cooperate with the ICC and implement its requests on all of these acts and procedures. For instance, “States Parties are *obliged* to comply with requests to examine sites and places on its territory, including exhumation and examination of grave sites.”<sup>138</sup> Thus, for any of these types of

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130. *See id.* art. 91(1).

131. *See id.* art. 92(2)(a).

132. *See id.* art. 92(3).

133. *See id.*

134. *See* Valerie Oosterveld et al., *The Cooperation of States with the International Criminal Court*, 25 *FORDHAM INT’L L.J.* 767, 786 (2001).

135. *See* Rome Statute art. 93(1).

136. *See id.*

137. *See id.* art. 93(1)(a)–(i).

138. *Commentary Rome Statute, Part 9*, CASE MATRIX NETWORK [hereinafter *Rome Statute: Commentary*], <https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary->

requests, the state party must execute the request, and make sure there is adequate domestic procedural law for doing so.<sup>139</sup>

### C. *Protection of Victims and Witnesses*

As is true with any court, the ICC's success depends on its ability to obtain testimony from witnesses or victims concerning the relevant cases.<sup>140</sup> Unless there are sufficient legal guarantees to ensure protection of witnesses, it is impossible to obtain the proper testimony of those witnesses.<sup>141</sup> As such, the Rome Statute has specific provisions concerning the protection of victims and witnesses to support the participation of victims in the proceedings and ensure a safe environment for witnesses to provide their testimony truthfully, and free from pressure or fear of harm or punishment.<sup>142</sup>

Under the Rome Statute, it is the responsibility of state parties to collaborate with the ICC to protect victims and witnesses.<sup>143</sup> While the ICC is primarily responsible for protecting victims and witnesses during investigation, prosecution, and trial, it will require state parties to cooperate with the ICC in such protection,<sup>144</sup> particularly when the relevant victims and witnesses live within the territory of a state party.<sup>145</sup> As such, Article 68(1) of the Rome Statute requires that the ICC "shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses."<sup>146</sup> In Article 93(1)(j), the Rome Statute further requires the assistance of state parties for protection of victims and witnesses, as well as evidence preservation, "under procedures of national law."<sup>147</sup>

Article 93, in fact, allocates the protection of victims and witnesses to national jurisdiction.<sup>148</sup> This means that if a state party's

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[clicc/commentary-rome-statute/commentary-rome-statute-part-9/](https://perma.cc/8697-XZUQ) [https://perma.cc/8697-XZUQ] (last visited Apr. 3, 2016) (emphasis added) ("This is probably one of the most important and common types of assistance which the [International Criminal Court (ICC)] may seek.").

139. *See id.*

140. *See* Oosterveld et al., *supra* note 134, at 807.

141. *See id.*

142. *See Victims and Witnesses Protection and Support*, ICC [hereinafter ICC, *Victims Support*], [https://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/protection/Pages/victims%20and%20witnesses%20protection.aspx](https://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/protection/Pages/victims%20and%20witnesses%20protection.aspx) [https://perma.cc/PSX9-L9SX] (last visited Apr. 30, 2016).

143. *See* Rome Statute, art. 93(1)(i), July 17, 1998, 2187 U.N.T.S. 90.

144. *See Rome Statute: Commentary*, *supra* note 138.

145. *See id.*

146. *See* Rome Statute, art. 68(1).

147. *See id.* art. 93(1)(j).

148. *Id.* art. 93(1)(j).

laws do not have provisions for protection of victims and witness, it should adjust its national law to the requirements of the Rome Statute to provide such protections for victims and witnesses.<sup>149</sup> In addition to the Rome Statute, the Rules of Procedure and Evidence of the ICC enable the ICC to issue orders to ensure protection of victims and witnesses throughout their involvement in court proceedings.<sup>150</sup> Finally, under Article 43(6), the ICC has already established the Victims and Witnesses Unit within its administrative services organ,<sup>151</sup> to provide protective measures and security arrangements, counseling, and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of their testimony.<sup>152</sup>

#### D. *Enforcement of Sentences, Forfeitures, and ICC Fines*

The Rome Statute requires clear procedures for enforcement of sentences, forfeitures, and ICC fines. According to the Statute, the ICC has the authority to discuss the possibility of enforcement of sentences with a specific state party and also has the authority to issue orders for forfeiture of property or freezing of assets within the territory of state parties.<sup>153</sup> According to the Rome Statute, although a state party may suggest some conditions, the ICC's sentence of imprisonment should be binding on those states.<sup>154</sup> The ICC will also oversee the enforcement of sentences and conditions of imprisonment within territory of a state party to ensure that they are compatible with the international standards that govern the treatment of prisoners.<sup>155</sup>

With respect to forfeitures and fines, Article 109(1) mandates that "States Parties shall give effect to fines or forfeitures ordered by the [ICC] under Part 7, without prejudice to the rights of bona fide third parties, and in accordance with the procedure of their national law."<sup>156</sup> The Article thus requires states not only to ensure

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149. See *Rome Statute: Commentary*, *supra* note 138.

150. Report of the Preparatory Commission for the International Criminal Court: The Rules of Procedure and Evidence, Rules 87–88, United Nations Preparatory Commission for the International Criminal Court, U.N. Doc. PCNICC/2000/1/Add.1 (Nov. 2, 2000) [hereinafter ICC Rules of Evidence].

151. See Rome Statute, art. 43(6).

152. See *ICC Victims Support*, *supra* note 142.

153. See Rome Statute, arts. 93(1)(k), 105, 109.

154. See *id.* arts. 103(1)(b), 105(1).

155. See *id.* art. 106(1).

156. See *id.* art. 109(1).

that they have the necessary laws and procedures in place,<sup>157</sup> but to actually apply them.

### III. CURRENT RELEVANT STRUCTURES AND PROCEDURES IN AFGHANISTAN AND LACK OF APPROPRIATE COOPERATION LAW

#### A. *The Afghan Constitution*

As the supreme law of the land, the Constitution of Afghanistan (Constitution) contains some general provisions concerning respect for international treaties, competency of courts, and arrest of Afghan citizens. For example, the Constitution adheres to international human rights laws and proclaims that the state shall observe the United Nations Charter, inter-state agreements, international treaties to which Afghanistan has joined, and the Universal Declaration of Human Rights.<sup>158</sup> Under the clear language of Article 7, Afghanistan must comply with its international obligations as created by ratification or accession to different bilateral and multilateral agreements and treaties.<sup>159</sup> As such, Afghanistan must fulfill all its obligations under the Rome Statute, including investigation, prosecution, and punishment of alleged perpetrators of crimes against humanity and war crimes, and must fully cooperate with the ICC upon the receipt of any request from the court.

On the other hand, there are a few provisions in the Constitution of Afghanistan that appear to contradict its international obligations vis-à-vis the Rome Statute, particularly if the ICC as the Permanent International Criminal Court exercises its jurisdiction over crimes committed within the territory of Afghanistan. For example, Article 120 of the Constitution states that the authority of the judicial organ shall include consideration of all cases filed by real or incorporeal persons, including the state, as plaintiffs or defendants, before the court in accordance with the provisions of the law.<sup>160</sup> Under this explicit language, jurisdiction in all cases lies solely with the province of Afghanistan's judiciary, and the Constitution does not recognize any other court's jurisdiction.<sup>161</sup>

157. See Oosterveld et al., *supra* note 134, at 824.

158. *Qanoon Asasi Jamhori Islami Afghanistan* [The Constitution of the Islamic Republic of Afghanistan], art. 7 [hereinafter AFG. CONST.].

159. See *id.*

160. See *id.* art. 120.

161. See *id.* art. 120. Based upon the text of Article 120, one can also argue that the Article restricts the jurisdiction of the judiciary to those cases that are brought "before the court." In line with this interpretation, the Constitution of Afghanistan, in Articles 69 and 78, excludes the president and ministers from being tried by the judiciary in cases where

Additionally, Article 122 of the Constitution stipulates that no Afghan law shall, under any circumstances, exclude any case or area from the jurisdiction of the Afghan judiciary, as defined in Chapter 7 of the Constitution, and submit it to another authority.<sup>162</sup>

Considering these constitutional provisions, one may argue that any crime committed in the territory of Afghanistan should be considered and prosecuted only by the judiciary of Afghanistan; under this interpretation, the ICC could not exercise its jurisdiction over Afghanistan's territory. However, the principle of complementarity in the Rome Statute itself resolves this potential contradiction. As explained earlier, the Statute gives primacy to national jurisdictions to prosecute international crimes.<sup>163</sup> The ICC may only intervene and exercise its jurisdiction whenever a national legal system fails to do its job, or there is a lack of will to prosecute such crimes.

### B. *The Penal Code and Criminal Procedure Code*

The Penal Code of Afghanistan,<sup>164</sup> as a substantive law, has no provisions concerning international crimes, such as war crimes, crimes against humanity, or genocide. Notably, the Afghan government enacted a new criminal procedure code in 2014,<sup>165</sup> yet this code does not contain substantial regulations in relation to the responsibility of Afghanistan to cooperate with the ICC. The code only generally refers to Rome Statute crimes in two articles, wherein it exempts Rome Statute crimes from statutes of limitations that would normally apply<sup>166</sup> and allows secret measures for uncovering of the crimes.<sup>167</sup> Furthermore, while the Rome Statute encourages state parties to incorporate international crimes into their domestic laws,<sup>168</sup> due to the absence of such crimes in the Penal Code of Afghanistan, the ICC or national courts must

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they are accused of crimes against humanity, felonies, and/or national treason. *Id.* arts. 69, 78.

162. *See id.* art. 122.

163. *See* JURDI, *supra* note 94, at 33.

164. *Qanooni Jazaae Afghanistan* [Afghanistan Penal Code] Official Gazette, October 1976, No. 347 [hereinafter Afg. Penal Code], translated in *Afghanistan: Penal Code English*, ACE, <http://aceproject.org/ero-en/regions/asia/AF/Penal%20Code%20Eng.pdf/view> [<https://perma.cc/LMG6-NVHR>] (last visited Apr. 3, 2017).

165. *Qanooni Ejraat Jazaae* [Criminal Procedure Code], Official Gazette, May 2014, No. 1132 [hereinafter Afg. Criminal Procedure Code].

166. *See id.* art. 72(2).

167. *See id.* art. 113(8).

168. *See* Rome Statute, pmb. ¶ 4, July 17, 1998, 2187 U.N.T.S. 90.

directly apply the relevant provisions of the Rome Statute to the alleged crimes.

The Penal Code of Afghanistan has been under review for over four years. According to some reports, the international crimes covered by the Rome Statute will be defined and incorporated into the new penal code,<sup>169</sup> but review and finalization of the new code will take a long time. Moreover, the code must pass both houses of Parliament, and in the end, it will likely cover only substantive issues, not procedural matters like international cooperation.

### C. *The Law on the Organization and Jurisdiction of Afghan Courts*

Afghanistan also recently enacted the Law on the Organization and the Jurisdiction of the Afghanistan Judiciary (Judiciary Law).<sup>170</sup> The goal of this law is to organize and define the hierarchy of all the courts and their jurisdictions in Afghanistan.<sup>171</sup> Notably, the Judiciary Law does not have any provisions that address the ICC. Like the Constitution, the Judiciary Law emphasizes the grant of authority to consider all cases to the Afghan courts.<sup>172</sup> It also states that no law can remove any case from the jurisdiction of the Afghanistan judicial branch.<sup>173</sup>

Again, to address this possible contradiction with ICC jurisdiction, the Rome Statute never assigns primacy to ICC jurisdiction.<sup>174</sup> If the Afghan judiciary is willing and able to prosecute alleged perpetrators of international crimes, the ICC would not be in a position to intervene.<sup>175</sup> However, when Afghan national courts fail to prosecute international crimes, that failure automatically opens the door to the ICC to exercise its jurisdiction through the principle of complementarity.<sup>176</sup>

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169. *Safare Haiat Mahkama Jazae ba Afghanistan* [An ICC's Team to Visit Afghanistan], AFGHANPAPER.COM (1394) [2016], <http://www.afghanpaper.com/nbody.php?id=110613> [<https://perma.cc/4QZ8-UFC5>] [hereinafter AFGHANPAPER, *Report* 2016].

170. *Qanooni Tashkil Wa Salaheyat Mahakem Jamhori Islami Afghanistan* [Law on Organization and Jurisdiction of Judiciary of Islamic Republic of Afghanistan], Official Gazette, June 2013, No. 1109 [hereinafter *Afg. Judiciary Law* 2013], translated by Abdul Mahir Hazim (on file with author).

171. *See id.* art. 1.

172. *See id.* art. 8(1).

173. *See id.* art. 8(2).

174. *See supra* Section I.D.

175. *See id.*

176. *See id.*

#### D. *Lack of Coordination Mechanisms Within Afghan Domestic Laws*

There is currently no clear mechanism for cooperation between Afghanistan and the ICC within existing Afghan domestic laws. A report by Afghanistan Watch indicates that “[t]he government of Afghanistan since signing and ratification of the [Rome] Statute has performed nothing serious regarding implementation . . . in this country.”<sup>177</sup> There have been some efforts to make the relevant domestic laws of Afghanistan compatible with the Rome Statute.<sup>178</sup> However, these efforts are mostly focused on substantive issues, such as incorporating international crimes under the law of Afghanistan, rather than on cooperation and procedural issues.

In addition, it has been almost four years since the Penal Code of Afghanistan came under review, but it is still unclear when the new draft will be finalized by the Ministry of Justice and when it will be sent to the Parliament for approval.<sup>179</sup> Although according to a recent report by the Ministry of Justice, the revision of the first part of the penal code has been finalized by the Penal Code Reform and Revision Group (a committee responsible for revising the penal code),<sup>180</sup> it is not clear what will happen with the new draft of the code and when the next steps will be taken to enact the code.

The absence of any clear policy on this matter causes confusion among Afghan law enforcement agencies and, as a result, the Afghan government has not provided coherent responses to previous requests from the ICC. The reports of the ICC to the U.N. General Assembly indicate that for the past seven consecutive years, the Afghan government has not provided any response or

177. Husain Moen & Ahmad Zia Mohammadi, *International Criminal Court (ICC) in Afghanistan: A Report on the Consultative Meeting on Obligations of Afghanistan Under (ICC)*, AFG. WATCH 4 (Oct. 24, 2009) [hereinafter ICC AW REPORT 2009], [http://www.operationspaix.net/DATA/DOCUMENT/5012~v-International\\_Criminal\\_Court\\_ICC\\_in\\_Afghanistan\\_A\\_Report\\_on\\_the\\_Consultative\\_Meeting\\_on\\_Obligations\\_of\\_Afghanistan\\_under\\_ICC.pdf](http://www.operationspaix.net/DATA/DOCUMENT/5012~v-International_Criminal_Court_ICC_in_Afghanistan_A_Report_on_the_Consultative_Meeting_on_Obligations_of_Afghanistan_under_ICC.pdf) [<https://perma.cc/4UFN-EPTV>].

178. See *id.*

179. See *Bahshte Nokhoste Code Jazae Afghanistan Ba Wezarate Adleya Taslim Dada Shod* [The Draft of the First Part of the Penal Code Is Submitted to the Ministry of Justice], RADIO AZADI (2016), <http://da.azadiradio.com/a/27709534.html> [<https://perma.cc/E77G-L5W7>]; see also *Peshnawaise Code Jazae Afghanistan Nehae Shod* [The Draft of the Afghanistan Penal Code Is Finalized] DAILY 8AM (2016), <http://8am.af/1395/02/13/afghanistan-was-the-final-draft-criminal-code/> [<https://perma.cc/3C27-M9C8>].

180. Abdul Mahir Hazim & Tariq Ahmad, Global Legal Monitor: Afghan Government Announces New Draft Penal Code, Lib. Cong. (July 1, 2016), <http://www.loc.gov/law/foreign-news/article/afghanistan-government-announces-new-draft-penal-code/> [<https://perma.cc/2FE4-M435>].

cooperation with ICC requests.<sup>181</sup> The ICC's 2013 report also recognized the reluctance of the stakeholders to cooperate, including the government of Afghanistan, as a challenge to ICC activities and assessments in Afghanistan.<sup>182</sup>

Regardless of the absence of a clear procedural mechanism, the government of Afghanistan did little or almost nothing to cooperate with the ICC over the past thirteen years. According to the available information, it only held two sessions among high level authorities to discuss the implementation of the Rome Statute in Afghanistan. The first one was held in March 2005, when the government assigned an inter-ministerial commission, with the participation of civil society organizations, to determine how Afghanistan can make its laws compatible with the Rome Statute.<sup>183</sup> Based on the decision of the commission, the Afghan Independent Human Rights Commission provided a report to the Ministry of Justice on possible legislation that would implement the Rome Statute in Afghanistan,<sup>184</sup> but it appears that the Ministry of Justice has still done nothing with the report.<sup>185</sup>

A more recent session addressing implementation of the Rome Statute was held by the Afghanistan National Security Council (ANSC), and included the participation of the president; the CEO; vice presidents; ministers of foreign affairs, defense, the interior, and justice; the attorney-general; the director of national security; and a representative of the Supreme Court.<sup>186</sup> The ANSC approved the establishment of a committee with members from the participating institutions under the chairmanship of the Sec-

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181. See Eleventh Rep. of the I.C.C. for 2014–2015, at 4–5, U.N. Doc. A/70/350 (Aug. 28, 2015); see also Tenth Rep. of the I.C.C. for 2013–2014, at 5, U.N. Doc. A/69/321 (Sept. 18, 2014); Ninth Rep. of the I.C.C. for 2012–2013, at 14, U.N. Doc. A/68/314 (Aug. 13, 2013) (“Several requests for information sent by the Office in the past two years to various States, including the Government of Afghanistan and States with troops in Afghanistan, have been dismissed or remain pending.”); Eighth Rep. of the I.C.C. for 2011–2012, at 15–16, U.N. Doc. A/67/308 (Aug. 14, 2012); Seventh Rep. of the I.C.C. to the U.N. for 2010–2011, at 15, U.N. Doc. A/66/309 (Aug. 19, 2011); Sixth Rep. of the I.C.C. for 2009–2010, at 16, U.N. Doc. A/65/313 (Aug. 19, 2010); Fifth Rep. of the I.C.C. for 2008–2009, at 13, U.N. Doc. A/64/356 (Sept. 17, 2009).

182. Ninth Rep. of the I.C.C. for 2012–2013, at 14.

183. *Status of Ratification and Implementation of the Rome Statute and the Agreement on Privileges and Immunities (APIC) and Recommendations to the States under Review at the 18th Session of the Human Rights Council's Universal Periodic Review (UPR)*, COALITION FOR THE ICC 1 (2014) [hereinafter *Status and Implementation of the Rome Statute*], [http://www.iccnw.org/documents/Coalition\\_for\\_the\\_ICC\\_ICC\\_Recommendations\\_18th\\_session\\_UPR-Annexe.pdf](http://www.iccnw.org/documents/Coalition_for_the_ICC_ICC_Recommendations_18th_session_UPR-Annexe.pdf) [<https://perma.cc/XR59-YC7A>].

184. See *id.*

185. See *id.*

186. See AFGHANPAPER, *Report 2016*, *supra* note 169.

ond Vice President.<sup>187</sup> The committee held its first session in January of 2016 to discuss a letter from the ICC and implementation of the Rome Statute.<sup>188</sup> The committee also guided the Ministry of Justice to publish the Rome Statute in the official gazette and to continue working on incorporating the relevant provisions of the Rome Statute into the new penal code.<sup>189</sup>

This could be a positive step forward by the current government of Afghanistan, but the government must continue to make tangible progress. The government must demonstrate it is serious about developing a functioning mechanism for implementation of the Rome Statute.

E. *The ICC Approach to Supporting Cooperation: Lack of Adequate Investigation and Follow Up*

As the ICC reports illustrate, Afghanistan has been under preliminary investigation for more than nine years<sup>190</sup>—the longest period for any country to be subject to preliminary investigation.<sup>191</sup> While many horrific incidents occur in Afghanistan on a daily basis, the reports of the ICC to the U.N. General Assembly<sup>192</sup> and the OTP’s reports on preliminary examinations<sup>193</sup> show that during the past ten years, the ICC has made little progress in terms of deciding whether it should open an official investigation in Afghanistan. For instance, the OTP report in 2013 asserts that “the Prosecutor has decided that the preliminary examination of this situation [in Afghanistan] should be expanded to include admissibility issues.”<sup>194</sup> Subsequently, the reports of the next two years (2014 and 2015) indicate that the OTP is in the process of assessing the admissibility of specific cases to determine whether the OTP should seek authorization from the Pre-Trial Chamber (the ICC division with authority over pretrial processes and final oversight over the OTP’s ability to open a new investigation)<sup>195</sup> to conduct

187. *See id.*

188. *See id.*

189. *See id.*

190. *See sources cited supra* note 181.

191. Mark Kersten, *The ICC in Afghanistan: Peace, Justice and Accountability*, JUSTICE IN CONFLICT (Jan. 21, 2014), <https://justiceinconflict.org/2014/01/21/the-icc-in-afghanistan-peace-justice-and-accountability/> [<https://perma.cc/JC6Z-LEG6>].

192. *See sources cited supra* note 181.

193. *See sources cited supra* note 77.

194. *Report on Preliminary Examination Activities*, ICC ¶ 56, at 23 (2013), <https://www.icc-cpi.int/OTP%20Reports/otp-report-2013.aspx> [<https://perma.cc/3KTK-WCUY>].

195. *See* Karen L. Corrie, *Pre-Trial Division of the International Criminal Court: Purpose, Powers, and First Cases*, AM. NON-GOVERNMENTAL ORGS. COALITION FOR THE ICC I, <http://>

an investigation of alleged crimes committed in Afghanistan under Article 15(3) of the Rome Statute.<sup>196</sup>

Furthermore, although the OTP reports admit the occurrence of crimes against humanity and war crimes, as well as a significant increase in civilian casualties in recent years, they have not provided any substantial information or evidence on whether any person has been prosecuted or held accountable for committing these crimes by the legal system of Afghanistan.<sup>197</sup> This is a vital issue that must be addressed by the OTP during the admissibility process in order to determine whether the government of Afghanistan is willing or able to prosecute the allegedly committed international crimes.

Additionally, as noted above, the ICC reports state that the government of Afghanistan did not respond to many ICC requests, yet the reports did not present any inkling of the ICC's reaction to the state of (non)cooperation between Afghanistan and the ICC. Also, the reports do not address how long this situation might be allowed to continue, nor what the ICC's next steps and measures might be if the government of Afghanistan continues to fail to provide information to the ICC. This long and frustrating period of preliminary examination suggests that the ICC is not fulfilling its own responsibility. Under the Rome Statute, the ICC is required to attentively follow situations like the one in Afghanistan.<sup>198</sup> It must sufficiently pressure the Afghanistan government to prosecute alleged criminals or the ICC itself must intervene based on the principle of complementarity, asserting its jurisdiction over alleged criminals whom the Afghan government is either unwilling or unable to prosecute.

#### IV. APPROACHES TO INCORPORATION OF COOPERATION ACTS

There are essentially two kinds of approaches to state cooperation with the ICC. The first involves state parties, such as Kenya, where alleged international crimes have been committed and the ICC is presently carrying out investigations or pursuing cases involving these states,<sup>199</sup> but where these countries did not make

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[www.amicc.org/docs/Pre-Trial%20Chamber%20Corrie.pdf](http://www.amicc.org/docs/Pre-Trial%20Chamber%20Corrie.pdf) [<https://perma.cc/RJ4E-AALS>] (last visited Apr. 3, 2017).

196. See OTP REPORT 2015, *supra* note 62, at 31.

197. See *id.* at 27.

198. See Rome Statute, art. 87(7).

199. *Situations Under Investigation*, ICC [hereinafter *Situations Under Investigation*, ICC], <https://www.icc-cpi.int/pages/situations.aspx> [<https://perma.cc/Q5FV-AP2K>] (last visited Apr. 3, 2017).

their domestic laws compatible with the Rome Statute, nor did they institute any laws to facilitate cooperation with the ICC.<sup>200</sup> The second approach involves state parties, especially those considered developed countries, that have enacted specific laws to make their domestic laws compatible with the Rome Statute and facilitate cooperation with the ICC, but where there are as yet no ongoing cases under investigation or even under consideration before the ICC (although there are some allegations and preliminary examinations by the ICC concerning commission of international crimes by the citizens of these latter countries).<sup>201</sup>

Of course, the ideal exemplar would be a state party that has instituted a law compatible with the Rome Statute (a cooperation law) where there is a case involving such state under consideration by the ICC. However, as of yet, there are no such models. There are currently approximately ten states under investigation, including Kenya and Libya,<sup>202</sup> and seven countries under preliminary examination, including Afghanistan and the United Kingdom (the latter for actions committed in Iraq).<sup>203</sup> The state parties where allegedly committed international crimes are under investigation and consideration before the ICC have not enacted any laws regarding cooperation with the ICC, and thus their domestic laws are still incompatible with the Rome Statute.

Considering the two “models,” this Article has chosen the second, and focuses on the United Kingdom and Australia for three reasons. First, this Article is dedicated to persuading the government of Afghanistan to fulfill its responsibility under the Rome Statute by adopting legislation and adjusting its domestic law to be compatible with the Rome Statute. Second, regardless of the significant differences between the state of development and legal systems of those two model countries and Afghanistan, the laws of the two selected countries—the United Kingdom and Australia—were

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200. *ICC Trial Chamber V(B) Refers Non-Cooperation of the Kenyan Government to the Assembly of States Parties to the Rome Statute*, ICC (2016), <https://www.icc-cpi.int/pages/item.aspx?name=PR1239> [<https://perma.cc/T5RE-MTBN>].

201. See *Chart on the Status of Ratification and Implementation of the Rome Statute and the Agreement on Privileges and Immunities (APIC)*, COALITION FOR INT'L CRIM. CT., [http://www.iccnw.org/documents/Global\\_Ratificationimplementation\\_chart\\_May2012.pdf](http://www.iccnw.org/documents/Global_Ratificationimplementation_chart_May2012.pdf) [<https://perma.cc/G3SZ-5E4C>] (last updated May 2012). Cf. *Situations Under Investigation*, ICC, *supra* note 199 (noting many countries with laws supporting the ICC are not being investigated).

202. See *Situations Under Investigation*, ICC, *supra* note 199.

203. See *Preliminary Examinations*, ICC, <https://www.icc-cpi.int/pages/preliminary-examinations.aspx> [<https://perma.cc/37HR-PPVV>] (last visited Apr. 3, 2017); see also *Situations under Investigation*, ICC, *supra* note 196.

enacted with the congruous purpose of adjusting their domestic laws to be compatible with the Rome Statute and the intention to facilitate cooperation with the ICC. Third, the laws of the two countries identify key areas for cooperation with the ICC. Therefore, both of their approaches can serve as helpful models for nations like Afghanistan that have yet to adopt cooperation laws. As the Sections below explain, despite many similarities between the laws of the United Kingdom and Australia in terms of aim, authority, and substance, they are significantly different with regard to coverage, determination of national institutions for cooperation, and envisaging specific details with respect to the requirements of the Rome Statute.

### A. *United Kingdom*

First, this Section examines the example of the United Kingdom's cooperation laws both in theory and in practice. Specifically, it analyzes the relevant legal provisions related to cooperation with the ICC and seeks to answer whether there is in fact actual cooperation between the United Kingdom and the ICC concerning alleged war crimes by nationals of the United Kingdom in Iraq.

#### 1. The International Criminal Court Act of 2001

In 2001, before ratifying the Rome Statute, the United Kingdom enacted the International Criminal Court Act (ICCA) to ensure that the United Kingdom's domestic law would be compatible with the requirements of the Rome Statute.<sup>204</sup> The Act had four objectives, including authorizing the national legal system to arrest and surrender persons requested by the ICC<sup>205</sup> and facilitate other forms of cooperation with the ICC.<sup>206</sup> The Act contains provisions that anticipate almost every article of the Rome Statute, especially Part IX of the Statute.<sup>207</sup> It not only focuses on procedural issues, such as delineating clear steps for cooperation between the United Kingdom and the ICC, but it also covers other substantive issues of the Rome Statute, such as definitions of international crimes.

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204. David Turns, *Aspects of National Implementation of the Rome Statute: The United Kingdom and Selected Other States*, in *THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES* 343–44 (Dominic McGoldrick, Peter Rowe & Eric Donnelly eds., 2004).

205. *See id.* at 344.

206. *See id.*

207. Robert Cryer & Olympia Bekou, *International Crimes and ICC Cooperation in England and Wales*, 5 J. INT'L CRIM. JUST. 441, 450 (2007).

Generally, this Article discusses the most important points<sup>208</sup> of three sections of the ICCA, namely Sections 2, 3, and 4. Each section is devoted to a specific area of cooperation. Section 2 addresses the arrest and delivery of persons;<sup>209</sup> Section 3 regulates other forms of assistance;<sup>210</sup> and Section 4 details enforcement of ICC sentences and orders.<sup>211</sup>

a. Arrest and Delivery of Persons

The second part of the ICCA contains detailed provisions on how to cooperate with the ICC concerning the arrest and surrender of persons wanted by the ICC. The ICCA delineates a clear and specific channel through which ICC arrest requests should be processed. According to the ICCA, if the secretary of state of the United Kingdom receives an arrest request from the ICC concerning a person who has committed Rome Statute crimes or who is convicted by the ICC, the arrest request should be referred to an appropriate judicial officer.<sup>212</sup>

Next, the ICCA anticipates two situations. First, if an arrest warrant accompanies the ICC request and the judicial officer is satisfied that the warrant is in fact issued by the ICC, that officer should approve the enforcement of the warrant within the territory of the United Kingdom.<sup>213</sup> Second, when a person is convicted by the ICC, the request may not contain an arrest warrant, but rather a copy of the conviction or other information that indicates the person has been convicted.<sup>214</sup> In this case, the judicial officer should issue an arrest warrant for the person to whom the conviction refers.<sup>215</sup> In both circumstances, the ICCA names the arrest warrant as a “Section 2 Warrant.”<sup>216</sup> The ICCA does not provide further instruction regarding the next steps for making the arrest, but it would appear that after endorsing the ICC arrest warrant or issuing an arrest warrant, the subsequent actions would proceed according to the relevant domestic laws of the United Kingdom.

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208. This Article will not comprehensively discuss every provision of the three parts, as that would be beyond the scope of the Article.

209. International Criminal Court Act (2001), c. 17, §§ 2–26 (U.K.) [hereinafter U.K. International Criminal Court Act 2001].

210. *See id.* arts. 27–41.

211. *See id.* arts. 42–49.

212. *See id.* art. 2, schs. (1)–(2).

213. *See id.* art. 2, sch. (3).

214. *See id.* art. 2, sch. (4).

215. *See id.* art. 2, sch. (4).

216. *See id.* art. 5.

The ICCA also specifies the process of delivering arrested persons to the ICC. The most important point is that after a person is arrested under a Section 2 Warrant, he or she should be brought before a competent court as soon as possible.<sup>217</sup> After the competent court ensures that all the anticipated procedures under Section 2 of the ICCA have been implemented properly, it issues a delivery order.<sup>218</sup> The delivery order will adhere to the ICC request regarding whether the person should be delivered directly into ICC custody or to another specified state in case of conviction.<sup>219</sup> In addition, the court has authority to postpone the proceedings to address charges of inadmissibility of cases before the ICC.<sup>220</sup>

#### b. Other Forms of Assistance

In addition to the obligations to arrest and surrender outlined in the Rome Statute, Article 93(1) provides a number of other ways in which state parties are required to cooperate with the ICC in its investigations and prosecutions.<sup>221</sup> Like Article 93 of the Rome Statute, the ICCA addresses additional forms of cooperation with the ICC in relation to investigation and prosecution, including procedures for: questioning a suspect or accused person, obtaining or production of evidence, transfer of a prisoner to give evidence or assist in investigations, search and seizure, taking of fingerprints, orders of exhumation, freezing orders concerning property, and verification and transmission of materials to the ICC.<sup>222</sup> The ICCA includes various provisions that address those forms of cooperation and that capture domestic procedure, so as to best facilitate cooperation between the state and the ICC. For instance, according to the ICCA, whenever the secretary of state receives a request from the ICC regarding investigation and prosecution of a person, the person must be informed of his or her rights before being questioned and must consent to such interview.<sup>223</sup> The consent of the person in question can be delivered directly by the person or through an agent acting on his or her behalf in cases of physically or mentally handicapped individuals or youth.<sup>224</sup> Furthermore,

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217. *See id.* art. 5(1).

218. *See id.* art. 2(a)–(b).

219. *See id.* art. 3.

220. *See id.* art. 4.

221. *See* Cryer & Bekou, *supra* note 207, at 455.

222. *See* U.K. International Criminal Court Act 2001, c. 3, §§ 27–41.

223. *See id.* c. 3, § 28(1)(2).

224. *See id.* c. 3, § 4.

the ICCA relates its provisions regarding taking fingerprints to similar U.K. domestic laws in order to facilitate cooperation and clarify for authorities how to respond to ICC requests.<sup>225</sup>

### c. Enforcement of ICC Sentences and Orders

Another area of cooperation that is regulated by the ICCA is execution of ICC orders and sentences within the territory of the United Kingdom.<sup>226</sup> According to Section 42(1) of the ICCA, if the ICC specifies the United Kingdom as the place where a convicted person should complete his or her imprisonment, the U.K. secretary of state will comply with the ICC specification.<sup>227</sup> In addition, according to the ICCA, the U.K. government will also cooperate with ICC requests to temporarily return a prisoner to the custody of the ICC or change the place of imprisonment of a prisoner from the United Kingdom to another specified state.<sup>228</sup>

## 2. ICC Preliminary Examination and the United Kingdom's Actual Cooperation with the ICC

The previous Subsection demonstrates that the United Kingdom has satisfied many of the statutory requirements under the Rome Statute. This Subsection examines whether these laws have been tested in practice, and if so, how well they performed. In January 2014, the European Center for Constitutional and Human Rights and Public Interest Lawyers presented to the ICC a 250-page official complaint with new facts and evidence about the commission of war crimes by British forces in Iraq.<sup>229</sup> As the OTP reported, after the new communications, the ICC prosecutor re-opened the preliminary examination of the situation in Iraq, which had been closed in 2006.<sup>230</sup> Although the alleged crimes were committed in the territory of Iraq, which is not a state party to the Rome Statute, the ICC still has jurisdiction over all war crimes, crimes against humanity, and genocide committed by British nationals as of July

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225. See *id.* c. 3, § 34(2) (“In subsection (1) and that Schedule ‘fingerprints’ and ‘non-intimate sample’ have the meaning given by Section 65 of the Police and Criminal Evidence Act 1984 or, in Northern Ireland, Article 53 of the Police and Criminal Evidence (Northern Ireland) Order 1989.”).

226. See *id.* c. 4, §§ 42–49.

227. See *id.* c. 4, § 42(1)(a)–(b).

228. See *id.* c. 4, § 43(1)(a)–(b).

229. Jean Shaoul, *U.K. Referred to International Criminal Court for War Crimes in Iraq*, WSWs (2014), <https://www.wsws.org/en/articles/2014/06/03/iraqj03.html> [<https://perma.cc/5ZJ9-MQPQ>].

230. See OTP REPORT 2015, *supra* note 62, at 11 ¶ 43.

1, 2002,<sup>231</sup> including any international crimes committed by British nationals in Iraq. The crimes allegedly committed by British nationals in Iraq between 2003 and 2008<sup>232</sup> include 1,009 individual cases of torture and other forms of ill treatment, 259 unlawful killings of civilians, 88 cases of denial of a fair trial, 19 cases of rape in detention, and 26 cases of other forms of sexual violence.<sup>233</sup>

The latest report of the OTP indicates that the office reviewed approximately 1,146 witness statements concerning the allegations, and its preliminary examination is currently focused on subject matter jurisdiction.<sup>234</sup> The report further explains that the OTP is assessing the reliability and credibility of the received information and their sources, and it is determining whether the ICC could have jurisdiction over the alleged crimes:

The Office is currently engaged in processing and analyzing the vast amount of material provided by the communication senders while conducting a thorough evaluation of the reliability of the sources and the credibility of the information received. In conducting its assessment of whether the alleged crimes fall within the jurisdiction of the Court and were committed on a large scale or pursuant to a plan or policy, the Office will take into account the findings of the relevant investigations conducted by the [U.K.] authorities as well as the outcomes of judicial review proceedings in the High Court of Justice of England and Wales.<sup>235</sup>

With respect to the level of cooperation between the ICC and the government of the United Kingdom in the preliminary examination phase, the OTP reports that in two subsequent years (2014 and 2015), both the complainants and the U.K. government have fully collaborated with ICC requests and preliminarily examination activities.<sup>236</sup> The OTP report states that “[t]he Office has maintained close contact with relevant stakeholders, including senders of Article 15 communications and the [U.K.] government, both of whom have provided full cooperation with the Office’s preliminary examination activities during the reporting period.”<sup>237</sup> These reports from the OTP indicate that cooperation between the ICC and the United Kingdom has been proceeding in the way it should,

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231. *See id.* at 7 ¶ 29.

232. *See id.* at 7 ¶ 23.

233. *See id.* at 9 ¶¶ 35–38.

234. *See id.* at 10 ¶¶ 41, 43.

235. *See id.* at 10 ¶ 44.

236. *See, e.g.,* OTP REPORTS 2014, *supra* note 77; *see also* HRW REPORT 2001, *supra* note 51, ¶ 40.

237. *See* OTP REPORT 2015, *supra* note 62, at ¶ 40.

so it appears that the United Kingdom's cooperation mechanism is working relatively well thus far.

### B. *Australia*

In 2002, Australia enacted its International Criminal Court Act (ICC Act) to ensure proper implementation of the Rome Statute within its territory and to make its domestic laws compatible with the Statute.<sup>238</sup> Article 3(1) of the ICC Act explains, "The principal object of this Act is to facilitate compliance with Australia's obligations under the [Rome] Statute."<sup>239</sup> The ICC Act has fourteen parts and 189 sections with detailed and specific provisions in regard to facilitating cooperation between Australia and the ICC. According to the ICC Act, a request for cooperation can be made by the ICC to Australia, in relation to an investigation or prosecution which is conducted by the ICC prosecutor on the following issues: arrest and surrender of a person to the ICC; identification and location of a person or things; obtaining or producing evidence or articles; questioning persons being investigated or prosecuted; service of documents; facilitating the appearance of people voluntarily before the ICC; temporary transfer of prisoners to the ICC; examination of places or sites; enforcement of searches and seizures; provision of records and documents; protection of victims and witnesses and preservation of evidence; and assistance with the forfeiture of property related to crimes within the jurisdiction of the ICC.<sup>240</sup>

The ICC Act designated the Australian attorney-general as the point person to deal with ICC requests and other forms of cooperation under the Rome Statute.<sup>241</sup> The attorney-general in turn must execute ICC requests for cooperation,<sup>242</sup> and must consult with the ICC whenever there is a problem with the execution of a request.<sup>243</sup> Specifically, the ICC Act emphasizes that the attorney-general must consult with the ICC if a request for cooperation raises any problems in relation to Australia's obligations under

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238. Gillian Triggs, *Implementation of the Rome Statute for the International Criminal Court: A Quiet Revolution in Australian Law*, 25 SYDNEY L. REV. 507, 507 (2003).

239. International Criminal Court Act 2002 (Cth), para 3(1) (Austl.) [hereinafter Austl. ICC Act 2002].

240. *See id.* para 7(1)(a).

241. *See id.* para 8(1). Any request from the ICC should be sent to the attorney-general of Australia through diplomatic channels or the International Criminal Police Organization.

242. *See id.* para 10(1).

243. *See id.* para 11(1).

international law in general or under Article 98 of the Rome Statute in particular.<sup>244</sup>

If the attorney-general receives an arrest request with the requisite documentation from the ICC,<sup>245</sup> he or she is directed to send the request with a written notice to any magistrate.<sup>246</sup> Following notice from the attorney-general, the magistrate must issue an arrest warrant on behalf of the ICC and report back to the attorney-general.<sup>247</sup> The ICC Act also permits applications for bail, but only after first seeking approval of the ICC to make sure that the arrested person is not an escape risk.<sup>248</sup> After accomplishing an arrest, the attorney-general may also use his or her absolute discretion to issue a warrant of surrender.<sup>249</sup>

In practice, although there were some complaints regarding the alleged commission of international crimes by former Australian Prime Ministers Tony Abbott and John Howard,<sup>250</sup> there are no actual situations under preliminary examination or investigation by the ICC in relation to those complaints.

However, Australia has included ICC-related issues in its annual report by the attorney-general, providing information about com-

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244. *See id.* para 12(1).

245. According to Article 17 of the International Criminal Court Act (ICC Act), the ICC request for arrest should be accompanied by some information and documents including identification and location of the wanted person and a copy of the arrest warrant. In addition, the ICC arrest request should include a copy of the judgment of conviction in cases where the person has already been convicted. *See id.* para 20(1).

246. *See id.* para 20(1).

247. *See id.* para 20(2)–(3).

248. *See id.* para 24.

249. *See id.* para 29.

250. *See Amy Maguire, Will the International Criminal Court Prosecute Australia for Crimes against Humanity?*, CONVERSATION (Oct. 26, 2014), <http://theconversation.com/will-the-international-criminal-court-prosecute-australia-for-crimes-against-humanity-33363> [<https://perma.cc/8KW2-32SF>]. For instance, independent federal member of the Australian Parliament Andrew Wilkie has filed a complaint to the ICC's Office of the Prosecutor requesting that the ICC investigate and prosecute former Prime Minister Tony Abbott and his ministers for crimes against humanity, especially ill treatment of asylum seekers. *Id.* In another example, a complaint was sent to the ICC against former Prime Minister John Howard, accusing him of committing innumerable international crimes by sending Australian forces to Iraq in May 2003. *Complaint against John Howard to the International Criminal Court*, AIM NETWORK (Jan. 11, 2015), <http://theaimn.com/complaint-john-howard-international-criminal-court/> [<https://perma.cc/3F2N-S8CN>]. The complaint states that “[a]s a result of this decision [to join the invasion of Iraq], I believe that offenses were committed, and that these offenses are punishable under Article 6 Genocide, Article 7 Crimes Against Humanity, and Article 8 War Crimes of the Rome Statute.” *Id.* The recent reports of the ICC provide no indication that the ICC is considering these complaints.

pliance to the community and stakeholders.<sup>251</sup> This report is mandated by Section 189 of the ICC Act, which states that “[t]he [Attorney-General] Department must publish each year, as an appendix to the Department’s Annual Report for that year, a report on the operation of this Act, the operations of the ICC, and the impact of the operations of the ICC on Australia’s legal system.”<sup>252</sup> As such, the attorney-general is responsible for providing an annual report regarding the operations of the ICC and its probable impact on the Australian legal system. Since there is no situation or case under investigation by the ICC, almost all of the annual reports of the attorney-general concerning ICC operations end with these two sentences:

During the reporting year, the operations of the ICC had no discernible impact on Australia’s legal system. The future impact of ICC operations is expected to depend on the number of active prosecutions and investigations undertaken, as well as the number and nature of requests for assistance received by Australia.<sup>253</sup>

### C. *The Two Acts Compared*

Comparing the United Kingdom’s ICCA and Australia’s ICC Act, there are some important similarities in terms of goals, jurisdiction, and content. Similar to the United Kingdom, the goal of Australia’s ICC Act is to facilitate cooperation between the ICC and Australia and adjust Australia’s domestic laws to comply with the Rome Statute.<sup>254</sup> As with the United Kingdom, Australia’s ICC Act grants priority to Australian national jurisdiction to prosecute, investigate, and consider international crimes.<sup>255</sup> In addition, the both acts attempt to respond to the provisions of Part 9 of the Rome Statute, which includes provisions concerning international cooperation with the ICC.<sup>256</sup>

251. See, e.g., *Annual Reports 2009–2015*, ATTORNEY-GENERAL’S DEP’T, <https://www.ag.gov.au/Publications/AnnualReports/Pages/default.aspx> [<https://perma.cc/R3UB-4UYB>].

252. See Austl. ICC Act 2002, para 189.

253. See, e.g., ATTORNEY-GENERAL’S DEP’T ANNUAL, ATTORNEY-GENERAL’S DEPARTMENT REPORT 2014–2015, Appendix 6, <https://www.ag.gov.au/Publications/AnnualReports/14-15/Pages/Part5-Appendixes/appendix-6.aspx> [<https://perma.cc/C9C5-9WDY>] (last visited Apr. 3, 2017) (Austl.).

254. See U.K. International Criminal Court Act 2001, Explanatory Notes (6); Austl. ICC Act 2002, para 3(1).

255. See U.K. International Criminal Court Act 2001, Explanatory Notes (6); Austl. ICC Act 2002, para 3(2).

256. See U.K. International Criminal Court Act 2001, arts. 2–46; Austl. ICC Act 2002, paras 7-172.

On the other hand, the acts of the two countries have some striking differences. While the United Kingdom's ICCA encompasses and incorporates both substantive and procedural issues that are defined in the Rome Statute, Australia's ICC Act only covers procedural issues that define the process of cooperation between the ICC and Australia.<sup>257</sup> As such, the ICCA not only regulates the procedure of cooperation between the United Kingdom and the ICC, but it also defines Rome Statute crimes (genocide, crimes against humanity, and war crimes)<sup>258</sup> and determines the appropriate punishment for those crimes.<sup>259</sup> In contrast, Australia has enacted a separate law to specifically address the relevant substantive provisions of the Rome Statute, such as defining and determining international crimes and their punishments.<sup>260</sup>

Perhaps of greater significance, the two acts are different in terms of which national institution they designate to play the role of liaison with the ICC and other countries. The United Kingdom's ICCA, for example, specifies the secretary of state as the institution to coordinate on behalf of the government with the ICC.<sup>261</sup> On the other hand, the Australian ICC Act establishes the Department of the Attorney-General as the primary office to facilitate and consider requests for cooperation by the ICC within the territory of Australia.<sup>262</sup>

Finally, the acts differ in terms of the level of specificity provided in their provisions for cooperation and dealing with potential conflicts and problems in executing ICC requests. Unlike the ICCA, Australia's ICC Act has very detailed provisions, covering almost all required aspects of cooperation mandated by the Rome Statute.<sup>263</sup> It also predicts probable contradictions between ICC requests and Australia's obligations under other agreements. For instance, the ICC Act responds to Article 98 of the Rome Statute and mandates that if an ICC request contradicts Australia's obligations to another foreign country under international law, the attorney-general shall

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257. See U.K. International Criminal Court Act 2001, arts. 50–74; Austl. ICC Act 2002, paras 7–172.

258. See U.K. International Criminal Court Act 2001, c. 5, § 50.

259. See *id.* c. 5, § 53.

260. Australia has enacted the International Criminal Court (Consequential Amendments) Act 2002 “to amend the Criminal Code Act 1995 and certain other acts in consequence of the enactment of the ICC Act, and for other purposes.” International Criminal Court (Consequential Amendments) Act 2002 (Austl.).

261. See U.K. International Criminal Court Act 2001, c. 2-4.

262. See Austl. ICC Act 2002, paras 4, 8, 10, 11.

263. See Austl. ICC Act 2002, paras 7–48 (included in “General provisional relating to requests by the ICC for cooperation”).

postpone the execution of the request until the foreign country agrees with the execution of the request.<sup>264</sup>

## V. RECOMMENDATIONS AND POTENTIAL CHALLENGES FOR AFGHANISTAN'S COOPERATION LAW

### A. *Initial Recommendations*

This Article recommends that Afghanistan enact a procedural law to facilitate cooperation with the ICC, a law that can serve as a means for the ICC to assert its jurisdiction over crimes that have been perpetrated over the past thirteen years. Learning from the experience of other countries like the United Kingdom and Australia, and understanding the treaty obligations of Afghanistan, it is time for Afghanistan to align its national legislation with all obligations under the Rome Statute, including incorporating provisions to cooperate promptly and fully with the ICC in investigating, prosecuting, and trying international crimes.

While this Afghan cooperation law should contain detailed provisions, this Article recommends that any potential cooperation law should address at the very least the following important issues: (1) determining a focal point for cooperation and the role of Afghanistan's Ministry of Foreign Affairs, Supreme Court, and Ministry of Interior (Police) with respect to the ICC's operations in Afghanistan; (2) consultations with the ICC, the role of its recommendations in any related process, and Afghanistan's obligation to another foreign country related to Article 98 of the Rome Statute; (3) procedures for arrest and surrender of a person and facilitating questioning of any person being investigated or prosecuted; (4) protection of victims and witnesses; (5) development of a mechanism for the filing of complaints by individuals and organizations; (6) execution of searches and seizures and enforcement of ICC sentences and orders; (7) waiver of immunity; (8) providing an annual report on the implementation of the Rome Statute; (9) increasing political will; (10) calling for stronger steps by the ICC; and (11) establishing effective coordination among Afghan law enforcement and civil society organizations. The following Subsections will address these proposals in turn.

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264. *See id.* para 12(4).

## 1. Determination of a Focal Point for Cooperation and the Roles of Afghanistan's Ministry of Foreign Affairs, Supreme Court, and Police

As a starting place, Afghanistan will need to specify an appropriate national institution to be responsible for efficient cooperation with the ICC, including timely responses to the ICC's requests. As explained above, the United Kingdom and Australia took different approaches in identifying a national institution as a focal point for cooperation. In the United Kingdom, the secretary of state was given the major role; but in Australia, the attorney-general was designated as the central point to facilitate cooperation with the ICC.<sup>265</sup> Considering the relevant domestic laws of Afghanistan, including the Constitution and Criminal Procedure Code, the Australian approach would probably be most successful in Afghanistan. In addition, the attorney-general would be the most appropriate individual to fulfill the mission of a focal point for the ICC in Afghanistan because the Constitution of Afghanistan currently vests the duties of investigation and prosecution in the attorney-general.<sup>266</sup> Prosecutors have the authority to issue arrest warrants<sup>267</sup> as well as to monitor the process of any arrest in the country.<sup>268</sup> Given the duties and authorities of the attorney-general, his or her role as the focal point between the ICC and the Afghan government would decrease any potential conflicts of authority among law enforcement agencies of Afghanistan when the agencies execute ICC requests for cooperation.

Rome Statute Article 59 requires state parties to bring arrested persons before a competent judicial authority prior to their surrender to the ICC to ensure that the arrests are in accordance with law and the proper rights have been respected.<sup>269</sup> It also gives discretion to state parties to carry out any arrest proceedings based on their domestic laws.<sup>270</sup> As a matter of domestic law and procedure, every country delegates specific authorities to its own law enforcement agencies. For example, pursuant to Article 59(2) of the Rome Statute, the United Kingdom's ICCA requires that an arrested person should be brought before a competent court to ensure that the arrest warrant is from the ICC and the arrested

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265. See *supra* Section IV.D.

266. See AFG. CONST. art. 134(1).

267. See Afg. Criminal Procedure Code, art. 97, Official Gazette, May 2014, No. 1132.

268. See *id.* art. 80(3).

269. See *id.* art. 80(2).

270. See Rome Statute, art. 59(1), July 17, 1998, 2187 U.N.T.S. 90.

person is indeed the one specified in the warrant.<sup>271</sup> Similarly, Australia's ICC Act grants this authority to a magistrate.<sup>272</sup> Additionally, the ICCA specifies the role of a judicial officer (competent court), the high court, and the U.K. Supreme Court in connection with the arrest and surrender of a person to the ICC.<sup>273</sup> Likewise, Australia's ICC Act specifies the role and authority of magistrates and police officers with regard to the process of cooperation with the ICC.<sup>274</sup>

Inevitably, Afghanistan's Ministry of Foreign Affairs, Supreme Court, and Ministry of the Interior will need to be involved with any ICC operations in Afghanistan. Although the attorney-general should take a central role in cooperating with the ICC, the Afghan law should also define the roles of these other institutions to clarify their responsibilities in connection with ICC operations. Because the Ministry of Foreign Affairs is also involved in the Law on Extradition of Accused and Convicted Persons and Justice Cooperation,<sup>275</sup> it should serve as a liaison between the ICC and the attorney-general. The Ministry of Foreign Affairs could, for instance, transfer any letter, request, warrant, or verdict of the ICC to the attorney-general, and vice versa.

The Constitution of Afghanistan allows for extradition of Afghan citizens based upon international treaties to which Afghanistan has joined.<sup>276</sup> The Supreme Court is the institution with the authority to decide on the extradition or surrender of an Afghan to a foreign country.<sup>277</sup> This design is compatible with the requirement in Article 59 of the Rome Statute and it is similar to the practices in the United Kingdom and Australia. Accordingly, the cooperation law should specify the procedures for approving surrender of accused persons within the territory of Afghanistan to the ICC and detail

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271. See U.K. International Criminal Court Act 2001, c. 2, § 3.

272. See Austl. ICC Act 2002 (Cth), para 23(2).

273. See U.K. International Criminal Court Act 2001, c. 9.

274. See, e.g., Austl. ICC Act 2002, paras 20, 128.

275. See *Qanoni Esterdade Motahameen, Mahkomeen Wa Hamkari Adli* [the Law on Extradition of Accused and Convicted Persons and Justice Cooperation] art. 5, Official Gazette, April 2013, No. 1103. The law aims to facilitate cooperation with foreign nations in the detection of crimes and identification, arrest, investigation, and trial of an accused. It also regulates the methods to request extradition of an accused, convicted individual as well as addressing related issues. In this law, the abovementioned institutions have specific roles in cooperation to extradite or request extradition of an accused or convicted person. *Id.* arts. 2, 5.

276. See AFG. CONST. art. 28(1).

277. See Afg. Judiciary Law 2013, art. 31(5), Official Gazette, June 2013, No. 1109.

how the Afghan Supreme Court should exercise its authority in this regard.

In addition, since the Ministry of the Interior (the Afghan police) has the authority to implement arrest and surrender warrants, as well as to supervise detention centers and prisons in Afghanistan,<sup>278</sup> the cooperation law should determine the ministry's role with respect to holding any person in a detention center under an ICC arrest warrant until either surrender to the ICC or execution of the ICC's sentence in Afghanistan's prisons. While the United Kingdom's ICCA states that a person convicted by the ICC should be detained in a special place,<sup>279</sup> Australia's ICC Act does not specify whether a person arrested or convicted by an ICC warrant or sentence would be kept in a regular prison or in a separate place.<sup>280</sup> Adoption of the U.K. approach that would hold ICC prisoners in a special place would arguably be the best approach in Afghanistan, because the current situation of prisons in Afghanistan<sup>281</sup> is not compatible with the standards required under the Rome Statute.

## 2. Consultations with the ICC and Afghanistan's Article 98 Obligations to Other Foreign Countries

The Rome Statute requires state parties to expedite consultations with the ICC in order to address any barriers or issues that impede or prevent the implementation of an ICC request.<sup>282</sup> Afghanistan's new law may follow Australia's ICC Act, which has adequately addressed this important issue and required the Australian attorney-general to consult with the ICC and seek the ICC's recommendations any time it faces challenges in executing an ICC request. This component would facilitate communication between the ICC and Afghanistan, and it would help prevent any potential issue or problem from impeding execution of the ICC's requests. For example, if the ICC issues an arrest warrant for a person who has already been tried and convicted by Afghan courts, a quick consultation with the ICC will be useful to clarify the situation for the ICC and avoid any possible confusion in the process.

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278. See *Visions and Tasks*, MINISTRY INTERIOR, <http://moi.gov.af/fa/page/5718/5729> [https://perma.cc/ZV32-2PK5] (last visited Feb. 10, 2017).

279. See U.K. International Criminal Court Act 2001, § 42(3)(c).

280. See, e.g., Australian ICC Act 2002, paras 46, 160.

281. See *UNAMA Is Concern Over Prisons Situation in Afghanistan*, BAKHTAR NEWS AGENCY (May 3, 2016), <http://www.bakhtarnews.com.af/eng/security/item/22490-unama-is-concern-over-prisons-situation-in-afghanistan.html> [https://perma.cc/W3M7-578A].

282. See Rome Statute, art. 97, July 17, 1998, 2187 U.N.T.S. 90.

Additionally, Afghanistan has signed many bilateral agreements with other states, and at some point, Afghanistan's obligations under multi- or bilateral agreements may conflict. An example of this potential conflict is the bilateral security agreement between Afghanistan and the United States, under which Afghanistan may not surrender to the ICC any U.S. soldier who is accused of committing international crimes.<sup>283</sup> In fact, Article 98(2) of the Rome Statute responds to these conflicts by stating that the ICC will not require a state party to break its obligations under another bilateral agreement;<sup>284</sup> nonetheless, the new cooperation law of Afghanistan should also incorporate this provision. While the United Kingdom's ICCA does not address this issue, Australia's ICC Act provides an appropriate model for Afghanistan, because it incorporates Article 98 of the Rome Statute and requires the attorney-general to consult with the ICC to prevent any potential conflict in the process of cooperating with the ICC. Thus, adopting the Australian approach will help Afghanistan avoid potential conflicts among its various obligations to other countries based on bilateral and multilateral agreements.

### 3. Procedures for Arrest, Surrender, and Facilitation of Questioning

Although Afghanistan's Criminal Procedure Code and Police Law have regulated the process for arrest of an accused person within the territory of Afghanistan, they do not have adequate provisions to facilitate the process of arrest and surrender of an accused to the ICC. The new cooperation law will thus need to establish how the ICC's arrest warrants should be pursued in Afghanistan and what procedure should be instituted to facilitate the surrender of a person to the ICC. This provision should also describe the timing for an arrest request, from the time the Ministry of Foreign Affairs receives the warrant through the period during which the arrested person may or may not be surrendered to

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283. Security and Defense Cooperation Agreement, Afg.-U.S., Sept. 30, 2014, arts. 13(5), 54 I.L.M. 252, Ministry of Foreign Affairs (Afg.) [hereinafter Afg.-U.S. Security Agreement 2014], <http://mfa.gov.af/Content/files/BSA%20ENGLISH%20AFG.pdf> [<https://perma.cc/7UQC-6SUG>].

284. Article 98(2) states "The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender." Rome Statute, art. 98(2), July 17, 1998, 2187 U.N.T.S. 90.

the ICC according to the decision of the Supreme Court. Finally, it should include the attorney-general's measures for arresting the person in cooperation with the police.

Although the cooperation acts of the United Kingdom and Australia envisage the process of arrest and surrender and the possible institutions involved, they are not perfect models because they do not contain provisions to limit the processing time from receipt of an arrest warrant until surrender of the person to the ICC. Thus, the new Afghan law should establish a time limitation and create a new procedure for any ICC-related arrest and surrender. In particular, in addition to the attorney-general and the police, some other institutions might be involved in the process, such as the ICC, the Supreme Court, and the Ministry of Foreign Affairs. Therefore, it would be best to set appropriate time limitations to accelerate the cooperation of the various entities and the process of arrest and surrender of a person to the ICC.

Finally, the ICC may request questioning of a person who lives in the territory of Afghanistan during investigation or prosecution. The new law should detail how, for example, the attorney-general can execute such a request and when and how a person should respond to such questioning. The law must also include what rights the person is entitled to during such questioning and investigation. The cooperation acts of the United Kingdom and Australia fully comply with the Rome Statute and adequately address this issue: they require the relevant authorities to inform the person of his or her rights (such as the right to remain silent, the right to counsel, and the right to a translator) before asking any questions.<sup>285</sup> Afghanistan should use those provisions as models.

#### 4. Protection of Victims and Witnesses

Because the Rome Statute sets high standards for the protection of victims and witnesses, addressing their physical and psychological well-being,<sup>286</sup> the new Afghan law should either directly refer to the application of the relevant provisions<sup>287</sup> of the Rome Statute or incorporate them into the new law, including options such as pro-

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285. Article 55 of the Rome Statute describes the rights of persons during investigation, including the right to not be compelled to self-incriminate, the right to be treated humanely, the right to access to a translator, and so forth. *See id.* art. 55; *see also*, U.K. International Criminal Court Act 2001, art. 28; Austl. ICC Act 2002, para 71.

286. *Id.* 68(1).

287. *Id.* art. 68 (the protection of victims and witnesses).

viding testimony via camera or withholding victim or witness identifying information.

While Afghanistan's Criminal Procedure Code has a few articles concerning the protection of witnesses, such as provisions about concealment of witness identity,<sup>288</sup> it does not address the separate issue of protection of victims. Such provisions will be key to prosecuting perpetrators of international crimes because to date, victims of international crimes have not been able to raise their voices or file complaints against alleged war criminals.<sup>289</sup> They simply have not had adequate protections under the domestic law of Afghanistan.<sup>290</sup> If they did file a complaint, they would be easily targeted and threatened by the alleged criminals, and no law would sufficiently guarantee their safety.<sup>291</sup> Therefore, the new law should incorporate the standards required by the Rome Statute and the Rules of Procedure and Evidence of the ICC.<sup>292</sup> Alternatively, similar to Australia's act, it should directly require the application of the Rome Statute standards to requests of the ICC for protection of victims and witnesses. Although Australia's ICC Act is limited to the ICC's language regarding protection of victims and witnesses,<sup>293</sup> the United Kingdom's ICCA goes a little further and includes additional provisions that allow British courts to hold confidential sessions to protect victims and witnesses.<sup>294</sup> Afghanistan should do the same.

## 5. Development of a Mechanism for Filing Complaints by Individuals and Organizations

While a person or organization can directly send information to the OTP regarding the commission of alleged crimes,<sup>295</sup> it would

288. See Afg. Criminal Procedure Code, art. 53, Official Gazette, May 2014, No. 1132 ("Protective Measures for Witnesses" including concealing identity); *id.* art. 54 ("Witnesses That Will Receive Protective Measures"); *id.* art. 55 ("Application for Protecting Measures for Witnesses").

289. See ICC AW REPORT 2009, *supra* note 177, at 6.

290. See *id.* at 6.

291. See Karim Talbi, *Victims of Afghan Wars Demand Justice Before Peace*, RAWA (2010), <http://www.rawa.org/temp/runews/2010/05/14/victims-of-afghan-wars-demand-justice-before-peace.html> [<https://perma.cc/3GDC-PFJ9>]; see also ICC AW REPORT 2009, *supra* note 175, at 6.

292. See Rules of Evidence, *supra* note 150, rs. 87–88. The Rules of Procedure and Evidence explain the protective measures with details on how to support and protect victims and witnesses in the process of investigation and trial.

293. See Austl. ICC Act 2002 (Cth.), para 80.

294. See U.K. International Criminal Court Act 2001, § 30(2).

295. *How Can People Report Crimes to the ICC?*, JUSTICE HUB (2015), <https://www.icc-pi.int/about/otp/Pages/otp-contact.aspx> [<https://perma.cc/V43N-26G5>].

be very challenging for Afghans to do this due to language barriers with the ICC. The ICC advises communicators to send any information in either English or French.<sup>296</sup> This makes it difficult for victims to submit information, or even to understand how to send the information in the first place, unless they are proficient in one of those languages. Thus, the new Afghan law should develop a reliable mechanism that makes it easy for both individuals and nongovernmental organizations (NGOs) to inform the ICC about international crimes, as well as about any concerns regarding immunity an alleged criminal may enjoy due to corruption or lack of willingness by the government of Afghanistan to prosecute. Perhaps because most people in the United Kingdom and Australia speak English, the cooperation acts of those two countries have not developed a mechanism to address this issue upon which Afghanistan can model its own.

Establishment of a special department within the attorney-general's office—with supervision by the ICC—to receive information concerning any alleged international crimes could be effective. Accordingly, the department would be able to receive complaints, information, and other documents, translate them into the language of the court, and then send them to the ICC. This way, the ICC will be more accessible to everyone in Afghanistan, including the victims whose voices would otherwise never be heard without the existence of such a mechanism.

## 6. Execution of Searches and Seizures and Enforcement of ICC Sentences and Orders

The new Afghan law should also incorporate procedures for implementing ICC requests for searches and seizures. This issue should be carefully regulated while taking into account the other relevant domestic laws of Afghanistan. For instance, it is forbidden for an Afghan police officer to enter a house without its owner's permission or a court warrant.<sup>297</sup> The new law will need to address this issue and specify whether ICC search warrants have the same weight as a domestic court's order. Additionally, the law should address whether ICC orders for searches and seizures will be reviewed by Afghan domestic courts, which would determine the validity of ICC search warrants, or whether another process should be followed.

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296. *See id.*

297. *See* Afg. Criminal Procedure Code, art. 119, Official Gazette, May 2014, No. 1132.

The cooperation acts of the United Kingdom and Australia address these issues differently. The United Kingdom's ICCA directly subjects the execution of ICC searches and seizures to its domestic law,<sup>298</sup> primarily to the Police and Criminal Evidence Act 1984. Accordingly, British police have the right to execute searches and seizures only if they have a warrant from a magistrate court.<sup>299</sup> On the other hand, according to Australia's ICC Act, the attorney-general can authorize a police officer to execute a search or seizure.<sup>300</sup> Hence, it would be in closer conformity with the domestic law of Afghanistan to use the ICCA as a model with respect to this provision, rather than the ICC Act.

When the ICC sentences a convicted criminal, state parties should cooperate with the ICC to execute and enforce that sentence. Although the ICC will consider the nationality of the sentenced criminal when it specifies the place of imprisonment,<sup>301</sup> that will not necessarily determine the country in which the convict should receive the sentence. Typically, the ICC chooses a state party that has already showed its willingness to accept such convicted persons.<sup>302</sup> As such, a sentenced person may also be introduced to Afghanistan to serve his or her imprisonment in Afghanistan. Therefore, the new law should indicate whether the person sentenced by the ICC should serve such time in a prison that is built for other Afghans or in a separate prison.

The Rome Statute has set high standards, and "the conditions of imprisonment should be consistent with widely accepted international treaty standards governing treatment of prisoners."<sup>303</sup> The new law should take this into account and should not only incorporate the required high standards for imprisonment of a person convicted by the ICC, but following the British example, should require a separate prison for holding ICC prisoners. In this manner, Afghanistan will be able to comply with the international standards required by the Rome Statute.

## 7. Waiver of Immunity

The Rome Statute applies equally to all persons regardless of their official capacities and their immunities under national or

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298. See U.K. International Criminal Court Act 2001, § 33(1).

299. See Police and Criminal Evidence Act (1984) (2001), c. 60, § 8 (Eng.).

300. See Austl. ICC Act 2002 (Cth), para 77.

301. See Rome Statute, art. 103(3)(d), July 17, 1998, 2187 U.N.T.S. 90.

302. See *id.* art. 103(1)(a).

303. See *id.* art. 106(2).

international law.<sup>304</sup> However, the ICC may not go forward with a request related to cooperation in surrender of a person who has immunity under international law where the consent of a third state is needed, such as with diplomatic immunity (specifically, when the third state is not a state party to the Rome Statute).<sup>305</sup> In such a case, the ICC will only proceed if it can obtain the consent of the third state for the waiver of immunity.<sup>306</sup> This is a significant point that should be addressed in Afghanistan's new law. The law should specify the ways that the requests should be implemented regarding waiver of immunity and the role of the ICC in this process. Australia's ICC Act is completely silent and does not have any provision regarding this issue. However, the United Kingdom's ICCA contains specific provisions in line with the requirements of the Rome Statute.

According to Section 23 of the ICCA, any state or diplomatic immunity attaching to a person who serves as head of state or ambassador by reason of his or her connection to a state party will not prevent arrest or surrender of him or her if the ICC issues an arrest or surrender warrant.<sup>307</sup> Furthermore, after the ICC obtains a waiver from a third state concerning a person who has immunity by virtue of his or her connection to a nonstate party, the ICC request for arrest or surrender of such person will be executed as in the first situation, without consideration of the immunity of the person.<sup>308</sup> On this issue, then, the British approach for incorporating the waiver of immunity presents a clear model for Afghanistan to follow.

## 8. Annual Reports on Implementation of the Rome Statute

Learning from Australia's ICC Act, which requires the attorney-general to provide an annual report on ICC activities and their potential impact on the national legal system of Australia, the new Afghan law should also require the Afghan attorney-general to provide an annual report regarding cooperation between Afghanistan and the ICC and any ICC operation within the territory of Afghanistan. The report should analyze any positive or negative impact of such ICC operations on the Afghan legal system. Finally, the report should be shared with the Afghanistan Cabinet and be

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304. *See id.* art. 27.

305. *See id.* art. 98(1).

306. *See id.* art. 98(1).

307. *See* U.K. International Criminal Court Act 2001, § 23(2).

308. *See id.*

made available to the public to inform Afghan citizens regarding ICC cases and next steps.

## B. *Further Recommendations*

Although there will be positive impacts to enactment of a cooperation law, the law itself will not live up to expectations if Afghanistan does not recognize other factors related to the rule of law, in general, and the implementation of the Rome Statute and cooperation law, in particular. Therefore, this Article also makes the following recommendations that should help enforce the Rome Statute and the potential cooperation law.

### 1. Increase Political Will

Increasing and encouraging political will may be the most important factor for implementing the Rome Statute and bringing alleged criminals to justice. Afghanistan has been suffering from lack of such political will for the past fourteen years. During this time, not only have Afghanistan government leaders done nothing to prosecute the perpetrators of international crimes over the past three decades, but they consistently avoided prosecuting allegedly notorious terrorists and war criminals who were arrested in battle in Afghanistan after 2003.<sup>309</sup> While the leaders of the current government (President Ghani and Chief Executive Abdullah) pay lip service to the importance of the rule of law, justice, and cooperation with the ICC—for example, recently President Ghani approved the execution<sup>310</sup> of six terrorists<sup>311</sup>—they have undertaken no serious actions in this regard. In fact, recently they have signed a peace agreement with one of the most notorious warlords,<sup>312</sup> Gulbuddin Hekmatyar, who is alleged to be responsible

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309. See Paul D. Shinkman, *Why Afghanistan's President Karzai Would Release 65 Dangerous Terrorists*, U.S. News (Feb. 13, 2014, 12:13 PM), <http://www.usnews.com/news/articles/2014/02/13/why-afghanistans-president-karzai-would-release-65-dangerous-terrorists> [<https://perma.cc/4AZL-GK5H>].

310. The execution of the terrorists caused many controversies as some argued that the terrorists were low profile and that political reasons were behind the President's approval of the execution. For more information, see Sune Engel Rasmussen, *Afghanistan Executes Six Taliban prisoners*, GUARDIAN (May 8, 2016, 10:30 AM), <https://www.theguardian.com/world/2016/may/08/afghanistan-executes-six-taliban-prisoners-ashraf-ghani> [<https://perma.cc/2JDL-8KVA>].

311. See Sune Engel Rasmussen, *Six Taliban Inmates Executed in Kabul Prison*, RADIO FREE EUR. (May 8, 2016), <http://www.rferl.org/content/taliban-inmates-executed-in-kabul-prison/27722314.html> [<https://perma.cc/KM25-4NVA>].

312. See Sune Engel Rasmussen, *'Butcher of Kabul' Pardoned in Afghan Peace Deal*, GUARDIAN (Sept. 22, 2016), <https://www.theguardian.com/world/2016/sep/22/butcher-of-kabul-pardoned-in-afghan-peace-deal> [<https://perma.cc/N7XX-S3FW>].

for the deaths of thousands of innocent people<sup>313</sup> before and after the ratification of the Rome Statute.

Political will means taking practical and real steps towards prosecution of alleged perpetrators of gross crimes, making domestic laws compatible with the Rome Statute, and proper cooperation with the ICC. The leaders of Afghanistan have both a legal and a moral duty to end the culture of impunity and move to investigate any allegedly committed international crimes in Afghanistan, as well as to fulfill Afghanistan's international obligations under the Rome Statute by adapting the relevant Afghan national laws to the requirements of the Statute, including enacting and fully executing a new cooperation law. By doing so, the leaders will send a strong message to the people of Afghanistan and potential criminals that no longer will anyone escape punishment for committing Rome Statute crimes in Afghanistan.

## 2. Call for Stronger Steps by the ICC

From the beginning of Afghanistan's accession to the Rome Statute until now, the ICC has undertaken almost no action to address the atrocities that have plagued Afghanistan. Instead, the ICC should lead direct (or at least indirect) investigations and prosecutions of international crimes in Afghanistan, utilizing all available tools to ensure enforcement of the Rome Statute. This Article thus urges the ICC to take a firm stance and move towards prosecuting all perpetrators of grave crimes in Afghanistan. If Afghanistan does not cooperate, there are other options available to the ICC, such as referring the case to the Assembly of State Parties.<sup>314</sup>

## 3. Establish Effective Coordination Amongst Afghan Law Enforcement Agencies and Civil Society Organizations

Considering the severity of the international crimes in question, prosecution and investigation of such crimes requires much greater effort than what attends ordinary crimes. Therefore, there must be strong and effective coordination between the police, prosecutors, and the courts, as well as between these governmental institutions and civil society and NGOs. With vigorous coordina-

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313. *See id.*

314. *See* Rome Statute, art. 87, July 17, 1998, 2187 U.N.T.S. 90 ("Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.").

tion, the relevant governmental and nongovernmental institutions will be able to respond effectively and timely to the ICC's cooperation requests, especially cases of arrest and surrender of persons wanted by the ICC. Particularly, the role of civil society organizations and NGOs is essential in this process. NGOs could assist law enforcement agencies with respect to providing information on possible unpunished crimes, providing evidence and documents, and presenting victims and witnesses before the ICC.<sup>315</sup>

### C. *Potential Challenges to Enactment and Implementation of a New Cooperation Law*

Unfortunately, legislation, enactment, and implementation of a new cooperation law will not be easy in Afghanistan. Drafting new legislation and adapting domestic laws to the Rome Statute will likely encounter many challenges. Most of the challenges have already been pointed out in various parts of this Article. Determination of the potential obstacles in the way of enacting a new cooperation law is important to figure out how to deal with and overcome these barriers. The most important challenges to be considered and addressed are the following: (1) insecurity in Afghanistan; (2) a lack of political will and a lack of awareness about the Rome Statute and the ICC; (3) certain amnesty instruments that would conflict with the Rome Statute, including a bilateral security agreement between the United States and Afghanistan and the Afghan Amnesty Law; (4) the dilemma of peace versus justice; and (5) the prevalence of warlords in power and rampant corruption in the judiciary. The following Subsections address each of these.

#### 1. Insecurity in Afghanistan

The security situation is notoriously unstable in Afghanistan.<sup>316</sup> This insecurity not only provides safe havens for alleged criminals but allows for continuous violations of human rights and humanitarian law by various armed groups in Afghanistan. Nonetheless, many alleged criminals have been captured during the conflict by Afghan and U.S. forces, including some high profile insurgent leaders such as the second highest profile leader of the Haqqani

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315. See, e.g., ICC AW REPORT 2009, *supra* note 177, at 9 (proposing NGOs assist with 'collecting information,' 'exerting pressure,' 'public awareness . . . [and] education.').

316. See, e.g., Mujib Mashal & Eric Schmitt, *Afghan Security Crisis Sets Stage for Terrorists' Resurgence*, N.Y. TIMES (Dec. 2, 2016), [http://www.nytimes.com/2016/12/02/world/asia/afghanistan-security-terrorism-taliban.html?\\_r=0](http://www.nytimes.com/2016/12/02/world/asia/afghanistan-security-terrorism-taliban.html?_r=0) [<https://perma.cc/82G9-ZNJC>].

Network.<sup>317</sup> Yet none of them have been held accountable by the Afghan legal system. This shows that if Afghanistan fulfilled its obligations under the Rome Statute, there would be sufficient criminals to be prosecuted and brought to justice. Such notorious leaders of terrorist groups are responsible for killing literally thousands of civilians.<sup>318</sup>

## 2. Lack of Political Will and Lack of Awareness About the Rome Statute and the ICC

Lack of political will is another obstacle to implementing the Rome Statute and enacting a cooperation law. It would appear that the government of Afghanistan and the international community “have adopted a conservative approach regarding justice in Afghanistan.”<sup>319</sup> The international community spent huge sums of money to rebuild the country, but paid little attention to holding the perpetrators of gross crimes accountable.<sup>320</sup> To address this issue, the role of the ICC and the Assembly of State Parties would be significant in terms of pressuring the government of Afghanistan to comply with its obligations under the Rome Statute.

One possible cause for this want of political will is the unfortunate lack of awareness of the Rome Statute and the ICC within the Afghan community. Afghans, both in governmental positions and members of the general public, do not know much about the Rome Statute or the ICC.<sup>321</sup> The relevant institutions, people, and even most government officials who would be responsible for investigating and prosecuting international crimes do not have enough information about the ICC.<sup>322</sup> The Ministry of Justice could play an important role in raising awareness by translating the Rome Statute into Dari and Pashto, and publishing and disseminating it to the relevant institutions and the public.

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317. See *Amneyat Meli Farde Shomara Dowe Haqqani Ra Bazdasht Kard* [National Security Captured the Second Highest Profile Leader of the Haqqani Network], BBC (2014), [http://www.bbc.com/persian/afghanistan/2014/10/141016\\_k03\\_afghan\\_nds\\_arrest\\_haqqani\\_key\\_men](http://www.bbc.com/persian/afghanistan/2014/10/141016_k03_afghan_nds_arrest_haqqani_key_men) [<https://perma.cc/9HQW-86B2>].

318. See *id.*

319. See ICC AW REPORT 2009, *supra* note 177, at 12.

320. See *id.*

321. See *id.*

322. See *id.*

### 3. The Bilateral Security Agreement Between the United States and Afghanistan and the Afghan Amnesty Law

The agreement between the United States and the government of Afghanistan that was signed in 2014 is another concern regarding application of the Rome Statute and the potential cooperation law. This agreement prohibits the government of Afghanistan from referring American citizens who may commit international crimes in Afghan territory to the ICC for prosecution.<sup>323</sup> A recent incident relevant to this agreement was the bombing of the Kunduz Trauma Center run by Médecins Sans Frontières by U.S. forces on October 3, 2015, which caused many casualties, including the killing of forty-two and injury to forty-three innocent people.<sup>324</sup>

While some human rights organizations labeled the incident a war crime and called for independent international investigations,<sup>325</sup> the U.S. Department of Defense's report concluded that the incident was unintentional and thus cannot be considered a war crime.<sup>326</sup> Due to the bilateral security agreement, the ICC will not be able to assert jurisdiction in such a case.

Furthermore, as noted previously,<sup>327</sup> Afghanistan's own Amnesty Law could be another obstacle to prosecution of alleged criminals. The law gives amnesty to those who have committed gross violations of human rights and war crimes in the past.<sup>328</sup> Again, this challenge could be addressed by increased political will whereby, in coordination with ICC pressure, the Amnesty Law could be nullified, opening a path for full implementation of the Rome Statute.

### 4. The Dilemma of Peace Versus Justice

It has been almost six years since the government of Afghanistan established a peace process to integrate opposition armed groups, including the Taliban, who are willing to lay down their weapons and start a normal life within the country.<sup>329</sup> If the opposition

323. See Afg.-U.S. Security Agreement 2014, *supra* note 283, art. 13(5).

324. See *Factsheet: Kunduz Hospital Attack*, MSF, <http://www.msf.org/en/article/factsheet-kunduz-hospital-attack> [<https://perma.cc/VP3T-JQFZ>] (last updated Feb. 8, 2016).

325. See, e.g., *Kunduz Bombing Needs Independent Investigation*, AMNESTY INT'L (last updated Feb. 8, 2016), <http://www.amnestyusa.org/news/press-releases/kunduz-bombing-needs-independent-investigation> [<https://perma.cc/SSW4-LTLA>].

326. See *Report on Airstrike on the MSF Trauma Center in Kunduz Afghanistan*, U.S. CENTRAL COMMAND (Apr. 29, 2016), <http://www.centcom.mil/news/press-release/april-29-centcom-releases-kunduz-investigation> [<https://perma.cc/5B4C-2P67>].

327. See *supra* Sections I.C.–D.

328. See *supra* Section I.C.

329. See *Aya Mawjudayate Nehade Shourae Ale Sulh Afghanistan Zer Sawal Ast? [Is The Existence Of Afghanistan's High Peace Council Is Under Question?]*, BBC (2016), <http://>

armed groups agree to join the peace process, the government of Afghanistan will not prosecute them for past crimes.<sup>330</sup> However, the majority of Afghans deem the government's peace process to be a huge failure because it did not help end the war, nor has it made the country's situation stable.<sup>331</sup> One may even say that, to some extent, the peace process has had the adverse effect of empowering the Taliban, since the government did not aggressively or seriously engage them.<sup>332</sup> For the most part, "the Taliban are showing a total unwillingness"<sup>333</sup> to enter into earnest peace negotiations. ICC intervention could thus potentially have a negative impact on the peace process, and vice versa. Regardless of any grant of immunity to the Taliban and other armed groups who join the peace process, no one can cede the rights of victims to file complaints against those alleged criminals.<sup>334</sup> Therefore, in any case, there is a place for ICC intervention to address such crimes.

## 5. Warlords in Power and Rampant Judiciary Corruption

Finally, one of the greatest barriers to enactment of a cooperation law involves the presence of powerful warlords in the current government who allegedly committed grave crimes themselves. They represent a serious threat within the executive branch and Parliament to enacting such a law. It was these warlords who enacted the Amnesty Law to pardon themselves for committing grave crimes in the past. If they attempt to prevent passage of the cooperation law at the outset, the president could enact such a law through a presidential decree.<sup>335</sup>

Additionally, Transparency International—an organization that assesses citizens' views of endemic corruption—constantly ranks Afghanistan as one of the top five most corrupt countries in the

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[www.bbc.com/persian/afghanistan/2016/02/160206\\_zs\\_peace\\_council\\_funding\\_stopped](http://www.bbc.com/persian/afghanistan/2016/02/160206_zs_peace_council_funding_stopped) [<https://perma.cc/JQ3D-PZTL>].

330. See *Hukumat Ba Taleban Bara'at Medehad Na Mardom* [*The Government Acquits Taliban, Not People*], *AFGHANPAPER* (2012), <http://www.afghanpaper.com/nbody.php?id=46454> [<https://perma.cc/EDN8-9HTF>].

331. See *Talash Hai Hukomate Afghansitan Barae Asavate Manfi Jang Dar Afghanistan Nakam Booda Ast* [*Afghanistan Government's Efforts Failed to Bring Peace*], *RAH-E-FARDA* (2015), <http://www.farda.af/internal-news2/8570> [<https://perma.cc/Z4TV-UHTS>].

332. See *id.*

333. See Kersten, *The ICC in Afghanistan*, *supra* note 191.

334. See Afg. Amnesty Law, art. 3(3), Official Gazette, Dec. 2008, No. 965.

335. This was how Afghanistan passed the Law on the Elimination of Violence Against Women. See Mobina Jaffer, *EVAW Law Necessary for Sustainable Peace in Afghanistan*, *PARLIAMENT ARIANS NETWORK* (2013), <http://pncp.net/opinions/evaw-law-necessary-sustainable-peace-afghanistan> [<https://perma.cc/ZU5S-AA9Z>].

world,<sup>336</sup> and the institution in Afghanistan which is affected most by corruption is the judiciary.<sup>337</sup> Such widespread corruption has paralyzed the justice system in Afghanistan. Almost all governmental institutions, NGOs, and businesses are badly affected by this rampant corruption. This situation may affect the state of cooperation between the ICC and Afghanistan. On the other hand, possible intervention by the ICC regarding international crimes committed in Afghanistan—with consistent follow up by the ICC and strong coordination with national and international civil society organizations—could work to hold the national legal system accountable and finally end the culture of impunity.

Despite the many challenges, hope remains. Although a culture of impunity has been established over the years in Afghanistan, the potential intervention of the ICC—for instance, holding a trial of Hekmatyar or the Haqqani Network leader—could possibly change the whole dynamic and deter those who actively participate in the conflict and commit war crimes and crimes against humanity today. The ICC's commitment to prosecute criminals not only helps to bring current offenders to justice, but also deters future crimes by sending a strong message to potential criminals that they will not go unpunished for committing grave crimes.

Also, the menace of international prosecution by the ICC may spur the government of Afghanistan to be more accountable and fulfill its international obligations. Just beginning with a simple action, such as surrendering a captured notorious terrorist to the ICC for prosecution, will signal to Afghans and potential criminals that anyone who commits international crimes will be held accountable. On the other hand, the continuation of the current situation, with a lack of cooperation between Afghanistan and the ICC and a dearth of ICC involvement, is the worst possible scenario. The absence of both national and international prosecutions of crimes “can encourage perpetrators, fuel resentment, and perpetuate violence.”<sup>338</sup> These are not empty words; Afghans have seen and felt this over the decades.

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336. See *Global Perception Index 2015*, TRANSPARENCY INT'L (2016), <http://www.transparency.org/cpi2015> [<https://perma.cc/9YFE-UQ47>].

337. See, e.g., Corruption in Afghanistan: What Needs to Change, TRANSPARENCY INT'L (Feb. 16, 2016), [http://www.transparency.org/news/feature/corruption\\_in\\_afghanistan\\_what\\_needs\\_to\\_change](http://www.transparency.org/news/feature/corruption_in_afghanistan_what_needs_to_change) [<https://perma.cc/7TU5-PM56>]; INTEGRITY WATCH AFGHANISTAN & TRANSPARENCY INT'L, NATIONAL INTEGRITY SYSTEM ASSESSMENT: AFGHANISTAN 2015, 15, 50–60 (2016), <http://www.transparency.org/whatwedo/publication/6827> [<https://perma.cc/MK6Y-YDWW>].

338. See NOVAK, *supra* note 89, at vii.

Finally, the default of both institutional and actual cooperation between Afghanistan and the ICC, the inadequacy of ICC involvement, and failure to undertake any action to improve the situation, will have very negative consequences going forward, including strengthening the current culture of impunity, the continuation of Afghans' suffering from unpunished crimes by different armed groups, and ultimately diminishing the ability of the ICC to prosecute and punish criminals in Afghanistan.

#### CONCLUSION

For the last thirteen years, Afghanistan has been a state party to the Rome Statute, and yet it has taken no meaningful steps to fulfill its obligations to implement the Statute in the country. At the same time, Afghanistan is one of the world's countries most in need of ICC engagement to address the catastrophic crimes committed in the country over the past decade. The ICC's *raison d'être* is not just to ensure justice for past crimes, but also to deter potential criminals in the future. The main reasons for the current paucity of cooperation between the Afghan government and the ICC are the incompatibility of Afghanistan's laws with the Rome Statute and the lack of clear mechanisms to facilitate cooperation between the two institutions. The ICC will not be able to prosecute alleged criminals in Afghanistan and end the culture of impunity as to international crimes until there is a clear mechanism to facilitate cooperation between Afghanistan and the ICC. Enacting such a law would send a clear message throughout the country that such crimes against humanity and crimes of war will no longer be tolerated.

There exist two model legislations, the United Kingdom's and Australia's cooperation acts, which can be used as a basis for developing a new cooperation law in Afghanistan. Afghanistan can adopt those provisions that are most relevant to and compatible with the legal system and realities of Afghanistan, gleaned useful points from both the U.K. and Australian acts.

Along with the requisite institutional reforms, increasing political will, calling for further practical steps by the ICC, and encouraging vigorous coordination amongst governmental and nongovernmental organizations are essential additional steps. Finally, recognizing and addressing potential obstacles, such as the power of warlords, the country's insecurity, and endemic corruption, are essential for Afghanistan to move forward.

The establishment of the ICC as the first permanent international criminal court after years of effort by the international community brought hope for the future of justice in the world. It would be an egregious failure for the international community if the ICC could not engage properly in Afghanistan. It is time for the government of Afghanistan and the international community to take practical steps and show their actual commitment to ensuring justice, human rights, and humanitarian principles. Bringing Afghanistan's domestic laws into conformity with the Rome Statute requirements and facilitating the ICC's prosecution of Afghanistan's war criminals will finally end the longstanding culture of impunity, help the country recover from past atrocities, and lead Afghanistan into a more prosperous, secure, and just future.