Afghanistan: Towards Wider Interests of Justice?

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INTRODUCTION

The Pre-Trial Chamber ("PTC") II of the International Criminal Court ("ICC") handed down its much-awaited decision on the request for authorisation of an investigation into the situation in Afghanistan[1] earlier this year. The escalating conflict in Afghanistan has generated thousands of civilian casualties, many of whom were also victims of acts potentially constituting war crimes within the ICC's jurisdiction.[2] Thus, the decision that the investigation would not be in the interests of justice to pursue came as a surprise to the legal community, as given the presumed dormancy of the provision – many had thought that any admissible case would *ipso facto* be in the interests of justice to pursue. Indeed, it was widely assumed that the decision would only be subject to review by the PTC where the Office of the Prosecutor ("OTP") had decided *not* to pursue an investigation solely in the interests of justice.[3] This case note will analyse the role of state cooperation in the PTC's interests of justice determination in light of the principle of complementarity, which holds that the ICC should only intervene where a State Party was "unwilling or unable"[4] to investigate a crime falling under

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[1] *Situation in the Islamic Republic of Afghanistan* (Decision on the Authorisation of an Investigation) ICC-02/17 (12 April 2019).

[2] *Situation in the Islamic Republic of Afghanistan* (Request for Authorisation of an Investigation) ICC-02/17 (20 November 2017) [273].

[3] Dov Jacobs, 'Some extra thoughts on why the ICC Pre-Trial Chamber acted ultra vires in using the "interests of justice" to not open an investigation in Afghanistan' (*Spreading the Jam*, 12 April 2019) <https://dovjacobs.com/2019/04/12/some-extra-thoughts-on-why-the-icc-pre-trial-chamber-acted-ultra-vires-in-using-the-interests-of-justice-to-not-open-an-investigation-in-afghanistan/> accessed 12 August 2019.

[4] Rome Statute of the International Criminal Court (Rome Statute), art 17.

the ICC's jurisdiction. The objectives of domestic institution-building that the principle was conceived to foster will be considered, before concluding that the PTC's overt focus on prosecutorial success is misguided.

I. THE CASE

The OTP submitted the request to authorise a *proprio motu* investigation into the ongoing situation in the Islamic Republic of Afghanistan ("Afghanistan") in November 2017, pursuant to Article 15(3) of the Rome Statute.[5] The escalating conflict in Afghanistan has raged on for almost two decades, with what started as a Taliban insurgency spreading into a guerrilla-style war drawing in actors from beyond the state's borders, including the US and other international forces. The investigation concerned alleged crimes against humanity and war crimes in the territory of Afghanistan, and was classified into three "categories" according to the different groups allegedly responsible for the crimes, namely (i) the Taliban and other armed groups, (ii) Afghan Forces, and (iii) US Forces and the CIA.

The PTC examined whether there was a "reasonable basis to proceed" as per Article 53(1)[6] by assessing jurisdiction, admissibility, and whether it served the interests of justice to undertake the investigation. For an investigation to be admissible, it needs to meet the admissibility criteria of gravity and complementarity. The PTC, uncontroversially and in line with general academic consensus, agreed with the majority of the OTP's arguments, going so far as to make positive determinations on both the jurisdiction and admissibility requirements – only to subsequently deem that there were "substantial reasons to believe that an investigation would not serve the interests of justice".[7]

The PTC proceeded to list three factors considered in arriving at the determination: (1) significant time elapsed between alleged crimes and the Request, (2) scarce cooperation obtained by OTP, and (3) accessibility of relevant evidence and potential relevant suspects to the investigation.[8] In relation to factors 1 and 3, the PTC cited the long preliminary examination, the lack of action towards the preservation of evidence, and the worsening political situation in

[5] Rome Statute, art 15(3).
[6] Rome Statute, art 53.
[7] *Afghanistan* (n 1) [87].
[8] ibid [91].

Afghanistan complicating the process of obtaining evidence.[9] On the issue of scarce state cooperation, which is the main focus for the purposes of this note, it was deemed that changes within the political landscape in Afghanistan and key States made it "difficult to gauge the prospects of securing meaningful cooperation from relevant authorities for the future". In particular, the OTP's "difficulties in securing albeit minimal cooperation from the relevant authorities" were noted.[10]

The above factors were said to "possibly compromis[e] [the OTP's] chances for success".[11] As such, the PTC was of the opinion that "the prospects for a successful investigation and prosecution [were] extremely limited".[12] It was postulated that the failure of such an investigation could in turn create "frustration and possibly hostility vis-à-vis the Court",[13] negatively impacting the ICC's ability to credibly pursue the objectives it was created to serve. Such was the reasoning that ultimately led to the conclusion that it would not be in the interests of justice to pursue the investigation.

Questionable points of law could be raised concerning the PTC's treatment of state cooperation in relation to the principle of complementarity, and the wide interpretation of the interests of justice provision to equate it with the institutional preservation of the ICC.

II. STATE COOPERATION AND COMPLIMENTARITY

The extent of state cooperation (or lack thereof) is apparent from the OTP's preliminary examinations, and reflects varying levels of willingness to cooperate according to the "category" that was being pursued. As regards Taliban forces, the OTP noted efforts taken by the Afghan government to "build its capacity to meet its obligations under the Rome Statute" and to "facilitate national investigations and prosecutions of ICC crimes".[14] Among these efforts included the update of the country's Criminal Procedure Code, and a new Penal Code Bill

[9] ibid [92]-[93].
[10] ibid [94].
[11] ibid [95].
[12] ibid [96].
[13] ibid.
[14] *Afghanistan* (n 2) [273].

incorporating Rome Statute crimes and specifying superior responsibility.[15] Afghan authorities showed more restraint in proceedings against members of the Afghan Forces. Whilst a "limited number" of proceedings had been instituted, all cases were eventually dismissed.[16] Although the national proceedings have been found to be insufficient, there is little to indicate that authorities would have shown resistance to cooperation if the case had been brought to the international plane, given previous co-operation with other international bodies including the UN Committee Against Torture (CAT)[17] and UN Assistance Mission in Afghanistan.[18]

In a contrasting vein, reports concerning the willingness of US authorities to cooperate are a vastly different matter. From the outset, the OTP stated that specific information on national proceedings were sought from US authorities but "not receive[d]",[19] leaving it unable to obtain sufficient information "despite a number of efforts taken".[20] The OTP thus had to rely on publicly available information contained in open sources on which to base its report. A common theme of US obstinacy was notable throughout the OTP's assessment. This included CAT observations that the US provided "minimal statistics" and insufficient information leading to an inability to assess compliance,[21] and the delay of a Polish Prosecutor General's investigation into a CIA detention facility on its territory due to "a lack of US Government cooperation".[22] Indeed, it appears that the PTC's references to the difficulty in seeking the cooperation of "relevant authorities"[23] was its implicit and diplomatic way of referring to US authorities.

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15 The doctrine of superior responsibility as per Rome Statute art 28(b) states that "a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates".
16 *Afghanistan* (n 1) [277]-[278].
17 Committee against Torture 'Concluding observations on the second periodic report of Afghanistan' CAT/C/AFG/CO/2 (12 June 2017) AFG-OTP-0006-3144, 3.
18 UNAMA/OHCHR 'Treatment of Conflict-Related Detainees in Afghanistan: Preventing Torture and Ill-treatment under the Anti-Torture Law' (April 2019) 26
19 *Afghanistan* (n 2) [290].
20 ibid [296].
21 ibid [305].
22 ibid [330].
23 *Afghanistan* (n 1) [94].

In and of itself, the decision to factor in a state's willingness to cooperate with ICC investigators is already dubious, insofar as it is a consideration of extra-legal and prudential factors.[24] Seen through the lens of complementarity, however, the decision could arguably be said to turn everything the ICC was founded to stand for, on its head. The principle of complementarity was a founding cornerstone[25] of the Rome Statute, giving states primary responsibility to investigate and prosecute core international crimes. The OTP has largely taken a "positive" approach to complementarity, taking the stance that not only should State Parties retain this primary responsibility, but that they should be encouraged, or induced, to do so where possible. An ethos of domestic accountability and capacity-building is thus emphasised in the ICC's fight against impunity.[26] However, the decision not to authorise an investigation on the basis of lack of state cooperation – in other words, accountability – not only excuses such behaviour, but *encourages* such behaviour.

As a "court of last resort", it is the *raison d'être* of the ICC to be able to extend its reach where others cannot. This notion is seen in many features of the court, such as its potential for universal jurisdiction[27] or its ability to override immunity.[28] Complementarity can be conceived of as a spectrum – with governments that are willing and able on one end, and governments that are significantly unwilling or unable on the other. It is at this further end where the larger proportion of impunity gaps would have existed pre-ICC.[29]

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[24] See the discussion on the wide construction of the interests of justice determination later in this paper, and its relation to the non-derogatory nature of *jus cogens* norms.
[25] Sharon A Williams, 'Article 17: Issues of Admissibility' in Otto Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden: Nomos Verlagsgesellschaft, 1999) 383, 384.
[26] M Bergsmo, O Bekou & A Jones, 'Complementarity after Kampala: Capacity Building and the ICC's Legal Tools' (2010) 2 GoJIL 791.
[27] UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593 (Resolution 1593) & UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970 (Resolution 1970) pertained to the situations in Sudan and Libya respectively. Both situations were referred to the ICC by the UN Security Council (SC) pursuant to Rome Statute art 13(b). The SC resolutions imposed cooperating obligations on the state at issue, despite neither state having been party to the Rome Statute.
[28] Rome Statute, art 27(2).
[29] Will Colish, 'The International Criminal Court in Guinea: A Case Study of Complementarity' (2013) Revue québécoise de droit international 23.

It is this amalgamation of factors that makes trying difficult cases – that is, cases which might prove difficult to investigate due to absence of state cooperation – inherent to the role of the ICC. When following the doctrine of command responsibility or dealing with officials with immunity, the individual in question is almost always going to have a certain level of authority within the state. The principle of complementarity meanwhile filters cases such that the admissibility of an investigation is predicated on there having been a minimum level of domestic resistance to delivering justice. Oftentimes, the impunity normally is so grave that is goes to the very heart of the state's exercise of sovereign prerogatives,[30] and it is this quality that warrants the domestic extrication of the case and its elevation to the international fora. All factors considered, this leaves the ICC in a position where state cooperation is hard to come by. Lack of state cooperation unfortunately is part and parcel of the job.

In the context of this case, a third new level of state cooperation which determines whether an investigation will proceed has been created. The first is where a state is cooperative such that initiative is taken to undertake sufficient domestic proceedings. Such investigations will be deemed inadmissible for reasons of complementarity and the case tried domestically. The second is where it is domestically deficient, but cooperates internationally. The domestic deficiency is necessary for a positive determination of admissibility, and proceedings are brought before the ICC. These two constitute the traditional complementarity binary. The *Afghanistan* case has introduced a third layer, where the state is domestically deficient and refuses to cooperate internationally, so much so that it goes beyond legal questions of complementarity and admissibility, and it is deemed "not in the interests of justice" to proceed with the investigation.

This setback for promoting accountability and capacity-building in domestic institutions is two-fold because of the cooperation of the Afghan government. This is particularly so in relation to allegations against Taliban Forces, with authorities having made efforts to build its capacity to facilitate prosecutions. Where in other cases the ICC had taken the opportunity to engage

[30] Frédéric Mégret and Marika Giles Samson, 'Holding the Line on Complementarity in Libya: the Case for Tolerating Flawed Domestic Trials' (2013) 11 Journal of International Criminal Justice 571.

constructively,[31] in the present case they have washed their hands of the situation, whilst simultaneously rewarding the US for its obstructive ways.

In this context, the determination on interests of justice functions as the anti-complementarity provision, stipulating that it is acceptable not to cooperate with investigations even if a state seeks to avoid standing before the ICC, as long as they are sufficiently uncooperative so that an investigation is not in the "interests of justice". In other instances, complementarity is "intended to preserve the ICC's power over irresponsible states that refuse to prosecute those who commit heinous crimes",[32] and it is against that refusal that the ICC carries on its fight against impunity. The fluidity with which a lack of state cooperation can be construed to fit into either of these narratives is a dangerous tool of unfettered discretion. Given previous similar instances involving other recalcitrant states,[33] it is hard to defend against accusations of US exceptionalism, and the Courts need to be wary of the danger of it becoming a "one rule for them, another for us" situation.

Besides the danger it poses for the legitimacy of the ICC, the practical implications of factoring state cooperation into decisions are extensive as well. The lack of cooperation from national authorities in the ICTY trials provides a glimpse into potential repercussions, such as the confinement of successful cases to that of low-ranking officials.[34] Further, more cases are likely to be tried *ex post facto*, after the criminal incidents have come to a conclusion and normally as a product of regime change when authorities begin to cooperate, as was the case in Serbia,[35] which means the ICC might have a limited ability to make an actual difference to the situation whilst it is ongoing.

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[31] Such as in Guinea. Colish (n 29).
[32] Mohamed M El Zeidy, *The Principle of Complementarity in International Criminal Law* (Martinus Nijhogg 2008) 158.
[33] Previous investigations in Kenya and Georgia faced similarly dismal prospects of state cooperation.
[34] Hekelina Verrijn Stuart & Marlise Simons, *The Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese - Interviews and Writings* (Amsterdam University Press 2009) 53.
[35] It was only after Slobodan Milošević was overthrown as President of Serbia in 2000 that the ICTY began to receive tangible cooperation. Despite having been established in 1993, its efforts in the region until then proved modest.

III. SUCCESSFUL INVESTIGATIONS: IN THE INTERESTS OF JUSTICE?

Of course, in the examples drawn from the ICTY, the relevant individuals already had cases brought against them, so the reality is that the presence of an investigation made little practical difference. Even if the Afghanistan investigation had been authorised, it would have been doomed to failure from lack of state cooperation. This is the utilitarian argument the PTC employ – since the consequences would be the same anyhow, resources should be conserved and efforts should be focussed on successful prosecutions. This approach provides relief to the ICC's tattered reputation,[36] and perhaps instils better hope for its continued institutional functioning, given the criticism received from delayed investigations and the fact that the ICC has only ever produced three convictions that have survived appellate review.[37] Alongside political threats levelled by US authorities,[38] there was the an overwhelming sense that this was simply not a battle that the ICC had the wherewithal to face:

> "[T]he Court is not meant - or equipped - to address any and all scenarios where the most serious international crimes might have been committed; therefore, focussing on those scenarios where the prospects for successful and meaningful investigations are serious and substantive is key to its ultimate success."[39]

However, even if it makes no *practical* difference to the outcome, to refuse to authorise the investigation would be to *legally* permit the outcome. The concept of the ICC was founded on the idea of a body which upholds a set of fundamental norms by punishing certain *jus cogens* wrongs which shock the global conscience

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[36] Patryk I. Labuda, 'A Neo-Colonial Court for Weak States? Not Quite. Making Sense of the International Criminal Court's Afghanistan Decision.' (*EJIL: Talk!*, 13 April 2019) < https://www.ejiltalk.org/a-neo-colonial-court-for-weak-states-not-quite-making-sense-of-the-international-criminal-courts-afghanistan-decision/> accessed 10 August 2019.
[37] James Goldston, 'Don't Give Up on the ICC' (*Foreign Policy*, 8 August 2019) <https://foreignpolicy.com/2019/08/08/dont-give-up-on-the-icc-hague-war-crimes/> accessed 13 August 2019.
[38] Steve Holland, 'Trump administration takes aim at International Criminal Court, PLO' (*Reuters*, 10 September 2018) <https://www.reuters.com/article/us-usa-trump-icc/trump-administration-takes-aim-at-international-criminal-court-plo-idUSKCN1LQ076> accessed 13 August 2019.
[39] *Afghanistan* (n 1) [90].

of mankind.[40] This normative flavour in theory presupposes leaving no room for derogation, yet the decision not to authorise an investigation on the basis of prudential reasons overrides the moral imperative underlying the norms in question. In doing this, the ICC has lost its status as signaller of international normative standards to states. Not too long ago was it claimed that the most serious situations are chosen[41] for investigation, so as to make examples[42] and fulfil the Court's didactic legalist function. Such endeavours have now been sacrificed on the altar of its newfound focus on "successful" investigations, under the guise of interests of justice.

Yet despite its wide construction of the interests of justice provision, the PTC has taken a rather narrow view of what justice could entail. The ICC's overarching objective of the "effective prosecution of the most serious international crimes, the fight against impunity and the prevention of mass atrocities"[43] was relied upon to justify the prioritisation of state compliance. To reduce justice to the continued existence of the ICC, and by extension a mere quantum of successful investigations, is misguided. The problem here is the conflation of compliance with effectiveness,[44] in assuming that the ICC would be most effectively able to uphold the norms it espouses through higher levels of state compliance. In reality, the concept of justice reaches much further than the bounds of the ICC as an institution, and relinquishing this institutional egocentrism might allow for the realisation of justice on a wider level.

The traditional Austinian view which sees the ICC as only as powerful as its coercive power is perhaps lacking, and a wider view takes into account its political influence on state behaviour. The principle of complementarity serves as a humble reminder of this, and coupled with the ICC's norm-signalling function, encourages the pursuit of justice on a national level and leaves the ICC as a court

[40] M. Cherif Bassiouni, 'International Crimes: Jus Cogens and Obligatio Erga Omnes' (1996) 59 Law and Contemporary Problems 63, 69.
[41] Deputy Prosecutor's Remarks, 'Introduction to the Rome Statute Establishing the ICC and Africa's Involvement with the ICC' (14 April 2009).
[42] Martti Koskenniemi, 'Between Impunity and Show Trials' (2002) Max Planck UNYB 6, 1.
[43] *Afghanistan* (n 1) [89].
[44] Laurence R. Helfer & Anne-Marie Slaughter, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo' (2005) 93 California Law Review 899.

of last resort. As the OTP once remarked: "As a consequence of complementarity the number of cases that reach the court should not be a measure of its efficiency. On the contrary, the absence of trials before this court, as a consequence of the regular functioning of national institutions, would be a major success."[45] Perhaps the greatest irony lies in the fact that the attainment of the ICC's core objective might be best achieved in a world where it has little need to be employed.

CONCLUSION

The interests of justice determination in the PTC's Afghanistan ruling seemed like a knee-jerk ruling seeking the institutional preservation of the ICC, in response to the existential threat to the ICC's authority posed by US authorities. However, having to preside over difficult cases, oftentimes involving little state cooperation it is intrinsic to the role of the ICC and its fight against impunity to have to preside over difficult cases, oftentimes involving little state cooperation. As such, investigatory or prosecutorial failure might prove to be more common than success. The answer is not to altogether forego investigating such cases, and in doing so abandon long-standing legal principles like complementarity. Continuing down this idealistic path might strike one as a trade-off between global standard-setting and ICC potency. However, it is preferable that the Court continues to aspire towards concrete global normative standards of justice, even if it potentially means recurring institutional failure, than to achieve standards that fall below what ought to be aspired towards in the first instance. To do the latter might well prove to be a pyrrhic victory.

[45] Luis Moreno-Ocampo, ICC Prosecutor, 'Statement Made at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court' (16 June 2003).