THIRD WORLD APPROACHES *to* INTERNATIONAL LAW *Review*

TWAILR: Reflections #23/2020

Beyond Law and Numbers: Civilian suffering and the ICC's engagement with Afghanistan

Christiane Wilke

On 22 February 2020, the United Nations Assistance Mission to Afghanistan (UNAMA) released its *Annual Report on the Protection of Civilians in Armed Conflict*, informing Afghan and international publics that in 2019, 3,403 civilians were killed and 6,989 injured.[1] UNAMA 'urges' all parties involved in the conflict to 'conduct investigations following allegations of civilian casualties' and 'ensure accountability.'[2] Less than a month later, the Appeals Chamber of the International Criminal Court (ICC) authorized the ICC Prosecutor to launch a full investigation into the 'Afghanistan situation.'[3] This decision reversed the Pre-Trial Chamber's April 2019 ruling that such an investigation would not be 'in the interests of justice.'[4] The 2020 Appeals Chamber decision turned on a rather technical issue: whether the Pre-Trial Chamber is in a position to review the Prosecutor's determination that an

[1] United Nations Assistance Mission in Afghanistan (UNAMA), 'Protection of Civilians in Armed Conflict 2019' (February 2020) https://unama.unmissions.org/sites/default/files/afghanistan_protection_of_civilians_annual_report_2019_-_22_february.pdf (accessed 10 April 2020).

[2] UNAMA (2020) 73.

[3] *Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan*, Appeals Chamber, 5 March 2020, https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/17-138 (accessed 10 April 2020).

[4] *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan*, Pre-Trial Chamber, 12 April 2019, https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/17-33 (accessed 10 April 2020).

investigation is 'in the interest of justice.'[5] This reflection reads the ICC's engagement with Afghanistan together with the UNAMA reports on civilian deaths and injuries. Can the ICC's anticipated investigation ensure the 'accountability' that UNAMA calls for in its Annual Reports?

The UNAMA reports cannot fully represent the experiences of Afghan civilians, but they can draw our attention to the distribution of different modalities of violence in this conflict. For example, non-state actors used improvised explosive devices, while state militaries conducted airstrikes. At the ICC, these technological asymmetries are converted into legal asymmetries: the Prosecutor's investigation request focuses on the low-tech violence of non-state actors. Airstrikes, the signature modality of violence of US and NATO forces, consistently hover beneath the threshold of illegality in international law;[6] they are not included in the ICC Prosecutor's investigation request.

The TWAIL responses to the 2019 Pre-Trial Chamber decision read the refusal to authorize an investigation in the context of the US government's pressure on the ICC. Asad Kiyani criticized the decision as a 'surrender of international criminal justice'[7] while Helyeh Doutaghi and Jay Ramasubramaniam situated the decision as rooted in the 'existing systematic inequality in international legal order.'[8]

With the reversal of the Pre-Trial Chamber decision, we are now facing a different set of questions: How does the ICC's anticipated investigation map onto patterns of conflict violence in Afghanistan? What kind of justice can international criminal justice offer? Drawing on TWAIL scholarship that critiques international criminal law for its decontextualizing and individualizing properties in the face of complex military and structural violence, I offer an assessment of the ICC's ability to do justice to the conflict in Afghanistan.

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[5] Jennifer Trahan, 'The Significance of the ICC Appeals Chamber's Ruling in the Afghanistan Situation' (10 March 2020) http://opiniojuris.org/2020/03/10/the-significance-of-the-icc-appeals-chambers-ruling-in-the-afghanistan-situation/ (accessed on 10 April 2020).

[6] Christiane Wilke, 'High Altitude Legality: Visuality and Jurisdiction in the Adjudication of NATO Air Strikes' (2019) 34:2 *Canadian Journal of Law and Society* 261.

[7] Asad Kiyani, 'Afghanistan & the Surrender of International Criminal Justice' (16 September 2019) https://twailr.com/afghanistan-the-surrender-of-international-criminal-justice/ (accessed on 10 April 2020).

[8] Helyeh Doutaghi and Jay Ramasubramaniam, 'By not investigating the U.S. for war crimes, the International Criminal Court shows colonialism still thrives in international law' (15 April 2019) http://theconversation.com/by-not-investigating-the-u-s-for-war-crimes-the-international-criminal-court-shows-colonialism-still-thrives-in-international-law-115269 (accessed on 10 April 2020).

In their 2003 assessment of individual criminal responsibility in non-international armed conflicts, Antony Anghie and B.S. Chimni warned that international criminal law as a 'regime of international individual accountability alone' might be an insufficient response to militarized violence in the Global South and urged scholars to pay attention to 'the actualized experience' of people subjected to these oppressive orders.[9] Similarly, Pooja Parmar suggests that theories of human rights need to be examined with an eye to how they relate 'to human suffering in particular places.'[10] Kamari Clarke's work further examines the 'fictions' and 'affects' of international criminal justice operating in Africa: its ascription of individual rather than collective guilt, its focus on 'a guilty conviction' as a measure of 'justice', and its investment in sentimental stories of racialized victims.[11] Drawing on these strands of scholarship, I ask what the UNAMA reports suggest about possible gaps in the ICC's engagement with Afghanistan.

A Modest Request: The ICC Prosecutor's Investigation Request

The ICC Prosecutor's proposed investigation includes violence committed by the main parties to the conflict in Afghanistan since 1 May 2003, the date Afghanistan acceded to the ICC Statute. The alleged violations include crimes against humanity and war crimes committed by the Taliban (assassinations, persecution, the use of improvised explosive devices, and suicide attacks), the US forces (war crimes: torture, sexual violence) and by the Afghan National Security Force (war crimes: torture, sexual violence). The Request does not include alleged violations committed by other NATO forces such as the UK, Canada, and Germany. The US Government has responded to this investigation request by threatening not only the ICC as an institution, but also individual ICC staff members.[12]

The authorization of the investigation into the Afghanistan situation is groundbreaking in terms of the relationship between international criminal law and political

[9] Antony Anghie & B.S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) 2 *Chinese Journal of International Law* 77, at 78, 91.

[10] Pooja Parmar, 'TWAIL: An Epistemological Inquiry' (2008) 10 *International Community Law Review* 363, at 365.
[11] Kamari Maxine Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge, 2009) 4; Kamari Maxine Clarke, *Affective Justice: The International Criminal Court and the Pan-Africanist Pushback* (Duke, 2019).
[12] Elizabeth Evenson, 'US Again Threatens International Criminal Court' (19 March 2020) https://www.hrw.org/news/2020/03/19/us-again-threatens-international-criminal-court (accessed on 10 April 2020).

power: this is the first time that the ICC investigates violence by militaries from the Global North. In addition, the investigation into the Afghanistan situation might appear to counterbalance the ICC's overwhelming focus on African conflicts. As of May 2020, ten of the thirteen 'situations' under investigation are in Africa.[13] Yet while the investigation breaks with some problematic patterns, it perpetuates others. A comparison with systematic UN reports on civilian suffering in Afghanistan suggests that the Investigation Request overwhelmingly focuses on low-tech violence committed by non-state actors and refuses to include specific modalities of violence that are overwhelmingly employed by US and international forces, notably airstrikes.

Counting Violence

Since 2008, UNAMA has published Annual Reports on the 'Protection of Civilians in Armed Conflict.'[14] These reports quantify conflict violence by counting civilian deaths and injuries and attributing them to different parties to the conflict. In reading the Annual Reports against the ICC engagement with Afghanistan, I do not suggest that these UNAMA reports represent 'the actualized experience' of Afghans.[15] Rather, UNAMA reports are part of a larger network of 'legal technocratic practice[s]'[16] that quantifies and categorizes suffering. UNAMA, as well as human rights organizations, classify violence using categories that are derived from international humanitarian law and not from local knowledges and meanings.[17] The numbers of civilian casualties in the UNAMA reports are products of a specific 'consistent methodology' that defines the category of civilian as 'persons who are not members of the armed forces or of an organized armed group' and 'requires at least three different and independent types of sources' for a civilian casualty to be verified and therefore counted.[18]

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[13] See https://www.icc-cpi.int/pages/situation.aspx

[14] United Nations Assistance Mission in Afghanistan (UNAMA), 'Reports on the Protection of Civilians in Armed Conflict' https://unama.unmissions.org/protection-of-civilians-reports

[15] Anghie & Chimni (2003) 78.

[16] Kamari Clarke, *Affective Justice: The International Criminal Court and the Pan-African Pushback* (Duke, 2019) 16.

[17] See Sally Engle Merry, *The Seduction of Quantification: Measuring Human Rights, Gender Violence, and Sex Trafficking* (Chicago, 2016).

[18] United Nations Assistance Mission in Afghanistan (UNAMA), 'Protection of Civilians in Armed Conflict 2019' (February 2020) https://unama.unmissions.org/sites/default/files/afghanistan_protection_of_civilians_annual_report_2019_-_22_february.pdf (accessed 10 April 2020), at 1, 3.

These 'technocratic discourses that fetishize body counts'[19] discount the less visible and quantifiable 'slow violence'[20] of living under prolonged armed conflict, including illnesses and deaths arising from infrastructure destroyed in the conflict as well as psychological trauma, displacement, impoverishment, and food insecurity.

UNAMA's focus on counting and representing verified civilian deaths and injuries produces specific knowledge effects. The consistent use of a methodology allows the agency to compare and track numbers. The aggregated numbers indicate measurable progress, give reasons for 'concern,' and enable affective reactions to changing levels of violence. For example, the 10,392 civilian casualties in Afghanistan recorded for 2019 include 3,403 deaths and 6,989 injuries, 'representing a five per cent decrease as compared to 2018 and the lowest overall level of civilian casualties since 2013.'[21] A pie chart included in the report informs us that 42% of all civilian casualties were caused by improvised explosive devices, 29% by ground engagements, and 10% by airstrikes. Through comparisons and representation in graphs, the numbers congeal into facts and trends over time. Yet, as UNAMA notes, the existence of (verified or unverified) civilian casualties 'does not mean a violation has been committed, although high numbers of casualties may be indicative of violations of reflect patterns of harm.'[22] After all, international humanitarian law is permissive: civilian deaths that are not foreseeable, not disproportionate to the military objectives pursued, and not the result of the intentional targeting of civilians are not in violation of international humanitarian law.[23] As set out below, the threshold is even higher for international criminal responsibility.

Even though civilian casualty numbers are the unstable products of specific methodologies that focus on visible acute suffering and neglect the 'slow violence' of living under prolonged armed conflict, they indicate the distribution of harms that result from different modalities of violence.

UNAMA reports that in 2019 – as in every year since 2008 – the majority of civilian casualties were caused by 'anti-government elements,' a category that includes the Taliban as

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[19] Hugh Gusterson, 'Drone Warfare in Waziristan and the New Military Humanism' (2019) 60 (Supplement 19) *Current Anthropology*, S77, at S83.

[20] Rob Nixon, *Slow Violence and the Environmentalism of the Poor* (Harvard, 2011).

[21] UNAMA (2020) 5.

[22] UNAMA (2020) 1.

[23] See Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2nd ed (Cambridge, 2010) 135, 139.

well as a local affiliate of the Islamic State. The UNAMA report highlights the widespread use of improvised explosive devices that are by definition indiscriminate in their effects as well as broader patterns of 'acts and threats of violence aimed at spreading terror among the civilian population.'[24] The ICC Prosecutor's Investigation Request captures these patterns of violence and makes a convincing case for investigating them as possible war crimes and crimes against humanity.

State Violence

The 'Pro-Government Forces' in the conflict are composed of different state military and security forces: The Afghan National Army, the Afghan National Directorate of Security, the International Military Forces, US military forces and other personnel. Whereas the Taliban are considered a non-state armed group (their ability to control territory notwithstanding) and have limited access to high-tech weaponry, the 'pro-government forces' all claim state authority, including policing and criminal justice powers. In addition, the US and other international forces operating in Afghanistan have access to sophisticated technologies of surveillance and violence.

The Prosecutor's Investigation Request exclusively focuses on state violence arising from detention: torture, sexual violence, and humiliation of detainees by both the Afghan Security Forces and US forces. Relying on reports by the UN, human rights organizations, and the US Congress, the Prosecutor details that torture of detainees was 'widespread' in a number of Afghan Security Forces detention facilities.[25]

The Prosecutor's request to investigate violence committed by the members of US armed forces and the CIA has received the most attention. Given the US role as a champion for international criminal justice insofar as perpetrators hail from the Global South, coupled with the increasingly hostile stance towards the ICC, this attention is understandable. Drawing on a US Senate Intelligence Committee report as well as information from human rights organizations, the Prosecutor claims 'at least 54 detained persons … were subjected to torture, cruel treatment, outrages upon personal dignity, rape and/or sexual violence by members of the US armed forces on the territory of Afghanistan, primarily in the period 2003-2004, and

[24] UNAMA (2020) 35.

[25] *Public redacted version of 'Request for authorisation of an investigation pursuant to article 15'*, 20 November 2017, ICC-02/17-7-Conf-Exp, ICC Office of the Prosecutor (OtP), https://www.legal-tools.org/doc/db23eb/pdf/ (accessed 10 April 2020), para 165, 167.

24 additional persons were subjected to similar treatment by CIA personnel in Afghanistan, Poland, Romania, and Lithuania.[26] The request solely pertains to components of the post-9/11 US abduction and torture program that were executed on the territory of ICC state parties. It does not discuss evidence that nationals of other coalition forces – such as the United Kingdom[27] and Canada[28] – have engaged in torture, and it does not address the indefinite detention and torture of detainees in Guantánamo Bay.

Asymmetrical Violence

The ICC Prosecutor only requested to investigate conduct by US forces that did not result in death. Yet according to UN reports, Afghan and US forces have killed almost 8,000 Afghan civilians between 2007 and 2019. At least 3,654 of these deaths resulted from airstrikes using drones or conventional aircraft. [29] In 2019 alone, 700 civilians were killed and 345 were injured in airstrikes.[30]

Airstrikes have been the dominant means of violence employed by US and other international forces. They rely on technological and financial resources that are not available to most states, let alone non-state actors. Of all civilian casualties caused by international forces in 2019, 96% resulted from airstrikes.[31] Yet airstrikes are –perplexingly – legal. This is not just a story of US exceptionalism, but of technological asymmetries in warfare converted into legal asymmetries.

International lawyers have been drafting rules for aerial warfare since the 1923 *Hague Rules on Aerial Warfare*.[32] These rules have recognized that the view from the airplane cockpit can be confusing, that targets can be misidentified, and that bombs do not always land on the intended target. These international lawyers – hailing from the Global North and representing populations more likely to use bombs than to live under them – have proposed to enlist civilians on the ground to make themselves (and civilian infrastructure) 'sufficiently' visible to

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[26] OtP (2017) para 189.

[27] 'British government and army accused of covering up war crimes' (November 2019) https://www.theguardian.com/law/2019/nov/17/british-government-army-accused-covering-up-war-crimes-afghanistan-iraq (accessed on 17 July 2020).

[28] Murray Brewster, 'No need for inquiry into Afghan detainee torture, Liberals say' (17 June 2016) https://www.cbc.ca/news/politics/afghan-canada-prisoners-1.3640411 (accessed on 17 July 2020).

[29] Author's calculation based on the UNAMA Annual Reports 2007-2019.

[30] UNAMA (2020) 59.

[31] UNAMA (2020) 54.

[32] Hague Rules on Aerial Warfare (1923), https://wwi.lib.byu.edu/index.php/The_Hague_Rules_of_Air_Warfare

the eyes in the sky by painting the roofs of hospitals and other protected buildings with large visual markers.[33] In these *Rules*, bombing was configured as an activity with a shared responsibility between the aircrew (to not target civilians) and civilians (to make themselves visible as civilians).[34] These early encounters between international law and bombing still shape the ways that prosecutors and courts adjudicate air strikes.

Since 1990, not a single NATO official or soldier was prosecuted for civilian deaths arising from airstrikes.[35] The *International Criminal Tribunal for the former Yugoslavia* commissioned an outside 'expert report' on the legality of the NATO bombing of specific targets in Serbia. The report recommended no prosecutions, arguing that the presence of civilians in the target area was unexpected and not visible to the aircrews, and that the use of advanced visual technologies demonstrated that the soldiers had taken adequate precautions.[36] German litigation responding to the 3 September 2009 airstrike near Kunduz that was ordered by German soldiers and killed up to 142 civilians similarly exculpated the ground control officers because their insistence on interpreting the video images of the target as consistent with the absence of civilians was deemed reasonable.[37]

The ICC's engagement with the situation in Afghanistan, which is structured by the ICC Statute, occurs against the backdrop of this longstanding relationship between international law and aerial bombing. For civilian deaths to be considered a war crime, the ICC Statute requires that the perpetrators were 'intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities' (Art. 8 (b) (i)). Yet such findings of intent are complicated by the interplay between human judgments and visual technologies involved in airstrikes. For example, US Forces have at different times ascribed civilian deaths to 'a combination of human errors, compounded by process and

[33] Hague Rules on Aerial Warfare (1923), Art. 25, 26.
[34] See Christiane Wilke, 'How International Law Learned to Love the Bomb: Civilians and the Regulation of Aerial Warfare in the 1920s' (2018) 44:1 *Australian Feminist Law Journal,* at 29.
[35] In three instances, including this ICC proceeding, prosecutors initiated preliminary investigations. See Wilke, 'High Altitude Legality.'
[36] International Residual Mechanism for Criminal Tribunals, 'Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia' (June 2000) https://www.icty.org/sid/10052 (accessed on 17 July 2020).
[37] See Martina Kolanoski, 'Undoing the Legal Capacities of a Military Object: A Case Study on the (In)Visibility of Civilians' (2017) 42:2 *Law & Social Inquiry*, at 377; Wilke (2019).

equipment failures,'[38] have denied the civilian status of the victims,[39] and have refused to accept testimonial evidence of the deaths of civilians who were not visible from the plane.[40] Responsibility for civilian deaths from airstrikes is easily deflected.

The ICC Prosecutor's investigation request recognizes civilian deaths from airstrikes, but concludes that the 'Prosecution is unable at this stage to conclude that there is a reasonable basis to believe' that the civilians who died in the airstrikes under review were 'intentionally attacked.'[41] This finding is in line with the judgments of the ICTY Prosecutor as well as the German courts set out above. As long as international criminal law imagines war crimes to result from individualized intent to kill civilians, networked and technologically mediated violence will fly under the radar of courts.

Judgment Beyond the Law?

The ICC's engagement with the Afghanistan situation includes an investigation of violence by state military forces including US personnel, but the Prosecutor's request focuses on a narrow slice of violence committed by Afghan and US forces. While prosecutorial discretion can account for some of these omissions, the 'design selectivity' of international criminal law that readily accepts excuses for technologically mediated violence acts as a filter that removes airstrikes from public critical scrutiny by international courts.[42] In response, we might push for legal categories to become more responsive to practices of violence. For example, Jens David Ohlin has argued that the concept of 'intent' could be expanded to include reckless indifference to the possible presence of civilians in the target area.[43] In addition, the refusal by US forces to recognize persons who have been providing financial and logistical services to the Taliban as civilians could be interpreted as a policy to deliberately target this group of civilians.[44]

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[38] US Central Command, 'CENTCOM releases investigation into airstrike on Doctors Without Borders trauma center' (29 April 2016) https://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/904574/april-29-centcom-releases-investigation-into-airstrike-on-doctors-without-borde/ (accessed on 17 July 2020).

[39] Carlotta Gall, 'U.S. Killed 90, Including 60 Children, in Afghan Village, U.N. Finds', (26 August 2008) https://www.nytimes.com/2008/08/27/world/asia/27herat.html (accessed on 17 July 2020)

[40] See Christiane Wilke, 'Legal Tragedies: US Military Reporting on Civilian Casualties of Airstrikes' in Alexandra Moore (ed.), *Technologies of Human Rights Representation* (SUNY, 2021).

[41] OtP (2017) para 258.

[42] Kiyani (2016).

[43] Jens David Ohlin, 'Was the Kunduz Hospital Attack a War Crime?' (1 May 2016) http://opiniojuris.org/2016/05/01/was-the-kunduz-hospital-attack-a-war-crime/ (accessed on 17 July 2020).

[44] UNAMA (2020) 4.

Even if a reformist approach to the 'design selectivity' of international criminal law is an option[45], what is to be gained by the juridification of armed conflicts on a slanted globe? International criminal law, after all, is individualizing, focused on perpetrators, and retributive. It is not designed to deal with 'complex perpetrators' who have suffered from as well as participated in violence,[46] nor is it equipped to address dominant modalities of violence used by international forces. Moreover, international criminal law is not in a position to deliver participation rights or adequate reparations to victims at an appropriate scale.[47] Even the ICC's attempts to garner victim participation from Afghanistan shows the limits of this system: as the April 2019 ruling notes, a number of victims' submissions referred to incidents in which victims 'were indiscriminately or deliberately attacked by air strikes and drones by the US and other international forces.'[48] The Court cultivates and co-opts these victims and their desire for 'justice,' but it is unable to prosecute their perpetrators.

In decentering the categories of international criminal law and international humanitarian law, we can become more responsive to the experiences of violence and humiliation expressed by survivors of armed conflict. The 2008 *Afghan Independent Human Rights Commission* report occasionally steps outside the international humanitarian law framework to recognize that while 'a formal legal analysis might find no IHL [international humanitarian law] violation' in a number of incidents,[49] 'the Afghan public might judge the PGF [pro-government forces] more harshly than a military lawyer would.'[50] An engagement with armed conflict that is truly 'in the interests of justice', to use ICC parlance, has to do more than register the violations of a legality that has been largely crafted by the states of the Global North. What would it mean to think through law and justice 'from the point of view of the targeted,'[51] the people who are forced to live under the bombs and drones? It is our task to

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45 Kiyani (2016).

46 Erin Baines, 'Complex political perpetrators: reflections on Dominic Ongwen' (2009) 47:2 *Journal of Modern African Studies* 163.

47 Clarke (2019) 69, 88.

48 ICC Pre-Trial Chamber (2019) para 25.

49 AIHRC (2008) 37.

50 AIHRC (2008) 36.

51 Craig A. Jones, 'Frames of law: targeting advice and operational law in the Israeli military,' (2015) 33 *Environment & Planning D: Society and Space* 676.

understand the experiences of war beyond the casualty numbers and to imagine post-conflict justice beyond the confines of international criminal law.