

THE INTERNATIONAL CRIMINAL COURT AND
AFGHANISTAN: LEVERAGING POLITICS TO
BOLSTER ACCOUNTABILITY AND
ENHANCE LEGITIMACY

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The International Criminal Court (ICC), as the world's first permanent international criminal tribunal is charged with investigating and prosecuting some of the most serious crimes of international concern, with the goal of ending impunity and enhancing criminal accountability. The ICC Prosecutor exercises prosecutorial discretion by independently referring a situation to the Court "proprio motu" if the situation satisfies the ICC's jurisdictional requirements.

The Prosecutor's exercise of her prosecutorial discretion is inherently political. Given the Court's limited resources, the Prosecutor must inevitably give consideration to political expediency. Moreover, the Prosecutor relies on the political will of state leaders for cooperation with its investigations and for enforcement of the Court's decisions. The Prosecutor must therefore consider the likelihood of facing severe repercussions from state governments in response to its investigations.

However, the Prosecutor's consideration of a situation's political context in its determination of whether to initiate an investigation is distinct from declining to investigate in the face of political retaliation from powerful states. To illustrate this point, this Note analyzes the Prosecutor's exercise of proprio motu powers to initiate an investigation into the alleged war crimes and crimes against humanity committed in Afghanistan. The ICC's Pre-Trial Chamber decision concluded in part that any ICC investigation would be unfeasible due to the challenge in securing meaningful cooperation from the United States. Although the ICC Appeals Chamber reversed this decision in March 2020, on September 27, 2021, the Prosecutor chose to deprioritize the alleged crimes committed by the U.S. Armed Forces and CIA personnel in its investigation. This pursuit of selective justice sends a dangerous message to the international community that situations implicating powerful states can evade ICC investigation and prosecution through acts of non-cooperation. Thus, for the ICC to most effectively end impunity for serious crimes committed by politically powerful states, the Prosecutor must wield its proprio motu powers to compel genuine and meaningful domestic action.

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I. INTRODUCTION

As the world's first permanent international criminal tribunal, the International Criminal Court (ICC), seated in The Hague, is charged with "exercis[ing] its jurisdiction over persons for the most serious crimes of international concern."¹ The Rome Statute, the treaty establishing the ICC, divides prosecutorial authority between national governments and the Court itself, giving each the legal right and duty to investigate and prosecute the most serious international crimes.² By using this principle of complementarity, the ICC incentivizes govern-

1. Rome Statute of the International Criminal Court art. 1, July 17, 1998, 2187 U.N.T.S. 900 [hereinafter Rome Statute].

2. *Id.* art. 17. See also, William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L.J. 53, 57 (2008) ("[T]he Rome Statute creates a tiered system of prosecutorial authority. . . Within this system, both the domestic and international levels of governance have interrelated international legal duties to provide accountability for international crimes.").

ments to take action at the national level through the implicit threat of international intervention. The ICC's Office of the Prosecutor (OTP) has the challenging task of wielding its power and influence to encourage states to undertake national investigations and prosecutions, while simultaneously rejecting politically motivated requests for amnesty from state governments seeking to avoid international accountability and intervention.³ This tiered discretionary system enhances the Court's ability to end impunity and enhance accountability. While using the threat of an ICC investigation to induce domestic action is often challenging, it is also central to the Prosecutor's mission. By pressuring unwilling but capable governments to exercise their prosecutorial powers domestically, the Court can concentrate its limited resources on the cases that lack adequate domestic legal mechanisms and enforcement.

Throughout its operation, the ICC has faced numerous criticisms that it exercises its power selectively, favoring the political interests of the most powerful states. Political implications will always remain inherent in the ICC Prosecutor's decision-making, given that the exercise of prosecutorial discretion—determining which international crimes and which perpetrators to prosecute—is a decision that must account for the power dynamics, social climate, and domestic political atmosphere surrounding a given situation. Most, if not all, of the crimes the Court adjudicates are derived from past or ongoing political struggles and armed conflicts.⁴ In order to effectively prosecute the most serious crimes, the Court must

3. See, Burke-White, *supra* note 2, at 56–57 (“The Prosecutor is right to focus on the Court’s legal mandate and to reject politically driven calls for amnesty. . . [A] strategy of proactive complementarity would use the Court’s legal and political powers to activate states’ domestic courts in international criminal prosecutions.”).

4. See, e.g., International Criminal Court Project, *Situations & Cases - Overview*, THE AMERICAN BAR ASSOCIATION, <https://www.aba-icc.org/about-the-icc/situations-cases-overview/> [https://perma.cc/QA9R-6TS5] (last accessed: Mar. 18, 2022) (For example: the situation in Côte d’Ivoire focused on the violence that occurred in response to contested presidential elections in 2010, the situation in Georgia focused on alleged atrocity crimes committed during the 2008 Russo-Georgian war, and the situation in Libya investigated the mass violence that occurred during Libya’s popular uprising in 2011 against Muammar Gaddafi’s political regime.).

intervene in politically charged situations in order to achieve its objectives of ending impunity and promoting peace.⁵

The ICC Prosecutor cannot be a wholly political actor who exerts her power at the direction of certain states in response to pressure from powerful states in pursuit of their own political interests. However, the Prosecutor must take advantage of certain political dynamics in her exercise of prosecutorial discretion in order to drag states and other political actors into greater compliance with the demands of justice. Although the ICC must rely on the cooperation of state governments to operate, the Prosecutor must not abstain from acting simply to avoid alienating politically powerful states, such as the United States. Politically powerful states claim to be champions of human rights and proponents of universal justice, unless they themselves are accused of committing violations of international criminal law. The Court risks becoming a political institution, quickly losing its legitimacy, if politically powerful leaders can use their influence to insulate themselves and their governments from ICC prosecution, while leaders of less powerful states accordingly face ICC prosecution at little political cost.⁶

This double standard can undermine the legitimacy of the ICC, as the Court will be perceived as a political tool of powerful states, who can utilize the Court to prosecute the war crimes, genocide, and crimes against humanity committed by weaker states, while their own perpetrators can remain immune from prosecution due to the political backlash that would ensue in retaliation. This Note argues that the ICC should have utilized its political leverage to exert pressure on the U.S. government to thoroughly investigate alleged war

5. See Matthew R. Brubacher, *Prosecutorial Discretion Within the International Criminal Court*, 2 J. INT'L CRIM. JUST. 71, 83-84 (2004) (discussing the need for the ICC Prosecutor to weigh the potential political impact of a case alongside the gravity of the offense and the interest in justice).

6. See, e.g., *States 'failing to seize Sudan's dictator despite genocide charge'*, THE GUARDIAN (Oct. 21, 2018), <https://www.theguardian.com/global-development/2018/oct/21/omar-bashir-travels-world-despite-war-crime-arrest-war-rant> (documenting that many countries—including several States Parties—ignored outstanding ICC-issued warrants for the arrest of Sudanese President Omar al-Bashir, who was indicted by the ICC in 2009 for crimes against humanity, war crimes, and genocide during the conflict in Darfur, and allowed al-Bashir to travel to their countries without arresting him).

crimes committed by the U.S. Armed Forces and the CIA in Afghanistan. By pressuring the United States to thoroughly conduct its own investigations, the ICC would have enhanced its own legitimacy by demonstrating to the international community its ability to hold all states accountable, and to counter the impunity of powerful states.

Part Two of this Note provides an overview of the ICC's structure, highlighting the various ways a case can be brought before the Court, and further examines the principle of complementarity in prosecutorial discretion. Part Three reflects upon the drafting history of the Rome Statute, particularly the compromise reached regarding the appropriate level of discretion that should be afforded to the Prosecutor. Part Four analyzes how political context impacts the Prosecutor's decision to initiate an investigation, and under what circumstances political pressures from states threatens the Court's perceived legitimacy. The Note then turns to a case study, as Part Five examines the ICC's investigation into the situation in Afghanistan. It discusses the Pre-Trial Chamber and Appeals Chamber decisions and addresses concerns about incentivizing obstructionist behavior by states, as well as the U.S. government's response to the ICC's authorization of the Afghanistan investigation. It also critiques newly elected ICC Prosecutor Khan's decision to "de-prioritize" alleged crimes committed by U.S. personnel in the Afghanistan investigation. Finally, this Note concludes by offering a path forward for both the United States and the ICC that can better preserve the ICC's legitimacy and expand its influence.

II. THE STRUCTURE OF THE INTERNATIONAL CRIMINAL COURT

The Rome Statute entered into force on July 1, 2002, following its ratification by the requisite sixty signatory states.⁷ 123 states have now signed and ratified the Rome Statute,

7. *About*, INT'L CRIM. COURT, <https://www.icc-cpi.int/about> [<https://perma.cc/2GX2-3NRG>] (last visited Feb. 17, 2022). *See also* Rome Statute, *supra* note 1, art. 126(1) (entry into force of the Rome Statute); Rome Statute of the International Criminal Court, Status of Treaties, United Nations Treaty Collection https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&clang=_En-~:text=the+Statute+was+adopted+on,+of+an+International+Criminal+Court [<https://perma.cc/54YY-NPXF>] (last visited June 8, 2022) (entry into force on 1 July 2022 in accordance with article 126 of the Rome Statute).

agreeing to become States Parties to the ICC and consenting to the ICC's jurisdiction to investigate and prosecute alleged perpetrators of the crimes of genocide, crimes against humanity, war crimes, and as of July 17, 2018, crimes of aggression.⁸ By joining the ICC as a State Party, states consent to the ICC carrying out its mandate to end impunity on the basis of the legal rules and procedures stipulated in the Rome Statute.⁹ States Parties, through their membership in the Assembly of States Parties, appoint the ICC Prosecutor by majority vote.¹⁰ The Prosecutor then heads the OTP for a nine-year term.¹¹ The Assembly of States Parties also elects eighteen judges who serve on the Court's Pre-Trial, Trial, and Appeals Chambers, also for nine-year terms.¹²

ICC cases charging individuals with specific crimes enumerated in the Rome Statute proceed from "situations."¹³ Situations can be brought before the Court in three different ways. First, the U.N. Security Council, acting under Chapter VII of the U.N. Charter, can refer a situation to the Prosecutor, as they did for the situation in Darfur, Sudan.¹⁴ Second, a State Party may refer a situation to the Prosecutor.¹⁵ A State Party can refer the ICC to crimes occurring on any territory to which the ICC has jurisdiction, including its own. For example, the ICC's first situation, the situation in Uganda, was the result of a self-referral by Uganda, a State Party to the ICC in January

8. Rome Statute, *supra* note 1, art. 5; *See also*, Int'l Crim. Court, Assembly of States Parties, Resolution on the Activation of the Jurisdiction of the Court over the Crime of Aggression, No. ICC-ASP/16/ Res.5, (Dec. 14, 2017) (activating the Court's jurisdiction over the crime of aggression as of July 17, 2018).

9. Rome Statute, *supra* note 1, Preamble.

10. *Id.* art. 42(4).

11. *Id.*

12. *Id.* arts. 36(6), 36(9).

13. *See* ROD RASTAN, THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE 422 (Carsten Stahn & Mohammed M. El Zeidy eds., 2014) ("The term 'situation' under the Rome Statute denotes the confines within which the Court determines whether there is a reasonable basis to initiate an investigation and the jurisdictional parameters of any ensuing investigation.").

14. Rome Statute, *supra* note 1, art. 13(b). *See* S.C. Res. 1593 (Mar. 31, 2005) ("The Security Council. . .[a]cting under Chapter VII of the Charter of the United Nations, [d]ecides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court.").

15. Rome Statute, *supra* note 1, art. 13(a), 14.

2004.¹⁶ Third, the Prosecutor may exercise prosecutorial discretion by independently referring a situation to the Court *proprio motu* (“on one’s own initiative”) if the situation satisfies the Court’s jurisdictional requirements.¹⁷ Using her *proprio motu* powers, the Prosecutor can independently seek authorization from the ICC’s Pre-Trial Chamber to open a formal investigation into a situation if, after conducting a preliminary examination, she determines that there is a reasonable basis to proceed with an investigation.¹⁸ This requires the ICC to use its discretion to initiate investigations and prosecutions only after concluding that a state is unwilling or unable to initiate its own genuine domestic proceedings.¹⁹ The ICC therefore aims to end state impunity by ensuring that the gravest crimes do not go unpunished, as a court of last resort.²⁰

III. THE DRAFTING HISTORY OF THE PROSECUTOR’S *PROPRIO MOTU* POWERS

The Rome Statute was organized by the U.N. General Assembly and drafted in Rome at a conference entitled, “The U.N. Diplomatic Conference of the Plenipotentiaries on the Establishment of an International Criminal Court.”²¹ 160 states participated in the conference, which began on June 15, 1998 and concluded one month later.²² The Rome Statute then took effect on July 1, 2002 upon ratification by sixty States.²³ During these negotiations, prosecutorial authority generally—and particularly the Prosecutor’s ability to unilater-

16. ICC Presidency, Decision Assigning the Situation in Uganda to Pre-Trial Chamber II, ICC-02/04 (July 5, 2004).

17. Rome Statute, *supra* note 1, art. 13(c). *See also* Rome Statute, *supra* note 1, art. 17 (setting forth the ICC’s jurisdiction to include both crimes committed by a State Party national, *ratione personae*, and crimes committed on the territory of a State Party, *ratione loci*).

18. *Id.* art. 15.

19. *Id.*

20. *Id.*

21. U.N. Codification Division, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (July 17-18, 1998), https://legal.un.org/diplomaticconferences/1998_icc/ [<https://perma.cc/29JZ-F2MM>] (last accessed Mar. 9, 2022).

22. ICC, THE ICC AT A GLANCE (2019).

23. *Id.*

ally open investigations—was fiercely disputed.²⁴ States favoring a powerful independent Prosecutor argued that independence was essential to the legitimacy of any criminal court.²⁵ More than sixty “like-minded” states across various regions advocated for a more independent Prosecutor.²⁶ Without an independent Prosecutor, they argued that the Court’s decisions would become political, influenced by the powerful Security Council members, and the Court would lose its credibility as a result.²⁷

An opposing group of states, led by the United States delegation, proposed a role for the Prosecutor dependent upon U.N. Security Council authority.²⁸ If a State Party referred a situation to the ICC and that situation was the subject of U.N. Security Council deliberations, U.N. Security Council approval would be required.²⁹ The United States contended that a Prosecutor exercising its independent powers to open investigations *proprio motu* would “overwhelm the Court with complaints and risk diversion of its resources, as well as embroil the Court

24. Alexander K.A. Greenawalt, *Justice Without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT’L L. & POL. 583, 592 (2007).

25. *Id.*

26. See HUMAN RIGHTS WATCH, WORLD REPORT 1999: Special Issues and Campaigns 468 (1999), <https://www.hrw.org/legacy/worldreport99/special/icc.html> [<https://perma.cc/WK3J-JU4T>] (“[A] diverse group of like-minded states committed to a court with an ex officio prosecutor and the competence to decide, without additional state consent, its jurisdiction over a case.”).

27. See Rep. of the Ad Hoc Comm. on the Establishment of an International Crim. Ct., ¶ 121, U.N. Doc. A/50/22 (1995) (Responding to a proposal made by several delegations to authorize the Security Council to refer matters to the Court, several other delegations expressed reservation, stating that this “would reduce the credibility and moral authority of the court; excessively limit its role; undermine its independence, impartiality and autonomy; introduce an inappropriate political influence over the functioning of the institution.”).

28. David Scheffer, Ambassador at Large for War Crimes Issues, Address at American University, Washington, D.C. (Sept. 14, 2000), https://1997-2001.state.gov/policy_remarks/2000/000914_scheffer_au.html [<https://perma.cc/Q9XF-TDBC>].

29. See *id.* (“The third component of our position on initiating ICC investigations was to require that if a State Party referred a situation to the Court and that situation already was the object of Security Council deliberations, then the Security Council’s approval would be required before the matter could be taken up by the ICC.”).

in controversy, political decision-making, and confusion.”³⁰ This block feared an unaccountable, politically motivated Prosecutor, empowered to overzealously and unfairly target states enmeshed in highly sensitive political crises.³¹ Moreover, the Prosecutor could independently initiate an investigation *proprio motu* into a state that is not a party to the Rome Statute if a crime under the Rome Statute was committed on the territory of a State Party.³² Both groups perceived the risk that a politicized Court would threaten its own legitimacy; however, they disagreed about how this politicization would occur.

Ultimately, a solution was brokered by a proposal put forth by the German and Argentinean delegations.³³ It envisioned an independent Prosecutor empowered with opening investigations *proprio motu* but constrained by direct oversight by the U.N. Security Council, the Assembly of States Parties, and the ICC judiciary, to ensure accountability and to prevent frivolous and politically motivated prosecutions.³⁴

In accordance with Article 53 of the Rome Statute, the Prosecutor is required to consider three factors when exercising her *proprio motu* powers. First, after evaluating all available

30. Statement of David J. Scheffer, Ambassador at Large for War Crimes Issues And Head of the U.S. Delegation to the U.N. Diplomatic Conf. on the Establishment of a Permanent Int’l Crim. Ct., Testimony before the Committee on Foreign Relations of the U.S. Senate (July 23, 1998).

31. See SILVIA A. FERNANDEZ DE GURMENDI, THE ROLE OF THE INTERNATIONAL PROSECUTOR IN THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 181 (Roy S. Lee, ed. 1999) (“Those who argued against granting *proprio motu* powers to the Prosecutor feared an overzealous or politically motivated prosecutor targeting, unfairly or in bad faith, highly sensitive political situations.”).

32. Rome Statute, *supra* note 1, art. 12(2)(a).

33. See generally Preparatory Comm. on the Establishment of an Int’l Crim. Ct., *Proposal Submitted by Argentina and Germany for Article 46: Information Submitted to Prosecutor*, UN Doc. A/AC.249/1998/WG.4/DP.35, (Mar. 25, 1998) (proposing that the prosecutor alone should decide whether there is a reasonable basis for proceeding with an investigation). See also, Jay Goodliffe & Darren Hawkins, *A Funny Thing Happened on the Way to Rome: Explaining International Criminal Court Negotiations*, 71 J. OF POL. 3, 981 (2009) (At the Preparatory Committee, states ultimately adopted decisions favoring an independent Prosecutor with checks on its power.).

34. See Allison Marston Danner, *Prosecutorial Discretion and Legitimacy*, 514-15 (June 13, 2005) (“[T]he Prosecutor’s independent decision to initiate an investigation would be subject to judicial review by a pretrial chamber before the Prosecutor could actually proceed with the investigation.”).

information, she must determine whether there is a reasonable basis to believe that a crime within the Court's jurisdiction has been committed.³⁵

Second, the Prosecutor must assess whether the case would be admissible under Article 17 of the Rome Statute.³⁶ This determination examines whether the situation country's national courts are unwilling or unable to genuinely proceed with an investigation or prosecution independently.³⁷ A determination of "unwillingness" includes the consideration of whether relevant national proceedings were or are being undertaken with the purpose of shielding the prospective defendant from criminal responsibility, and whether they were or are being conducted independently or impartially and in a manner consistent with an intent to bring relevant perpetrators to justice.³⁸ The purpose of Article 17 admissibility is to ensure that the ICC remains complementary to national criminal jurisdictions, as expressed in the Preamble of the Rome Statute.³⁹ Complementarity requires deference to genuine investigations and prosecutions by states.⁴⁰ A case may also be inadmissible under Article 17 if it is of insufficient gravity to justify further action by the ICC.⁴¹ Gravity was not discussed during the initial negotiations of the Rome Statute, and only emerged after the Court began operating.⁴² In the ICC investigation of Lubanga, Former President of the Union des Patriotes Congolais/Forces Patriotiques pour la Libération du Congo who was ultimately convicted of the commission of war crimes in the Democratic Republic of the Congo, the Pre-Trial Chamber stated that "the social alarm such conduct may have caused in the international community" was an important component of the Court's gravity analysis.⁴³ The OTP rein-

35. Rome Statute, *supra* note 1, art. 53(1)(a).

36. *Id.* art. 53(1)(b).

37. *Id.* art. 17(1)(a)-(c).

38. *Id.* art. 17(2).

39. *Id.* pmb1.

40. Greenawalt, *supra* note 24, at 595.

41. *Id.* art. 17(1)(d).

42. See William A. Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. INT'L CRIM. JUST. 731, 736 (2008) (discussing how the gravity criterion did not become a major question until after the Court began to operate).

43. Prosecutor v. Lubanga, ICC-01/04-01/06-1-Corr-Red. Decision on the Prosecutor's Application for a Warrant of Arrest, ¶ 46 (10 February 2006)

forced this criterion, stating that it would consider the broader impact of crimes on “the increased vulnerability of victims, the terror subsequently instilled, or the social, economic, and environmental damage inflicted on the affected communities.”⁴⁴ The OTP also listed additional relevant factors in assessing gravity, including the scale, nature, manner of commission, and impact of the crimes.⁴⁵

Finally, if the Prosecutor can satisfy the first two requirements, she must then consider whether “there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.”⁴⁶ In September 2007 the OTP issued a policy paper that attempted to further define the term “interests of justice.” It asserted a presumption in favor of opening an investigation, and noted that electing not to exercise *proprio motu* powers on the basis of the interests of justice would be exceptional.⁴⁷ The paper also directed that in deciding whether an investigation would be in the interests of justice, the OTP should consider the broad objectives and purposes of the Rome Statute and the broad interests of the international community, while taking into account the political environment, including any potential adverse impacts on peace processes, security, and humanitarian efforts.⁴⁸ This history suggests that an “interests of justice” rationale should be construed narrowly, to include situations where, despite the

<https://www.icc-cpi.int/court-record/icc-01/04-01/06-1-corr-red> [<https://perma.cc/7DT4-YN97>]. See also, *Lubanga case*, ICC, <https://www.icc-cpi.int/drc/lubanga> (<https://perma.cc/8LKH-HDT4>) (On March 14, 2012, former President Thomas Lubanga Dylio was found guilty “of the war crimes of enlisting and conscripting children under the age of fifteen and using these children to actively participate in hostilities.”).

44. ICC OTP, Policy Paper on Case Selection and Prioritisation, ¶ 41 (2006), https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf [<https://perma.cc/D3CJ-SYZ8>].

45. *Id.* ¶ 37.

46. Rome Statute, *supra* note 1, art. 53(1)(c).

47. See ICC OTP, Policy Paper on the Interests of Justice, 3 (2007), <https://www.icc-cpi.int/dites/default/files/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPIInterestsOfJustice.pdf> [<https://perma.cc/AA8F-BMNU>] (“Taking into consideration the ordinary meaning of the terms [of Article 17] in their context, as well as the object and purpose of the Rome Statute, it is clear that only in exceptional circumstances will the Prosecutor of the ICC conclude that an investigation or a prosecution may not serve the interests of justice.”).

48. *Id.*

gravity of the crimes and the interests of the victims, there are greater countervailing considerations that cut against the opening of an investigation.⁴⁹

IV. THE ROLE OF POLITICS IN PROSECUTORIAL DISCRETION AND THE THREAT TO ICC LEGITIMACY

Although it would be a mischaracterization to classify the ICC as a wholly political institution, much of the Court's work is performed in the shadow of inter-state competitions for geopolitical power and influence. Justice cannot be achieved within a vacuum, free from geopolitics, especially in the context of international criminal law, where political power and influence is exerted by states in their efforts to both evade condemnation and to shape the agenda and objectives of the Court. It is therefore understandable that the ICC will face threats by states in response to the ICC's involvement into their domestic conflicts and political affairs. By issuing an indictment of powerful political leaders, such as Omar al-Bashir in the Darfur case, the ICC has the power to shame and stigmatize them in the eyes of both domestic and international audiences, which can loosen their grip on power and diminish their influence by changing the political narrative.⁵⁰ Before intervening in ongoing conflicts or post-conflict reconciliation processes, the Prosecutor must consider the impacts that a potential investigation and prosecution may have on a given country's political climate.⁵¹ She must also weigh those impacts against the interests of justice and accountability for the victims and international community.⁵² Moreover, the ICC re-

49. *Interests of Justice? The ICC Urgently Needs Reforms*, EJIL: TALK! (June 11, 2019), <https://www.ejiltalk.org/interests-of-justice-the-icc-urgently-needs-reforms/> [<https://perma.cc/72US-HWUJ>].

50. See Kenneth A Rodman, *When Justice Leads, Does Politics Follow? The Realist Limits of Prosecutorial Agency in Marginalizing War Criminals*, 17 J. INT'L CRIM. JUST. 1, 2 (2019) ("[A]llowing the ICC to take the lead, even in what seems like an unsupportive environment, can change the political context by stigmatizing those indicted by the Court, diminishing their influence and loosening their hold on power.").

51. See *id.* ("[P]rosecutors are likely to construe their discretion pragmatically, moving carefully within political parameters set by major powers in order to avoid alienating those on whom they depend for their effectiveness.").

52. See, e.g., M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, L. & CONTEMPORARY PROBS. Autumn 1996, at 12

lies on the political will of diplomats and government leaders for state cooperation and for enforcement of its decisions.⁵³ The ICC must therefore consider the likelihood of facing severe repercussions from state governments in response to its investigations, which could include refusing to execute ICC arrest warrants, withdrawing from the ICC, or issuing sanctions against the Court. Thus, a critique of the ICC as a wholly political instrument is not entirely justified, because it erroneously presumes that an ideal model of prosecutorial discretion would enable the Prosecutor to advance the ICC's objectives without taking into account any political pressures and considerations.⁵⁴

As the above considerations demonstrate, international criminal prosecutions cannot be dictated by purely legal standards free from political considerations, nor should international criminal tribunals be obligated to operate free from politics.⁵⁵ Given their limited resources, international criminal tribunals are confined to prosecuting only a small subset of the complaints they receive.⁵⁶ Since the ICC is a permanent court and has jurisdiction over a large number of states and crimes, it must filter through many potential cases that are within the

(referring to the inclination to decline to prosecute the leaders accused of atrocities in the former Yugoslavia due to political concerns, stating that it would effectively be “bartering away justice for political results, albeit in the pursuit of peace.”).

53. See Interview with Richard Goldstone, *YALE J. OF INT'L AFF.*, (Feb. 22, 2012), <https://www.yalejournal.org/publications/political-will-and-multilateral-cooperation-in-international-justice> [<https://perma.cc/7BQM-NTHT>] (“The ICC is completely dependent upon governments to carry out its orders. It has no police force or army and it never will have, so politics is determinative. It all depends on the political will of countries to cooperate with the ICC.”).

54. See Greenawalt, *supra* note 24, at 586 (“The negative refrain against ‘politicizing’ the ICC presupposes a positive model of prosecutorial discretion that furthers the Court’s institutional goals without recourse to political considerations.”).

55. *Id.* at 612.

56. See, e.g., Olympia Bekou, Triestino Marinello, and Yvonne McDermott, *Envisioning International Justice: What Role for the ICC?*, 2021 European Parliament Study, 23 (“[T]he prosecutor has difficult choices to make with regard to case selection, since the ICC is increasingly occupied with victims of grave human rights abuses, while resources and political support are limited.”).

Court's jurisdiction and would otherwise be admissible.⁵⁷ Thus, to determine which small subset of these potential cases should be initiated *proprio motu*, the Prosecutor must inevitably make this selection by giving consideration to political expediency.

Given the central role that considerations of political expediency play, politics should not be viewed as entirely external to the Court or to international law.⁵⁸ Hans Morgenthau, a prominent political scientist in the field of international relations, echoes this observation, stating that the 'legal' and the 'political' are not the complete converse of each other, since "a definition of politics as the negative counterpart of law a priori excludes the possibility that law may be part of the political."⁵⁹ Martti Koskenniemi, an international lawyer and legal scholar, adds that "institutions do not replace politics, but enact them."⁶⁰

However, the Court still must draw a line: certain political considerations should not play a role in the Prosecutor's exercise of her *proprio motu* powers or in the Court's decision-making. For example, the ICC should not decline to investigate or prosecute a government that has allegedly committed genocide on the basis of its strong political relations and economic ties with one or more U.N. Security Council states. This justification would be biased and illegitimate, negatively impacting the Court in the long run. If the Prosecutor's decision-making was compromised by political bargaining in order for states to

57. See, e.g., ICC Press Release, Communications Received by the Office of the Prosecutor of the ICC, pids.009.2003-EN (July 16, 2003), https://www.icc-cpi.int/NR/rdonlyres/9B5B8D79-C9C2-4515-906E-125113CE6064/277680/16_july__english1.pdf [<https://perma.cc/Q8AV-EMUA>] (noting that in the ICC's first year alone, the OTP received 499 communications concerning possible cases from 66 different states).

58. See, Sarah M. H. Nouwen & Wouter G. Werner, *Doing Justice to the Political: The International Criminal Court in Uganda and Sudan*, 21 EUR. J. INT'L L. 941, 943 (2010) ("The political is not something external to the Court, not just a force which potentially compromises the independence of the Court and needs to be overcome.").

59. See *id.* at 944 (Nouwen and Werner quote Morgenthau using Koskenniemi's English translation in *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2002), at 442.).

60. M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2002), at 177.

secure the immunity of their political leaders, the ICC would no longer be acting independently.

Thus, the Prosecutor, in exercising her discretionary *proprio motu* powers, must seek to act independently, yet continue to remain politically engaged in the situations and crimes she investigates, prosecutes, and adjudicates, to account for their underlying political context. Although the Prosecutor's decision to initiate an investigation *proprio motu* must be made in accordance with the objective legal criteria outlined in the Rome Statute, the ICC cannot effectively achieve its objective of obtaining accountability for the most serious international crimes if this decision is made in a purely legal vacuum.

Apart from the need to maintain unbiased and thorough investigations and proceedings within individual situations, the ICC's perceived legitimacy is also closely intertwined with the way in which the Prosecutor exercises her prosecutorial discretion. If the Prosecutor appears to be repeatedly selecting certain types of cases or situations, states may accuse the OTP of making biased decisions. For example, over the last several years, many African states have accused the ICC of disproportionately targeting nationals of African states, given that the majority of the Court's trials and investigations have implicated African states.⁶¹ The Prosecutor only opened its first investigation outside of the African continent in 2016.⁶² Following the ICC's indictment of Sudanese President Omar al-Bashir in 2009, members of the African Union, some of whom were States Parties to the ICC, rebuffed their ICC obligations by refusing to arrest al-Bashir when he travelled through their jurisdictions.⁶³ Although it was the U.N. Security Council that

61. See *Key Facts on the ICC and Africa*, COALITION FOR THE ICC, <https://coalitionfortheicc.org/explore-international-criminal-court-africa-icc> [<https://perma.cc/E3NV-P3BD>] (last visited Feb. 17, 2022) (noting that Georgia was the ICC's first investigation outside of Africa).

62. *Id.*; Adam Taylor, *Why so Many African Leaders Hate the International Criminal Court*, WASH. POST (June 15, 2015), <https://www.washingtonpost.com/news/worldviews/wp/2015/06/15/why-so-many-african-leaders-hate-the-international-criminal-court/> [<https://perma.cc/Q8A6-AQGG>].

63. *States 'failing to seize Sudan's dictator despite genocide charge'*, THE GUARDIAN (Oct. 21, 2018), <https://www.theguardian.com/global-development/2018/oct/21/omar-bashir-travels-world-despite-war-crime-arrest-warrant> (noting that Omar al-Bashir made trips to South Africa, Jordan, and Uganda—all of whom are States Parties to the Rome Statute.).

referred the situation in Darfur to the ICC, in refusing to cooperate with the Court, the Sudanese government asserted that the ICC was a “political organ of the E.U. . . . built to indict Africans.”⁶⁴

More recently, skeptics of the ICC’s political independence point to the Court’s inability to compel U.S. nationals to appear before the Court. The United States, in attempting to exempt Americans from the Court’s jurisdiction, continually asserts that the ICC lacks jurisdiction over non-States Parties.⁶⁵ However, this argument holds little water, since the Court has the power to exercise jurisdiction over alleged war crimes if they were committed on the territory of Afghanistan, a State Party to the Rome Statute since 2003.⁶⁶ Although the United States has participated in U.N. Security Council referrals to the ICC in the cases of Sudan, Libya, and Syria, all of whom are non-States Parties, some of the decisions made by the ICC’s first Prosecutor, Luis Moreno Ocampo, articulate the Court’s hesitation to confront powerful states.⁶⁷ For example, the preliminary examination into the situation in Georgia moved slowly, given Russia’s direct involvement, which contrasts the speed at which the ICC moved in relation to many African

64. *Sudan’s FM: “ICC is a Court Built to Indict Africans,”* AL JAZEERA (Oct. 29, 2016), <https://www.aljazeera.com/programmes/talktojazeera/2016/10/sudan-fm-icc-court-built-indictafricans-161027112211288.html> [https://perma.cc/88EH-5WJE].

65. *See New US sanctions on international tribunal prosecutor, aide*, AP NEWS (Sept. 2, 2020), <https://apnews.com/article/politics-united-nations-asia-pacific-europe-ec6fc680118ec01d01abe0173870e371> (noting that U.S. Secretary of State Michael Pompeo, in his announcement of the imposition of new sanctions on the ICC Prosecutor, stated that the United States “will not tolerate its illegitimate attempts to subject Americans to its jurisdiction.”).

66. Rome Statute, *supra* note 1, art. 12(2)(a) (setting forth this power). *See also Afghanistan, ICC*, <https://www.icc-cpi.int/afghanistan> [https://perma.cc/4PFB-CZ2W] (“Afghanistan deposited its instrument of accession to the Rome Statute on 10 February 2003. The ICC may therefore exercise its jurisdiction over crimes listed in the Rome Statute committed on the territory of Afghanistan or by its nationals from 1 May 2003 onwards.”).

67. *See* S.C. Res. 1593 (Mar. 31, 2005) (featuring a U.S. abstention from voting to refer the situation in Darfur to the ICC.); S.C. Res. 1970 (Feb. 26, 2011) (unanimously voting to refer the situation in Libya to the ICC). *See also* U.N. SCOR, 69th Sess., 7180th mtg., U.N. Doc. S/PV.7180 (May 22, 2014) (featuring a U.S. vote in favor of referring the situation in Syria to the ICC; however, China and Russia voted against the resolution, thus preventing the referral.).

cases.⁶⁸ Thus, the Court's apparent acquiescence to this double standard strengthens the claim that the Court acts favorably towards powerful Western countries, which risks eroding the ICC's perceived legitimacy.

V. THE ICC SITUATION IN AFGHANISTAN

In 2007, the OTP initiated a decade-long preliminary examination of the situation in Afghanistan after receiving various communications under Article 15 of alleged atrocity crimes.⁶⁹ On November 20, 2017, Prosecutor Fatou Bensouda used her *proprio motu* powers to request authorization from the ICC's Pre-Trial Chamber III to initiate a formal investigation into the alleged war crimes and crimes against humanity committed in Afghanistan, a State Party.⁷⁰ In the OTP's 2016 Preliminary Examination Report, Bensouda asserted that available information provided reasonable grounds to believe that members of the U.S. Armed Forces and U.S. Central Intelligence Agency (CIA) resorted to interrogation techniques on detained persons amounting to the commission of the war crimes of torture, rape, cruel treatment, and outrages on personal dignity, punishable under Article 8(2) of the Rome Statute.⁷¹ Furthermore, the OTP concluded that there is a reasonable basis to believe that these alleged crimes were committed as part of interrogation techniques approved by the CIA.⁷²

68. Anthony Dworkin, *Why America Is Facing Off Against the International Criminal Court*, EUROPEAN COUNCIL ON FOREIGN RELATIONS (Sept. 8, 2020), https://ecfr.eu/article/commentary_why_america_is_facing_off_against_the_international_criminal_court/ [<https://perma.cc/7EYA-6FWZ>] (“[T]he ICC also seemed in its early years to be trying to avoid any confrontation with great powers as it sought to establish itself as a fledgling international body. The first prosecutor, Luis Moreno Ocampo, moved with striking caution in opening investigations where great power interests were involved.”).

69. *See Afghanistan*, ICC, *supra* note 66 (“The preliminary examination of the situation in Afghanistan was made public in 2007.”).

70. ICC OTP, Summary of the Prosecutor's Request for authorisation of an investigation pursuant to article 15, Situation in Afghanistan ¶ 1 (2017), https://www.icc-cpi.int/itemsDocuments/Afghanistan/171120-afgh-art_15-app-summ_ENG.pdf [<https://perma.cc/R2Z9-FN46>].

71. ICC, Report on Preliminary Examination Activities ¶ 198 (2016), https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf [<https://perma.cc/VVZ6-EWQR>].

72. *See id.* ¶ 211 (“The information available provides a reasonable basis to believe that, in the course of interrogating these detainees, and in conduct supporting those interrogations, members of the US armed forces and

The OTP further determined that the alleged crimes were not isolated events; they were committed with the collective aim of extracting intelligence, in furtherance of U.S. policies and objectives in the war in Afghanistan.⁷³

*A. Rejecting the Prosecutor's Authorization to Open the
Afghanistan Investigation: The 2019 Pre-Trial Chamber
II Decision*

On April 12, 2019, Pre-Trial Chamber II (PTC) issued a decision denying the Prosecutor authorization to open an investigation into the situation in Afghanistan.⁷⁴ Although the PTC acknowledged that the Court had jurisdiction and that any potential cases stemming from the investigation would be admissible, it declined authorization on the grounds that an investigation would not “serve the interests of justice.”⁷⁵ This decision marked the first time that the ICC judges have invoked an “interests of justice” argument, based on Article 53 of the Rome Statute.⁷⁶ The PTC stated that “an investigation would only be in the interests of justice if prospectively it appears suitable to result in the effective investigation and subse-

the US Central Intelligence Agency (“CIA”) resorted to techniques amounting to the commission of the war crimes of torture, cruel treatment, outrages upon personal dignity, and rape.”).

73. *See id.* ¶ 212 (“[T]hey appear to have been committed as part of approved interrogation techniques in an attempt to extract ‘actionable intelligence’ from detainees.”).

74. ICC-02/17, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan (Apr. 12, 2019) [hereinafter “PTC 2019 Decision”]. *See also* ICC-Pres-01/18, Decision assigning judges to divisions and recomposing Chambers (Mar. 16, 2018) (The Afghanistan situation was reassigned from Pre-Trial Chamber III to Pre-Trial Chamber II on March 16, 2018).

75. *See* PTC 2019 Decision, *supra* note 74, at ¶ 96 (“[N]otwithstanding the fact all the relevant requirements are met as regards both jurisdiction and admissibility, the current circumstances of the situation in Afghanistan are such as to make the prospects for a successful investigation and prosecution extremely limited.”).

76. *See The ICC was wrong to deny prosecution request for Afghan probe*, AL-JAZEERA (Apr. 12, 2019), <https://www.aljazeera.com/opinions/2019/4/12/the-icc-was-wrong-to-deny-prosecution-request-for-afghan-probe> [https://perma.cc/YLY4-E96B] (“This marks the first time that judges have invoked this argument, yet the ruling was meagre on its application, devoting just three and a half pages to the subject and, remarkably, not referencing any other cases or jurisprudence on the subject.”).

quent prosecution of cases within a reasonable time frame[. . .]An investigation can hardly be said to be in the interests of justice if the relevant circumstances are such as to make such investigation not feasible and inevitably doomed to failure.”⁷⁷

The PTC judges rejected the Prosecutor’s request to open an investigation into the situation in Afghanistan on the basis of political factors, namely, the lack of cooperation from the U.S. government during a lengthy eleven-year-long preliminary examination.⁷⁸ The PTC’s decision explicitly included as part of its reasoning the significant changes in the political landscape of key non-States Parties to the Rome Statute as well as the volatility of the political climate.⁷⁹ The judges concluded that any ICC investigation into the situation in Afghanistan would be unfeasible because of the challenge in securing meaningful cooperation from the United States and Afghanistan, given the Prosecutor’s difficulty in securing even the most minimal cooperation during her preliminary examination, thus alluding to the United States’ obstructionist behaviors towards the Court.⁸⁰ The PTC added that even minimal U.S. cooperation would be unlikely, especially within the framework of an investigation.⁸¹ The decision concluded by stating that “victims’ expectation of justice will not go beyond little more than aspirations,” and an unsuccessful investigation would only create additional frustration and hostility, which would ultimately negatively impact the Court’s ability to pursue its objectives.⁸²

77. *Id.* ¶¶ 89-90.

78. *See id.* ¶¶ 91-96 (noting the “scarce cooperation” Prosecutor Fatou Bensouda was able to obtain throughout the OTP’s preliminary examination from various relevant authorities).

79. *Id.* ¶ 94. *See also id.* ¶ 92 (“[S]ome of the circumstances at the origin of the difficulties having marred the preliminary examination, and of its length, either remain unchanged or have rather changed for the worse; as such, they are also likely to impact any forthcoming investigation which might be authorised.”).

80. *Id.* ¶ 94.

81. *See id.* ¶ 94 (“The Chamber has noted the Prosecution’s submissions to the effect that even neutral, low-impact activities proved unfeasible. Accordingly, it seems reasonable to assume that these difficulties will prove even trickier in the context of an investigation proper.”).

82. *Id.* ¶ 96.

The PTC's Afghanistan decision sparked significant backlash from the international community.⁸³ In its own defense, the PTC asserted that non-cooperative and obstructionist behavior by states resulted in its determination that initiating an investigation would not serve the interests of justice, because this state behavior would undermine the investigation's feasibility.⁸⁴ Due to the high likelihood of non-cooperation from the U.S. military, CIA, and Afghan forces, the Court was concerned that any investigation would not unearth enough evidence to bring specific charges.⁸⁵ Moreover, even if specific charges were brought, the Court would likely be unable to secure and transfer individual suspects to The Hague.⁸⁶

Although the PTC's explanation may in fact be an accurate description of the resistance that plagues the Court, this line of reasoning incentivizes states who seek to avoid the Court's jurisdiction to actively undermine and obstruct the Court's work. It contrasts with the ICC's other endeavors that aim to incentivize states to cooperate.⁸⁷ Perhaps, as here, the ICC perceives certain obstructionist states like the United States as simply too powerful to confront. The PTC's decision

83. See, e.g., *Afghanistan: ICC refuses to authorize investigation, caving into USA threats*, AMNESTY INT'L, (Apr. 12, 2019), <https://www.amnesty.org/en/latest/news/2019/04/afghanistan-icc-refuses-to-authorize-investigation-caving-into-usa-threats/> [<https://perma.cc/HH9Z-BUGL>] (noting in a response to the PTC's decision authored by South Asia Director at Amnesty International, Biraj Patnaik that "[c]oming so closely on the heels of a series of unhinged attacks by senior USA officials, and following long and unexplainable delays up to this point, the decision ultimately will be seen as a craven capitulation to Washington's bullying and threats.").

84. See PTC 2019 Decision, *supra* note 74, ¶ 90 ("An investigation can hardly be said to be in the interests of justice if the relevant circumstances are such as to make such investigation not feasible and inevitably doomed to failure.").

85. See BRIANNE MCGONIGLE LEYH, *We will let it die on its own: culture, ideology, and power at play between the United States and the ICC*, in *INTERSECTIONS OF LAW AND CULTURE AT THE INTERNATIONAL CRIMINAL COURT* 337, 356 (Julie Fraser & Brianne McGonigle Leyh eds., 2020) (noting the problems the Court might face with a lack of cooperation by American and Afghan government entities).

86. *Id.*

87. See, e.g., ICC, Report of the Bureau on Non-Cooperation, Assembly of States Parties Seventeenth session, ICC-ASP/17/31, Annex III ¶ 1 (2018) (describing a non-cooperation "tool kit"); ICC Res. ICC-ASP/17/Res.5, Annex II, Assembly Procedures Relating to Non-Cooperation (Dec. 12, 2018) (discussing the Assembly of States Parties' non-cooperation procedures).

supports this inference, reading in part as an attempt to appease the United States to temper its hostility towards the Court.

B. *Appeals Chamber Reversal: Authorizing the Afghanistan Investigation*

Despite the PTC's decision, the Prosecutor's Afghanistan inquiry was not dead yet. After the Prosecutor requested leave to appeal the PTC's decision, on March 5, 2020 the ICC's Appeals Chamber concluded that the PTC erred in its application of the law, and authorized the Prosecutor to initiate the investigation into the alleged crimes in Afghanistan.⁸⁸ The Appeals Chamber concluded that the Prosecutor was not required to establish that proceeding with an investigation would be affirmatively in the interests of justice.⁸⁹ Instead, Article 53(1)(c) of the Rome Statute only requires that the Prosecutor, and not the PTC, consider the interests of justice as a potential countervailing reason not to proceed with an investigation even when the first two affirmative requirements—reasonable basis to believe and admissibility—are satisfied.⁹⁰ Accordingly, the PTC's analysis should have been limited to assessing whether the two criteria specified in Article 15(4) of the Rome Statute were met: whether there was a reasonable basis to proceed with an investigation and whether the case appeared to fall within the jurisdiction of the Court.⁹¹

88. Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4. Appeals Chamber Decision ¶ 46 (Mar. 5, 2020) [hereinafter "Afghanistan Appeals Chamber Decision"].

89. *Id.* ¶ 49.

90. ICC OTP, Policy Paper on the Interests of Justice, *supra* note 47 at 2. *See also* Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09, Pre-Trial Chamber Decision ¶ 63 (Mar. 31, 2010) ("Unlike subparagraphs (a) and (b), which require an affirmative finding, subparagraph (c) does not require the Prosecutor to establish that an investigation is actually in the interests of justice. Thus, the Chamber considers that a review of this requirement is unwarranted in the present decision.").

91. *See* Afghanistan Appeals Chamber Decision, *supra* note 88, ¶ 34 ("This provision [Article 15(4)] does not identify additional considerations that the pre-trial chamber must take into account for the purpose of this determination. A plain reading of the provisions, therefore, indicates that, for the purposes of exercising judicial control at this early stage of the pro-

C. *Threats by the United States in Response to the Court's Authorization of the Afghanistan Investigation*

In response, U.S. Secretary of State Michael Pompeo castigated the Appeals Chamber's decision as "a breathtaking action by an unaccountable political institution, masquerading as a legal body."⁹² On June 11, 2020, U.S. President Donald Trump issued a sweeping Executive Order authorizing asset freezes against any ICC officials and non-U.S. persons or entities that "directly engaged in" or "materially assisted in" efforts by the ICC to investigate or prosecute any U.S. personnel.⁹³ The Executive Order declared a national emergency, stating that any investigation by the ICC into the actions of the United States in Afghanistan constituted a threat to national security.⁹⁴ The first specific sanctions arising from the Executive Order were imposed on September 2, 2020, targeting Prosecutor Bensouda and another senior OTP official, Phakiso Mochochoko, the Head of the Jurisdiction, Complementarity and Cooperation Division.⁹⁵ The United States is also not alone in exacting threats against the ICC. Israel and the Philippines, both non-States Parties, have also directly threatened the ICC in their own attempts to avoid prosecution of their nationals and to maintain the current structure of political power.⁹⁶ The Biden Administration ultimately revoked the Ex-

ceeding, the pre-trial chamber need only consider whether there is a reasonable factual basis to proceed with an investigation, in the sense of whether crimes have been committed, and whether potential case(s) arising from such investigation appear to fall within the Court's jurisdiction.").

92. Merrit Kennedy, *International Criminal Court Allows Investigation Of U.S. Actions In Afghanistan*, NPR (Mar. 5, 2020), <https://www.npr.org/2020/03/05/812547513/international-criminal-court-allows-investigation-of-u-s-actions-in-afghanistan> [<https://perma.cc/9QRQ-NWEH>].

93. Exec. Order No. 13928, 31 C.F.R. § 520 (2020) ("Blocking Property of Certain Persons Associated With the International Criminal Court").

94. *Id.*

95. *US Sanctions International Criminal Court Prosecutor*, HUMAN RIGHTS WATCH (Sept. 2, 2020), <https://www.hrw.org/news/2020/09/02/us-sanctions-international-criminal-court-prosecutor#> [<https://perma.cc/6YDU-2C3S>].

96. *See, e.g.*, Oliver Holmes, *Netanyahu calls for sanctions over ICC war crimes investigation*, THE GUARDIAN (Jan. 21, 2020), <https://www.theguardian.com/world/2020/jan/21/netanyahu-calls-for-sanctions-over-icc-war-crimes-investigation-israel> and *'I will arrest you': Duterte warns ICC lawyer to steer clear of the Philippines*, REUTERS (Apr. 13, 2018), <https://www.reuters.com/article/us-philippines-duterte-icc/i-will-arrest-you-duterte-warns-icc-lawyer-to-steer->

ecutive Order and lifted the U.S. sanctions on ICC officials on April 2, 2021.⁹⁷ Nevertheless, the Biden Administration's Secretary of State Anthony Blinken reiterated that the U.S. government continues to strongly disagree with the ICC's investigation into the situation in Afghanistan and maintains its "longstanding objection" to the Court's jurisdiction over U.S. personnel.⁹⁸

D. *The De-Prioritization of Select Crimes Post-Taliban Takeover*

On March 26, 2020, the Afghan government asked the ICC to defer its investigation into the situation in Afghanistan, on the asserted basis that genuine domestic investigations and prosecutions were being undertaken.⁹⁹ The ICC granted this request and paused its investigation.¹⁰⁰ But on September 27, 2021, Karim AA Khan QC, the ICC's newly appointed Prosecutor, filed a submission to Pre-Trial Chamber II requesting authorization to resume his investigation into the situation in Afghanistan, due to "the significant change of material circum-

clear-of-philippines-idUSKBN1HK0DS [<https://perma.cc/3LVE-XTE7>] (detailing Duterte's threat to arrest ICC staff and stating that the Philippines withdrew its membership from the ICC in March 2019, the second state to withdraw after Burundi).

97. Press Statement, Antony J. Blinken, Secretary of State, Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court (Apr. 2, 2021), <https://www.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court/> [<https://perma.cc/262A-TZKZ>].

98. *See id.* (noting that Blinken also emphasized that the U.S. will continue to support efforts to secure criminal accountability for mass atrocities and to ensure that victims obtain access to justice, but only through its "co-operative relationships" with states).

99. *Public Annex I to the Notification to the Pre-Trial Chamber of the Islamic Republic of Afghanistan's letter concerning article 18(2) of the Statute*, ICC-02/17-139-Anx1, (Apr. 16, 2020) https://ccrjustice.org/sites/default/files/attach/2020/04/4-15-20_Prosecutor-Request-to-Defer_Annex_w.pdf [<https://perma.cc/9CQH-72TX>].

100. *See Notification to the Pre-Trial Chamber of the Islamic Republic of Afghanistan's letter concerning article 18(2) of the Statute*, ICC-02/17-139, (Apr. 15, 2020) ("Given the extraordinary circumstances presented by the pandemic, and the importance the Prosecutor places on her proper assessment of complementarity, the Prosecutor has agreed to provide the Government of Afghanistan until 12 June 2020 to enable it to comply fully with article 18(2) and rule 53.").

stances which became manifest in August 2021.”¹⁰¹ This referenced the recent Taliban seizure of several provincial capitals, and ultimately, Kabul, which caused the President of Afghanistan, Ashraf Ghani, to flee the country on August 15, 2021.¹⁰² In a statement accompanying his resumption request, Prosecutor Khan indicated that should Pre-Trial Chamber II grant authorization, the OTP would “deprioritise” the crimes committed by other actors, impliedly, the U.S. Armed Forces and CIA personnel, and instead focus on crimes allegedly committed by the Taliban and the Islamic State-Khorasan Province (“IS-K”).¹⁰³ Prosecutor Khan reasoned that in order to assemble credible cases that would provide proof of the alleged crimes committed by the Taliban and the Islamic State beyond a reasonable doubt, the OTP needs proper resources, which he attested, are constrained.¹⁰⁴ Accordingly, Prosecutor Khan impliedly concluded that a justifiable investigation into war crimes allegedly committed by U.S. personnel required either forthcoming cooperation from the U.S. government, or a significant increase in financial resources, both of which are unlikely to occur if the ICC’s investigation implicates U.S. officials.

VI. A MISSED OPPORTUNITY FOR DELIVERING COMPREHENSIVE JUSTICE AND BOLSTERING ICC LEGITIMACY

The ICC Appeals Chamber decision correctly interpreted and applied the Rome Statute to authorize the Prosecutor’s investigation into the situation in Afghanistan. The Prosecutor requested authorization after weighing relevant political factors in her determination of both the admissibility of the case and the lack of exceptional, countervailing reasons for not pursuing the investigation in the interests of justice, while also

101. *Request to authorise resumption of investigation under article 18(2) of the Statute*, ICC-02/17-16, ¶ 1 (Sept. 27, 2021), https://www.icc-cpi.int/CourtRecords/CR2021_08317.PDF [<https://perma.cc/M68M-HL4M>].

102. *Id.* ¶ 4.

103. Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, following the application for an expedited order under article 18(2) seeking authorisation to resume investigations in the Situation in Afghanistan (Sept. 27, 2021) [hereinafter “Khan Statement”], <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-following-application> [<https://perma.cc/4YYJ-LTW2>].

104. *Id.*

accounting for the strong presumption in favor of initiating the investigation where the sufficient gravity threshold has been met.¹⁰⁵ The Prosecutor's decision-making reflected a willingness to account for the political context in Afghanistan, and how a prospective ICC investigation would affect the interests of victims, the maintenance of international peace and security, and any adverse humanitarian consequences.¹⁰⁶ At the same time, those political factors were weighed narrowly, kept in check by the Court's overarching objectives of ending impunity and ensuring that the most serious international crimes do not remain unpunished.¹⁰⁷

An ICC Prosecutor's decision to consider a situation's political context in electing whether to initiate an investigation is distinct from a decision to decline to investigate in the face of political retaliation from powerful non-States Parties, such as the United States, when the evidentiary and admissibility thresholds have otherwise been met. This was not the first time the United States has challenged international institutions that threatened its international standing and power by seeking accountability for U.S. violations of international law.¹⁰⁸

The overarching challenge that the ICC faces is a loss of legitimacy due to politically motivated judicial actions in reaction to these individual threats. The PTC's decision to refuse the Prosecutor's authorization request was arguably motivated in part by the refusal of the United States to cooperate with or

105. ICC OTP, Policy Paper on the Interests of Justice, *supra* note 47 at 5.

106. *See id.* at 8-9 ("In situations where the ICC is involved, comprehensive solutions addressing humanitarian, security, political, development and justice elements will be necessary. . . Office will consider issues of crime prevention and security under the interests of justice, and there may be some overlap in these considerations and in considering matters in accordance with the duty to protect victims and witnesses under Article 68.").

107. *See id.* at 8 ("The concept of the interests of justice established in the Statute. . . must be interpreted in accordance with the objects and purposes of the Statute. Hence, it should not be conceived of so broadly as to embrace all issues related to peace and security.").

108. *See, e.g.,* Yuka Hayashi, *Countries Seek New Fix for Dormant International Trade Court*, WALL ST. J., Feb. 24, 2021 (detailing how the Trump Administration blocked the appointment of a new Director-General for the World Trade Organization (WTO) and the U.S. government continues to block the appointment of new judges to the WTO's Appellate Body in response to the Appellate Body rulings against the United States—thereby effectively paralyzing the institution because the Appellate Body lacks the quorum necessary to hear appeals).

acknowledge the Court's legitimacy as an international institution.¹⁰⁹ Moreover, several members of the international community perceived the PTC's decision as an example of the Court bowing to powerful states.¹¹⁰ By continuing to cave to threats of non-cooperation from major powers, the Court will exclusively punish weak states and allow powerful ones to escape criminal responsibility. Ironically, Secretary Pompeo's portrayal of the Court as a politically motivated institution that infuses politics into the judicial process would then come to fruition.

Although the Appeals Chamber corrected the PTC's initial misstep in its March 2020 decision, Prosecutor Khan ultimately granted the United States reprieve by deciding to abandon its investigation of U.S. military personnel and CIA officials.¹¹¹ A more thorough investigation would have represented a show of force and signaled to the international community that regardless of state power, individuals responsible for war crimes will be held accountable by the ICC. It would also have rebutted the notion that the ICC only investigates crimes committed by states from the Global South, particularly African states.

Alternatively, the United States could have used the ICC's current investigation as an opportunity to launch its own do-

109. See, e.g., *ICC 'undeterred' by US sanctions threat*, BBC NEWS (Sept. 11, 2018), <https://www.bbc.com/news/world-us-canada-45487865> [<https://perma.cc/T2XD-JFVN>] (detailing how former U.S. National Security Advisor John Bolton stated in a September 2018 speech that, "[w]e will not cooperate with the ICC. We will provide no assistance to the ICC. We will not join the ICC. We will let the ICC die on its own. After all, for all intents and purposes, the ICC is already dead to us.").

110. See, e.g., *Can the PTC Review the Interests of Justice*, OPINIOJURIS (Apr. 12, 2019), <http://opiniojuris.org/2019/04/12/can-the-ptc-review-the-interests-of-justice/> [<https://perma.cc/PXX2-RY5G>] (arguing that that the PTC has the power to review a Prosecutor's decision to not open an investigation in the interests of justice, and cannot review the Prosecutor's decision to open an investigation in the interests of justice—review would only be on the basis of jurisdiction and admissibility) and *A Neo-Colonial Court for Weak States? Not Quite. Making Sense of the International Criminal Court's Afghanistan Decision*, EJIL: TALK! (Apr. 13, 2019), <https://www.ejiltalk.org/a-neo-colonial-court-for-weak-states-not-quite-making-sense-of-the-international-criminal-courts-afghanistan-decision/> [<https://perma.cc/XTX4-7S7D>] (contending that the PTC's decision incentivizes obstruction by states and rewards non-cooperation).

111. Khan Statement, *supra* note 103.

mestic investigations. The ICC Prosecutor could have then deferred to the United States' investigation, in accordance with the principle of complementarity, and dropped its own investigation.¹¹² Back in August 2009, U.S. Attorney General Eric Holder expanded John Durham's mandate "to conduct a preliminary review into whether federal laws were violated in connection with the interrogation of specific [Afghan] detainees at overseas locations."¹¹³ Durham was initially appointed by Attorney General Holder to lead a Department of Justice criminal investigation into the CIA's destruction of interrogation videotapes.¹¹⁴ But he was tasked with reviewing only those interrogations that extended beyond the officially sanctioned guidelines of the CIA's "enhanced interrogation techniques," thereby declining to assess whether U.S. government-sanctioned interrogation techniques constituted torture or cruel treatment.¹¹⁵ Moreover, Attorney General Holder specified that interrogators acting in good faith on the basis of this CIA guidance would not face prosecution.¹¹⁶ The OTP's 2015 Preliminary Examination Report revealed that the Prosecutor, in determining whether to request initiation of an investigation, considered whether Durham's mandate was broad enough, and whether the investigation constituted a genuine process that focused on those most responsible for the most serious crimes.¹¹⁷ Ultimately, the Prosecutor's decision to open an investigation into the situation in Afghanistan partly rested on

112. Rome Statute, *supra* note 1, art. 18.

113. Eric Holder, Attorney General of the United States, *Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees* (Aug. 30, 2012), in DEPARTMENT OF JUSTICE, <https://www.justice.gov/opa/pr/statement-attorney-general-eric-holder-closure-investigation-interrogation-certain-detainees> [<https://perma.cc/6GMV-9GL2>].

114. *Id.*

115. David Bosco, *A Former U.S. Envoy's Thoughts on ICC Scrutiny of the United States*, LAWFARE Blog (Nov. 1, 2016), <https://www.lawfareblog.com/former-us-envoys-thoughts-icc-scrutiny-united-states> [<https://perma.cc/S745-MRV5>].

116. Eric Holder, Attorney General of the United States, *Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees* (Aug. 24, 2009), in DEPARTMENT OF JUSTICE, <https://www.justice.gov/opa/speech/attorney-general-eric-holder-regarding-preliminary-review-interrogation-certain-detainees> [<https://perma.cc/P425-B3VP>].

117. ICC OTP, *Report on Preliminary Examination Activities ¶¶ 1-3* (2015), <https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf> [<https://perma.cc/CP7N-RAUG>].

the OTP finding that the United States declined to criminally investigate or prosecute “any person who devised, authorized or bore oversight responsibility for the implementation by members of the CIA of the interrogation techniques constituting torture, cruel treatment or outrages upon personal dignity, whether in relation to those that were formally authorized by the OLC [Office of Legal Counsel] or those that went beyond the scope of the legal guidance.”¹¹⁸

The ICC Appeals Chamber’s authorization of the Afghanistan investigation provided the U.S. government with an opportunity to respond to allegations of U.S. government sanctioned torture and abuse of detainees in a systematic and transparent way. The United States could have appointed a special counsel and armed it with the mandate and the resources to review all of the available evidence.¹¹⁹ The special counsel could have then made an independent determination on whether to proceed with prosecutions against U.S. officials.¹²⁰ This broad and transparent process would have demonstrated to the ICC and to the international community a sincere effort by the U.S. government to determine responsibility and achieve accountability. This type of response would have advanced U.S. government credibility and accountability both at home and abroad.

Genuine domestic action by the United States would have also enhanced the ICC’s perceived legitimacy by demonstrating the Court’s ability to pressure powerful states to adequately address and investigate alleged crimes, despite their initial reluctance. The ICC’s goal of ending impunity for serious crimes could have therefore been achieved through either the ICC’s own investigations and prosecutions, or through its ability to compel meaningful domestic action. Thus, the Court’s tiered system maximizes its ability to end impunity and enhance accountability. Encouraging an unwilling, yet capable U.S. government to exercise its prosecutorial powers domestically, allows the Court to concentrate its limited resources on other

118. *Public redacted version of “Request for authorisation of an investigation pursuant to article 15”*, ICC-02/17-7-Conf-Exp, ¶ 328 (Nov. 20, 2017).

119. Bosco, *supra* note 115 (quoting former U.S. ambassador Stephen Rapp).

120. *Id.*

situations where adequate domestic legal mechanisms and enforcement are genuinely lacking.

Regrettably, Prosecutor Khan decided to pursue selective justice in the Afghanistan situation on the supposed basis of limited resources and the need for prioritization, yet the minimal likelihood of cooperation from a politically powerful non-State Party appears to be the central motivating factor in his decision.¹²¹ This type of political motivation sends a dangerous message to the international community that challenging or resource intensive situations implicating powerful states will avoid ICC investigation and prosecution, and their perpetrators will benefit from near-certain impunity.

Resource constraints are admittedly a reality for the ICC, as the Court simultaneously undertakes numerous preliminary examinations, investigations, and prosecutions. As of March 2022, there are seventeen ongoing investigations across four continents, as well as three ongoing preliminary examinations.¹²² But in Prosecutor Khan's budget proposal for 2022, which requested an 8.4 percent budget increase, no appeal was made for additional resources for his investigation in Afghanistan.¹²³

Moreover, throughout its existence, the ICC has regularly confronted significant cooperation challenges from both States Parties and non-States Parties. When states do not provide the ICC with access to their territories, or when state officials threaten prospective ICC witnesses in order to thwart in-

121. See Khan Statement, *supra* note 103 (“I am cognizant of the limited resources available to my Office relative to the scale and nature of crimes within the jurisdiction of the Court.”).

122. See *Situations under Investigation*, ICC, (last accessed: Mar. 20, 2022) <https://www.icc-cpi.int/pages/situation.aspx> [https://perma.cc/2FKQ-5FW8]; *Preliminary examinations*, ICC, (last accessed: Mar. 20, 2022) <https://www.icc-cpi.int/pages/pe.aspx> [https://perma.cc/HEU9-MPYV].

123. Proposed Programme Budget for 2022 of the International Criminal Court, ICC-ASP/20/10, Table 1 (Dec. 6-11, 2021), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP20/ICC-ASP-20-10-ENG.pdf [https://perma.cc/M9JH-R86A]. See also Julian Elderflower, *Uncertain Future for the ICC's Investigation into the CIA Torture Program*, JUST SECURITY (Nov. 12, 2021), <https://www.justsecurity.org/79136/uncertain-future-for-the-iccs-investigation-into-the-cia-torture-program/> [https://perma.cc/J7GK-S7NR] (“This budget increase does not include any request, however, for investigative resources for the Afghanistan investigation. . . does not ask the ASP for additional funds for (cyber-) investigators or desk analysts.”).

vestigations, the Court needs to pursue creative solutions. Despite difficulties in securing American cooperation, the Prosecutor could have pursued its investigations into the secret detention sites ('CIA black-sites'), on the territories of Lithuania, Poland, and Romania, all of whom are Parties to the Rome Statute.¹²⁴ The OTP could have also designed the investigation around access to witnesses outside of U.S. territory, including the released CIA detainees currently living outside of the United States.¹²⁵

VII. CONCLUSION

The ICC and the Prosecutor are not immune from politics. Rather, their decisions regarding whether to initiate investigations and whether to bring charges are inherently political. For the ICC to most effectively execute its mandate, its Prosecutor must use its power as tool to shape evolving political struggles. By prosecuting the most serious international crimes that "deeply shock the conscience of humanity," the ICC brands perpetrators of genocide, war crimes, and crimes against humanity as violators of international humanitarian and human rights norms.¹²⁶

124. See Situation in the Islamic Republic of Afghanistan, ICC-02/17-7-Red 20-11-2017, Pre-Trial Chamber III, ¶ 49 (Nov. 20, 2017) <https://www.legal-tools.org/doc/db23eb/pdf/> [<https://perma.cc/7NFP-TA6Q>] ("In particular, from 2002-2008, individuals allegedly participating in the armed conflict in Afghanistan, such as members of the Taliban or Al Qaeda, Hezb-e-Islami Gulbuddin and other militant groups, were allegedly transferred to clandestine CIA detention facilities located in those countries and are alleged to have been subjected to acts constituting crimes within the jurisdiction of the Court. Since such crimes were allegedly committed in the context of and associated with the armed conflict in Afghanistan, they are sufficiently linked to and fall within the parameters of the present situation.").

125. See, e.g., Sam Raphael, Crofton Black, Ruth Blakeley, *CIA Torture Unredacted*, THE RENDITION PROJECT, 157, 179, 181, 210, 218 (July 2019), <https://www.therenditionproject.org.uk/documents/RDI/190710-TRP-TBIJ-CIA-Torture-Unredacted-Full.pdf> [<https://perma.cc/D4YS-5MV3>] (noting that Abbar Al-Hawari, Laid Saidi, and Adel Ben Hamlili were released to Algeria, Wafti Bin Ali released to Kazakhstan, Bisher Al-Rawi and Jamil El-Banna released to the United Kingdom, and Suleiman Abdullah released to Tanzania).

126. See Nouwen & Werner, *supra* note 58, at 962 ("[T]he ICC provides a vocabulary with which opponents can label the enemy as a violator of universal norms, and thereby as the enemy of humanity itself. Adjudicating on ge-

The Court's initial decision to decline authorizing the initiation of the Afghanistan investigation was viewed by many in the international community as a politically biased decision, made to appease a powerful state that the ICC felt it could not afford to aggravate. But the ICC is best positioned to achieve its mandate of ending impunity when it can express coherent global norms. That in turn requires holding perpetrators of Rome Statute crimes accountable regardless of their political power and despite the potential backlash from non-Party States like the United States. Through the threat of international intervention, the ICC can leverage its principle of complementarity to incentivize states to take action at the national level. The Appeals Chamber decision authorizing the Afghanistan investigation offered the ICC an opportunity to make such an expression. A response by the United States that involved a genuine domestic investigation into alleged war crimes committed by the CIA and the U.S. military would have revealed to the international community that the Court is capable of exerting pressure that compels even the most politically powerful countries to take responsibility.

nocide, war crimes, and, most notably, crimes 'against humanity', the Court brands some as enemies of mankind, *hostes humani generis*.").