

**CREATION OF THE MODERN LORE: HOW PROSECUTORIAL
DISCRETION CREATES AN INTERNATIONAL PROSECUTOR AND
AN INTERNATIONAL CRIMINAL**

By

Gowri Niranjana

Submitted to

Central European University

Department of Legal Studies

In partial fulfilment of the requirements for the degree of Master of Arts in Human Rights

Supervisor: Lorenzo Gasbarri

Vienna, Austria

2023

© Central European University Private University

ACKNOWLEDGEMENTS

I would like to thank Lorenzo for introducing me to the world of international criminal law, which for a while now has become my life's purpose. All my love to my friends across the ocean who love me more than I know. This thesis runs on Tibeyen's Ethiopian coffee, Desirees espresso shots and Merve's biweekly boxing sessions, I could not have made it without you.

TABLE OF CONTENTS

Abstract	2
List of Abbreviations	3
Introduction.....	4
Significance of the Study	6
Outline.....	8
Literature Review.....	9
Prosecutorial Discretion in International Tribunals	10
Prosecutorial Discretion at the ICC	12
Drafting History	13
Prosecutor in the Rome Statute.....	15
Complementarity.....	19
Interpretation of the Criteria	20
Law and Practice of ‘Gravity’	20
Law and Practice of ‘Interests of Justice’	25
Conclusion	80
Bibliography	89

ABSTRACT

The thesis examines how the exercise of prosecutorial discretion by the Office of the Prosecutor at the International Criminal Court creates a certain notion of the ‘International Prosecutor’ and the ‘International Criminal.’ For this purpose, the thesis will focus on the exercise of prosecutorial discretion in the pre-trial stages of preliminary examination and initiation of an investigation. It will look at various avenues of prosecutorial discretion – both procedurally and substantively. It will discuss the concerns regarding the selective nature of the OTP's decisions and the potential consequences of prioritizing certain cases over others. It emphasizes the importance of the OTP's decisions being unbiased and not arbitrary to maintain the court's legitimacy. It will then discuss the lack of coherent policy when it comes to the exercise of discretion and how it shapes the functioning of the ICC. Based on this, the thesis will delve into how the exercise of discretion shapes the notion of an ‘International Prosecutor’ and an ‘International Criminal,’ in the landscape of global justice.

Concluding, the thesis will focus on the goals and strategies of the new ICC Prosecutor, Karim Khan, and his focus on efficiency, impact, and complementarity. It concludes by underscoring the importance of a structured and principled approach to the exercise of prosecutorial discretion. It also emphasizes the need for open policies and open reasons to foster trust and prevent the perception of bias.

LIST OF ABBREVIATIONS

ASP - Assembly of State Parties

CAR - Central African Republic

CBF - Committee on Budget and Finance

DRC - Democratic Republic of Congo

ECCC - Extraordinary Chambers in the Courts of Cambodia

EU - European Union

IER - Independent Expert Review

ICC - International Criminal Court

ICTY - International Criminal Tribunal for the former Yugoslavia

ICTR - International Criminal Tribunal for Rwanda

OTP - Office of the Prosecutor

PTC - Pre-Trial Chamber

SCSL - Special Court for Sierra Leone

STL - Special Tribunal for Lebanon

UNSC - United Nations Security Council

INTRODUCTION

In his work, *Jus post bellum*, Bass theorizes that post-war justice is an important component of just war itself.¹ No war can be just if post-war justice fails. In his deep dive into the moral and political consequences of political reconstruction and war crimes trials, he says “legal justice is one political good among many-like peace, stability, democracy, and distributive justice. *Jus post bellum* should be understood as a part of the determination of whether a war is just, not as a duty that trumps all others.”² However, what ‘post-war justice’ looks like still does not have a universally accepted answer.³

Different understandings of global justice, one of which is international criminal justice that seeks anti-impunity, have been in continuous competition with each other, claiming to have universality and/or supremacy over the other. There are a lot of stakes – legal, moral, historical - for having a universally accepted meaning of global justice. In the 1990s there was a clear shift of focus from the strong, grassroots-level human rights movement that emerged in the 1970s, to the dominance of the anti-impunity movement with a strong institutional element.⁴ Alternative ideas of global justice were marginalized and the anti-impunity movement that heralded the ideas of punitive justice became the dominant one, at the head of which was international law.

¹ Gary J Bass, ‘Jus Post Bellum’ (2004) 32 *Philosophy & Public Affairs* 384, 385 <<https://www.jstor.org/stable/3557994>> accessed 5 June 2023.

² *ibid* 406.

³ For a selection of these debates see, QC G. Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (Penguin, 2000); L. Moreno-Ocampo, ‘*The International Criminal Court: Seeking Global Justice*’ 215-225; V. Popovski, ‘*International Criminal Court: A Necessary Step Towards Global Justice*’, 31 *Security Dialogue* (2000) 405-419; S. Parmentier, ‘*Global Justice in the Aftermath of Mass Violence. The Role of the International Criminal Court in Dealing with Political Crimes*’, 41 *Annales Internationales de Criminologie* International Annals of Criminology - *Anales Internacionales de Criminologia* (2003) 203-224; D.F. Orentlicher, ‘*Judging Global Justice: Assessing the International Criminal Court*’, 21 *Wisconsin International Law Journal* (2003) 495-512; H.Kochler, *Global Justice or Global Revenge? International Criminal Justice at the Crossroads* (Springer, 2003).

⁴ Christine Schwöbel-Patel, *Marketing Global Justice: The Political Economy of International Criminal Law* (1st edn, Cambridge University Press 2021) 3 <<https://www.cambridge.org/core/product/identifier/9781108697651/type/book>> accessed 30 January 2023.

By the early 21st century, International Criminal Justice which seeks to fight impunity of mass atrocities had cemented its position as the placeholder of global justice.⁵ The ICC was established as the great temple built, heralding a “new legal era”⁶ which will ensure that the ‘most serious crimes of concern to the international community’ should not go unpunished.⁷ The Rome Statute for the ICC was negotiated in 1998 as a permanent court with its own legal personality, independent of the United Nations to ensure criminal accountability for international crimes. The Statute came into force on 1 July 2002 with 60 ratifications and the Court has been investigating and prosecuting individuals charged with the ‘gravest crimes of concern to the international community.’⁸

As of June 2023, the OTP has opened 31 cases in 14 different situations around the world.⁹ No investigation started by the OTP has closed without prosecution so far. The high degree of selectivity in the pre-trial stages ensures that the Court is not overwhelmed by cases.¹⁰ As a Court of last resort, the ICC must be highly selective, taking on cases that can have the most impact both in their own unique context¹¹ and in achieving the overarching goals of the Rome Statute: ending impunity, and preventing the recurrence of the most serious crimes.¹² This selection happens within the Office of the Prosecutor. The statutory legal criteria provide a very considerable degree of discretion to the Prosecutor to choose among many eligible situations and cases.¹³

⁵ *ibid* 6.

⁶ Luis Moreno-Ocampo, ‘The International Criminal Court: Seeking Global Justice’ 40 224.

⁷ Rome Statute of the International Criminal Court *loc* Preamble.

⁸ ‘About the Court’ (*International Criminal Court*) <<https://www.icc-cpi.int/about/the-court>> accessed 24 April 2023.

⁹ ‘Situations under Investigation’ (*International Criminal Court*) <<https://www.icc-cpi.int/situations-under-investigations>> accessed 24 April 2023; ‘Cases | International Criminal Court’ <<https://www.icc-cpi.int/cases>> accessed 24 April 2023.

¹⁰ Anni Henriette Pues, *Prosecutorial Discretion at the International Criminal Court* (Hart 2020) 10.

¹¹ *ibid* 13.

¹² Rome Statute of the International Criminal Court *art* Preamble.

¹³ Lovisa Badagard and Mark Klamberg, ‘The Gatekeeper of the ICC - Prosecutorial Strategies for Selecting Situations and Cases at the International Criminal Court’ [2016] SSRN Electronic Journal 642 <<https://www.ssrn.com/abstract=2784470>> accessed 11 April 2023.

Significance of the Study

Twenty years of its foundation, the ICC still campaigns for the universal ratification of the Rome Statute.¹⁴ At the end of the day, the ICC represents the “hope and expectations of normal people, who have lived through unprecedented times, who believe that justice is not a word but a promise that is going to be collectively delivered.”¹⁵ It is thus critical for the legitimacy of the Court that Prosecutor's decisions are not arbitrary or biased (or perceived so). Every decision of the Prosecutor has the potential to undermine the legitimacy of the Court. One very prominent critique the Court has received over its 20 years in function is its anti-African bias.¹⁶ Every person who has been tried in the ICC has been from the continent, including two heads of state.¹⁷ Every arrest warrant issued by the PTC was also for African nationals until the PTC II issued arrest warrants against Russian President Vladimir Putin and Commissioner for Children's Rights in the Office of the President of the Russian Federation Maria Alekseyevna Lvova-Belova for the war crime of unlawful deportation of population (children) (under articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute) two months ago.¹⁸

Upon its foundation, African countries were enthusiastic supporters of the Court. But over the years this relationship has deteriorated to a point where countries threatened to withdraw from the ICC itself.¹⁹ Apart from criticism from individual states, the African Union – the largest

¹⁴ ‘ICC President Promotes Universal Ratification of the Rome Statute at International Conference of Parliamentarians in Buenos Aires’ (*International Criminal Court*) <<https://www.icc-cpi.int/news/icc-president-promotes-universal-ratification-rome-statute-international-conference>> accessed 10 June 2023.

¹⁵ Karim A.A. Khan KC, ‘Statement by the ICC Prosecutor Mr. Karim A.A. Khan KC to the Assembly at the First Plenary Meeting’ <<https://asp.icc-cpi.int/sites/asp/files/2022-12/ASP21-STMT-PROS-ENG.pdf>> accessed 25 May 2023.

¹⁶ ‘Africa Question Is the International Criminal Court (ICC) Targeting Africa Inappropriately?’ (*The International Criminal Court Forum*) <<https://iccforum.com/africa>> accessed 10 June 2023.

¹⁷ ‘Cases | International Criminal Court’ (n 9).

¹⁸ ‘Situation in Ukraine: ICC Judges Issue Arrest Warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova’ (*International Criminal Court*) <<https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>> accessed 5 June 2023.

¹⁹ See withdrawal Notifications of South Africa, Gambia and Burundi ‘C.N.862.2016.TREATIES-XVIII.10 (Depositary Notification)’ <<https://treaties.un.org/doc/publication/cn/2016/cn.862.2016-eng.pdf>> accessed 5 June 2023; ‘C.N.805.2016.TREATIES-XVIII.10 (Depositary Notification)’ <<https://treaties.un.org/doc/publication/cn/2016/cn.805.2016-eng.pdf>> accessed 5 June 2023;

and most active intergovernmental organization in Africa passed a ‘Withdrawal Strategy,’ supporting the same.²⁰ The OTP has strongly held its position against this.²¹ However, over the last five years, the number of ICC investigations outside the African continent went from one to seven. This has however not encouraged more support for the ICC from the continent²² and continues to be one of the complex political challenges faced by the ICC.²³

Second, as the face of the ICC, the decisions of the Prosecutor reflect what the ICC stands for. He not only becomes the ‘gatekeeper’²⁴ of not only the Court but also symbolizes a very ambitious model of global justice the Court represents.²⁵ Its policy and procedure give shape and form to notions of ‘inter ests of justice,’ ‘interests of victims’ and ‘gravity of crimes’. Beyond creating benchmarks for these notions, the Court also sets out practice on complex and political dilemmas like ending long-standing and/or ongoing conflicts, normalizing relations with alleged criminals, reconciliation and reconstruction of post-conflict societies, and impunity and non-judicial transitional justice mechanisms.²⁶ As will be discussed in the following Chapter, conflicts between States and non-state actors who are focusing on conflict-

‘C.N.121.2017.TREATIES-XVIII.10 (Depositary Notification)’
<<https://treaties.un.org/doc/publication/CN/2017/CN.121.2017-Eng.pdf>> accessed 5 June 2023.

²⁰ ‘Decision on the International Criminal Court Doc. EX.CL/1006(XXX), Assembly of the Union, Twenty-Eighth Ordinary Session’ (African Union 2017) <https://au.int/sites/default/files/decisions/32520-sc19553_e_original_-_assembly_decisions_621-641_-_xxviii.pdf> accessed 10 June 2023.

²¹ ‘ICC’s Toughest Trial: Africa vs. “Infamous Caucasian Court”’ *Reuters* (28 October 2016) <<https://www.reuters.com/article/us-africa-icc-idUSKCN12S1U3>> accessed 10 June 2023.

²² ‘South Africa Plans Law Change over Putin ICC Arrest Warrant’ *BBC News* (30 May 2023) <<https://www.bbc.com/news/world-africa-65759630>> accessed 10 June 2023.

²³ Derrick M Nault, ‘Africa, the International Criminal Court, and Human Rights’ in Derrick M Nault (ed), *Africa and the Shaping of International Human Rights* (Oxford University Press 2020) 149 <<https://doi.org/10.1093/oso/9780198859628.003.0006>> accessed 10 June 2023.

²⁴ Hector Olasolo, ‘The Prosecutor of the ICC before the Initiation of Investigations: A Quasi-Judicial or a Political Body’ (2003) 3 *International Criminal Law Review* 87, 89 <<https://heinonline.org/HOL/P?h=hein.journals/intcrimlr3&i=93>> accessed 10 June 2023.

²⁵ Thomas Nagel, ‘The Problem of Global Justice’ (2005) 33 *Philosophy & Public Affairs* 113, 114 <<https://www.jstor.org/stable/3558011>> accessed 13 June 2023.

²⁶ Stephan Parmentier, ‘Global Justice in the Aftermath of Mass Violence. The Role of the International Criminal Court in Dealing with Political Crimes’ (2003) 41 *International Annals of Criminology* 203, 210 <<https://heinonline.org/HOL/P?h=hein.journals/iancrml41&i=203>> accessed 13 June 2023.

resolution and the prosecutors who focus on indictments of political leaders are very common.²⁷

Outline

The next chapter will look at the existing literature on prosecutorial discretion at the International Criminal Court. It will briefly examine the major debates over the key terms and concepts that are associated with the statutory provisions that give the Prosecutor discretion over what comes under the scrutiny of the ICC. The third chapter will analyse the procedural and substantive aspects of how prosecutorial discretion is used in practice at the ICC by looking at the preliminary examinations and their outcomes. Based on these, Chapter 4 will discuss how the exercise of discretion by the OTP shapes the ICC. It will examine if the choices made by the Prosecutor reinforce an image of the ‘ICC Prosecutor’ and an ‘International Criminal.’ The final chapter will look at the new Prosecutor’s actions so far and how they compound some of the concerns raised in the previous chapters. It will also look at why a structured and open approach to the exercise can go a long way in contributing to the legitimacy of the Court and the model of global justice it represents.

²⁷ See the discussion about the timing of indictment of marginalizing figures like Mladic by the ICTY and Charles Taylor by SCSL.

LITERATURE REVIEW

From HLA Hart's Legal Philosophy Discussion Group at Harvard,²⁸ the scope of what the limitation of judicial discretion should be has been a topic of passionate debate.²⁹ 'Discretion' has been loosely described as 'the power vested in an agent as part of an assignment to make legal decisions.'³⁰ Discretion has been widely accepted especially among positivist scholars as being critical to the application of the law, for both domestic and international law. It presents the subjective dimension of the exercise of law, an understanding that law should reflect the complexities of societies.³¹

International prosecutors occupy a unique space with respect to the scope of discretion. Domestic prosecutors aspire to achieve universal enforcement of criminal law and thus work with a narrow mandate for discretion for prosecution, prosecuting all crimes beyond *the de minimis* range.³² International prosecutors on the other hand have broad discretion to identify and prosecute only the gravest of international crimes.³³ They assume a special space especially because of its gatekeeping function ie, the power to decide whether a person should be charged, and if yes, with what charge.³⁴ This wide prosecutorial discretion has been a staple of international tribunals, as it leaves space for manoeuvring the ambiguous nature of the international legal framework itself. It provides international lawyers with the space to

²⁸ HLA Hart, 'Discretion Essay' (2013) 127 Harvard Law Review 652 <<https://heinonline.org/HOL/P?h=hein.journals/hlr127&i=664>> accessed 5 June 2023.

²⁹ Nicola Lacey, 'The Path Not Taken: HLA Hart's Harvard Essay on Discretion Essay' (2013) 127 Harvard Law Review 636 <<https://heinonline.org/HOL/P?h=hein.journals/hlr127&i=648>> accessed 5 June 2023.

³⁰ Ulf Linderfalk, 'Why Should We Distinguish Between the Exercise of Discretion and Interpretation?' (16 January 2019) 1 <<https://papers.ssrn.com/abstract=3316813>> accessed 4 June 2023.

³¹ Pies (n 10) 15.

³² Louise Arbour, 'The Need for an Independent and Effective Prosecutor in the Permanent International Criminal Court Discussion' (1999) 17 Windsor Yearbook of Access to Justice 207, 213 <<https://heinonline.org/HOL/P?h=hein.journals/windyrbaj17&i=212>> accessed 8 June 2023.

³³ Alexander La Greenawalt, 'Justice Without Politics? Prosecutorial Discretion and The International Criminal Court' (2007) 39 N.Y.U. J. Int'l L. & Pol 647.

³⁴ Kumaralingam Amirthalangam, 'Prosecutorial Discretion Is A Shield Not A Sword' (28 November 2019) 1 <<https://papers.ssrn.com/abstract=3494877>> accessed 8 June 2023.

manoeuvre the reality that interferes with “the dreams of visionary institution-builders.”³⁵ However, this also opens a door for the politicization of the OTP and thus leads to questioning of the integrity of the law itself.³⁶

Prosecutorial Discretion in International Tribunals

International tribunals have been, by their nature, created and functioned in the aftermaths of widespread conflict and violence. By the very nature of these, it is impossible to prosecute every potential offence. The prosecutors must, as a matter of necessity, be extremely selective in deciding which cases to investigate in order not to overload the system.³⁷ Prosecutorial discretion has been a key feature of the international justice system since the International Military Charter³⁸ in 1945.³⁹

What powers exactly define this ‘discretion’ has evolved over the years. Article 15 of the International Military Tribunal Charter states that: “The Chief Prosecutors shall individually, and acting in collaboration with one another, also undertake the following duties:

- (a) the investigation, collection, and production before or at the Trial of all necessary evidence,

³⁵ Jan Klabbbers, ‘Friedrich Kratochwil. The Status of Law in World Society: Meditations on the Role and Rule of Law’ (2014) 25 *European Journal of International Law* 1195, 1199 <<https://doi.org/10.1093/ejil/chu082>> accessed 8 June 2023.

³⁶ Poes (n 10) 3.

³⁷ Matthew R Brubacher, ‘Prosecutorial Discretion within the International Criminal Court’ (2004) 2 *Journal of International Criminal Justice* 71, 75–77.

³⁸ United Kingdom of Great Britain and Northern Ireland, United States of America, France and Union of Soviet Socialist Republics, ‘Charter of the International Military Tribunal - Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (“London Agreement”)’ <<https://www.refworld.org/docid/3ae6b39614.html>> accessed 24 February 2023.

³⁹ WA Schabas, ‘Prosecutorial Discretion v. Judicial Activism at the International Criminal Court’ (2008) 6 *Journal of International Criminal Justice* 731, 731–732 <<https://academic.oup.com/jicj/article-lookup/doi/10.1093/jicj/mqn045>> accessed 30 January 2023.

- (b) the preparation of the Indictment for approval by the Committee in accordance with paragraph of Article 14 hereof,
- (c) the preliminary examination of all necessary witnesses and of all Defendants,
- (d) to act as prosecutor at the Trial,
- (e) to appoint representatives to carry out such duties as may have assigned them,
- (f) to undertake such other matters as may appear necessary to them for the purposes of the preparation for and conduct of the Trial.”⁴⁰

Even though prosecutorial discretion was guaranteed in the IMT Charter, both the Nuremberg and the Tokyo tribunals were heavily criticized for the influences of power politics. One of the main criticisms was that the prosecutors acted as representatives of their own government.⁴¹

Institutional structures were designed for ICTY and ICTR to ensure that this does not repeat.⁴² In the Statute of the International Criminal Tribunal for the Former Yugoslavia, prosecutorial discretion was defined as follows in Article 16:

- “(1) The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.
- (2). The Prosecutor shall act independently as a separate organ of the International

⁴⁰ United Kingdom of Great Britain and Northern Ireland, United States of America, France and Union of Soviet Socialist Republics (n 38) art 15.

⁴¹ Brubacher, ‘Prosecutorial Discretion within the International Criminal Court’ (n 37) 75–76.

⁴² Schabas, ‘Prosecutorial Discretion v. Judicial Activism at the International Criminal Court’ (n 39) 731–733.

Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.”⁴³

Article 15 (4) also states that the Prosecutor “shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases.”⁴⁴

Prosecutorial Discretion at the ICC

The role of the Prosecutor at the ICC (in comparison to other international tribunals) is quite different. Other courts of international nature (IMT at Nuremberg and Tokyo, ICTY, ICTR, SCSL, ECCC)⁴⁵ were all established with jurisdiction over a very particular situation over a specific time period or in the context of a specific conflict. They did not have the authority to either decide against investigating or decide to expand their jurisdiction to other situations.

However, the scope of ICC jurisdiction is more flexible and can theoretically act worldwide according to specific statutory conditions.⁴⁶ Depending upon preliminary examinations⁴⁷ the Court can investigate potentially any situation that is not outside its jurisdiction. The ICC thus

⁴³ ‘Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (International Tribunal for the Former Yugoslavia)’ (*OHCHR*) art 16 <<https://www.ohchr.org/en/instruments-mechanisms/instruments/statute-international-tribunal-prosecution-persons-responsible>> accessed 10 April 2023.

⁴⁴ *ibid* 15.

⁴⁵ See Article 1 of Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994; Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 1993; (n 38); Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea; Agreement for and Statute of the Special Court for Sierra Leone, 6 January 2002 2002.

⁴⁶ Any State which is not a Party of the Statute may lodge a declaration with the Registrar and accept the exercise of jurisdiction by the Court with respect to any particular crime, Rome Statute of the International Criminal Court art 12; *ibid* 13.

⁴⁷ The Office of the Prosecutor, ‘Policy Paper on Preliminary Examination’ 7 <https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf> accessed 26 May 2023.

represents a prominent model of international justice that aspires to achieve universal jurisdiction over international crimes.⁴⁸ This wide jurisdiction makes it imperative for the Court to be selective in which crimes are being tried at the Court. The C

The ICC Prosecutor thus becomes a central character being the chief ‘strategist and gatekeeper’ of the Court.⁴⁹ However, the Prosecutor on a daily basis is on one hand stuck between the constraints of legal ambiguities of the ICC framework, lack of enforcement powers and other practical constraints and the coherence of procedure that criminal law emulates to secure its legitimacy against arbitrariness.⁵⁰

Drafting History

At the ICC, an institutional structure that guarantees the independence of the prosecutor to initiate criminal proceedings was meant also to distance itself from the legacies of victor’s justice and impunity that plagued the Military tribunals after World War 2.⁵¹ Thus, when a new permanent court was to be set up to try international crimes, the effort was put into having structural guarantees that would provide a certain level of independence and pragmatism to the Prosecutor.

Understanding the politics of establishing an international criminal tribunal is critical to examining the way it functions.⁵² The current statutory system is the result of a well-negotiated settlement between the ‘liberalists’ and ‘realists’ during drafting.⁵³ Spearheaded by NGOs the

⁴⁸ Pues (n 10) 2.

⁴⁹ Luc Reydam and others (eds), ‘1 Introduction’, *International Prosecutors* (Oxford University Press 2012) 2 <<https://doi.org/10.1093/acprof:oso/9780199554294.003.0001>> accessed 5 June 2023.

⁵⁰ Pues (n 10) 4.

⁵¹ Luc Reydam and others (eds), ‘2 The Politics of Establishing International Criminal Tribunals’, *International Prosecutors* (Oxford University Press 2012) 71 <<https://doi.org/10.1093/acprof:oso/9780199554294.003.0002>> accessed 5 June 2023.

⁵² *ibid* 7.

⁵³ Brubacher, ‘Prosecutorial Discretion within the International Criminal Court’ (n 37) 72–75.

former wanted an independent Prosecutor with the ability to initiate proceedings *ex officio* as they felt it was a precondition for creating an institution capable of holding all persons accountable for committing crimes of universal concern, regardless of their power or position. According to them, the ICC was the manifestation of aspirations to promote the building of ethical legal processes through the creation of institutions capable of promoting due process and the rule of law.⁵⁴ The ‘realists,’ led by the US had a different idea of the primary interest of the ICC and thus the prosecutor. According to them, the ICC and international law in general had their primary obligation to states and is derived from the interrelationship of states who consent to be bound only by those rules they perceive to be within their own interest. Following this logic, the creation of an OTP with independent prosecutorial discretion is an attempt to create a non-state actor, capable of independently modifying state behaviour.⁵⁵

The adopted Rome Statute is a compromise between the two. Article 15(1) allows the Prosecutor to open investigations *proprio motu* even when there is no referral by the concerned State or any State Party.⁵⁶ But this is limited by Article 15(3) which requires the Pre-Trial Chamber, to authorize the request by the Prosecutor for the same.⁵⁷ However, apart from judicial oversight, there is little in the ICC system that governs the exercise of discretion. Detailed guidelines to structure discretion (rather than a case-by-case review by the PTC) were not adopted to provide flexibility to the ICC system.⁵⁸ This flexibility is important to ensure that the Prosecutor can make highly selective decisions to fulfil the mandate of the Court.

⁵⁴ *ibid* 73.

⁵⁵ *ibid* 73–74.

⁵⁶ Rome Statute of the International Criminal Court art 15.

⁵⁷ *ibid* 15(3).

⁵⁸ Pues (n 10) 3.

The ICC Prosecutor can exercise discretion at various stages of the proceedings. This discretion has two dimensions – procedural and interpretative.⁵⁹ Procedural discretion involves flexibility in choosing the course of action whereas the interpretative dimension focuses on the application of broad notions that are left open in the Rome Statute, that are often tied to the factual circumstances of the situation in front of the ICC.⁶⁰

Prosecutor in the Rome Statute

The Rome Statute dictates three “trigger mechanisms” for the exercise of jurisdiction by the ICC. These are situated in a hierarchy of institutional safeguards that protect state sovereignty.⁶¹ The first two – referral by the Security Council and a State Party – Article 13(b) and 14 respectively, give no role to the prosecutor.⁶²

The triggering mechanism is to allow the Court to exercise its jurisdiction (Article 13 ICC). These are situated in a hierarchy of institutional safeguards that protect state sovereignty.⁶³ The first two – referral by the Security Council and a State Party – Article 13(b) and 14 respectively, give no role to the Prosecutor.

It is also here, the question of self-referral or voluntary state referral comes in. There is no reference to this novel concept in the drafting history of the Rome Statute.⁶⁴ It emerged in the OTP under the first Chief Prosecutor in 2003 as a policy of “inviting voluntary referrals by

⁵⁹ Poes also conceptualizes procedural as ‘strong’ and interpretative as ‘weak’ discretion following Dworkin’s reflections on discretion in Ronald Dworkin, *Taking Rights Seriously* (A&C Black 2013); Poes (n 10) 6.

⁶⁰ Poes (n 10) 6.

⁶¹ Brubacher, ‘Prosecutorial Discretion within the International Criminal Court’ (n 37) 77.

⁶² Schabas, ‘Prosecutorial Discretion v. Judicial Activism at the International Criminal Court’ (n 39) 734.

⁶³ Brubacher, ‘Prosecutorial Discretion within the International Criminal Court’ (n 37) 77.

⁶⁴ See review of the *travaux préparatoires* of Article 14 in W. Schabas, ‘Complementarity in Practice: Creative Solutions or a Trap for the Court?’, Federica Gioia, *The International Criminal Court and National Jurisdictions* (Mauro Politi ed, 0 edn, Routledge 2016) <<https://www.taylorfrancis.com/books/9781351887571>> accessed 8 June 2023.

territorial states as a first step in triggering the jurisdiction of the court”⁶⁵ to encourage and facilitate state cooperation with an investigation.⁶⁶

However, the third trigger mechanism, encompassed in Article 15 allows the Prosecutor to identify situations within the jurisdiction of the Court. Article 15 (1), reads:⁶⁷

“The Prosecutor may initiate investigations *proprio motu* based on information on crimes within the jurisdiction of the Court.”

Unlike Articles 13(b) and 14, this was not included in the draft of the Statute presented in the United Nations General Assembly in 1994 by the International Law Commission.⁶⁸ It is the post-ILC phase of negotiation in the Rome conference that led to the inclusion of one of the “great and controversial innovations⁶⁹” of the Rome Statute.

However, once a situation is deemed to have triggered the jurisdiction of the Court, the prosecutor has almost complete discretion to choose cases. The prosecutor is under no obligation to initiate proceedings once a situation has been referred to the OTP by the state or security council.⁷⁰ The Prosecutor conducts a preliminary examination to decide whether the situation warrants an ICC investigation or not based on Article 53 (1) of the Rome Statute states:⁷¹

⁶⁵ The Office of the Prosecutor, ‘Report on the Activities Performed During the First Three Years (June 2003 – June 2006)’ (2006) 7 <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/D76A5D89-FB64-47A9-9821-725747378AB2/143680/OTP_3yearreport20060914_English.pdf> accessed 8 June 2023.

⁶⁶ Kenneth A Rodman and Petie Booth, ‘Manipulated Commitments: The International Criminal Court in Uganda’ (2013) 35 Human Rights Quarterly 271, 272 <<https://www.jstor.org/stable/24518017>> accessed 11 April 2023.

⁶⁷ Rome Statute of the International Criminal Court art 15.

⁶⁸ Allison Marston Danner, ‘Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court’ (2003) 97 American Journal of International Law 510, 513 <https://www.cambridge.org/core/product/identifier/S0002930000041191/type/journal_article> accessed 8 June 2023.

⁶⁹ Schabas, ‘Prosecutorial Discretion v. Judicial Activism at the International Criminal Court’ (n 39) 734.

⁷⁰ Brubacher, ‘Prosecutorial Discretion within the International Criminal Court’ (n 37) 734.

⁷¹ Rome Statute of the International Criminal Court art 53.

“The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute.”

The use of the word ‘may’ rather than ‘shall’ regarding the Prosecutor’s ability to launch an investigation, as well as the fact that Article 53(2) allows the Prosecutor to decline to proceed with a prosecution after a preliminary investigation, give the Prosecutor primary competence in proceeding with an investigation and in determining the charges to be brought against an indictee.⁷² This is also provided as a way of conserving the resources of the Court.⁷³ By the nature of the situations under the purview of the ICC, there needs to be a mechanism to choose individuals who will be prosecuted at the ICC. The ICC has criteria for deciding if a case falls under its jurisdiction. But of all the cases that pass the criteria of jurisdiction and admissibility, the prosecutor decides which cases to go ahead with.

In case the jurisdiction was triggered by Article 14 or referred to the UNSC, the Prosecutor can proceed with the investigation if all the statutory criteria mentioned in Article 53 are met to establish a ‘reasonable basis to proceed’⁷⁴ with the investigation into the situation.⁷⁵

For those preliminary examinations initiated based on Article 15, like those triggered by Articles 14 and 13(b), there is an initial stage of preliminary investigations. Here, the Prosecutor makes an initial assessment as to whether a *prima facie* case exists. These are subject to a stricter regime of procedural safeguards than those that are launched in response to referrals made by states.⁷⁶ This was a compromise made during the Preparatory Committee, to

⁷² Brubacher, ‘Prosecutorial Discretion within the International Criminal Court’ (n 37) 75.

⁷³ *ibid* 79.

⁷⁴ Rome Statute of the International Criminal Court art 53.

⁷⁵ Situation, refers to the more general context of a situation of crisis that is generally ‘defined in terms of temporal, territorial and in some cases personal parameters, *Situation in the Democratic Republic of the Congo, Decision on Applications for Participation in the Proceedings of VPRS-1, VPRS-2, VPRS-3, VPRS-4, VPRS-5, VPRS-6* [2006] [65].

⁷⁶ Schabas, ‘Prosecutorial Discretion v. Judicial Activism at the International Criminal Court’ (n 39) 734.

allow the prosecutor to have more independence.⁷⁷ If the Prosecutor determines that a prima facie case does exist, he must submit the case to the Pre-Trial Chamber for authorization before launching an in-depth investigation.⁷⁸ Even though this slows down the investigations it ensures that in the absence of political backing from a state or the Security Council, the Prosecutor will have the judicial backing of the Court.⁷⁹

This decision to proceed with an investigation is made based on three factors. First, “The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed.”⁸⁰ Second, “the case is or would be admissible under Article 17”⁸¹ and third, “Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.”⁸²

Even though sounds subjective the ‘Reasonable basis test’⁸³ is an objective test whose purpose is to determine whether there is a sufficient evidential basis for pursuing a prosecution. Article 15(3), (4) and (6) are applicable to determine a ‘reasonable basis for an investigation,’ and Article 53(1) to whether there is a reasonable basis ‘to proceed under the Statute’ are concerned with determining whether there is sufficient information to indicate that a crime within the jurisdictional and admissibility restrictions has been or is being committed.⁸⁴ Article 53(2) requires sufficient evidence for the Pre-Trial Chamber to issue a warrant or summons. After

⁷⁷ Danner (n 68) 513.

⁷⁸ Rome Statute of the International Criminal Court art 53.

⁷⁹ Cale Davis, ‘Political Considerations in Prosecutorial Discretion at the International Criminal Court’ (2015) 15 *International Criminal Law Review* 170, 173 <<https://heinonline.org/HOL/P?h=hein.journals/intcrimlr15&i=174>> accessed 4 June 2023.

⁸⁰ Rome Statute of the International Criminal Court art 53(1)(a).

⁸¹ *ibid* 53(1)(b).

⁸² *ibid* 53(1)(c).

⁸³ Brubacher, ‘Prosecutorial Discretion within the International Criminal Court’ (n 37) 79–80.

⁸⁴ *Rules of Procedure and Evidence* (International Criminal Court 2019) art 48 <<https://www.icc-cpi.int/sites/default/files/Publications/Rules-of-Procedure-and-Evidence.pdf>> accessed 27 February 2023.

this, under Article 58, the Prosecutor will then be required to apply a higher threshold of reasonability to determine whether there is a ‘sufficient basis for a prosecution.’⁸⁵

The subjective part of prosecutorial discretion comes with the interpretation of ‘gravity,’ ‘interests of justice’ and ‘complementarity’ by the Prosecutor while making the determination whether to proceed or not. Article 17 regarding “Issues of Admissibility” and Article 53 which concerns the “Initiation of Investigation” are the two clauses that provide for the exercise of prosecutorial discretion based on “gravity,” “complementarity” and “interest of justice.” Any crime falling under the jurisdiction of ICC is those that require grave and serious consideration. Thus, there is much discretion that is applied by the Prosecutors Office in choosing which of those warrant investigation and prosecution.

However, ever since the first ICC prosecutor Luis Moreno Ocampo took office, academics highlighted the need for having a clear policy on how to effectively establish the Rule of law while at the same time dealing with the need to have state support to be able to effectively work in those very situations.⁸⁶ Even today, apart from the statutory provisions the Prosecutor (and the Court) has yet to implement a structured and principled exercise of this discretion.⁸⁷

Complementarity

Beyond an element of prosecutorial discretion, complementarity is at the heart of the ICC system. “Whenever there is genuine State action, the court cannot and will not intervene. But States not only have the right but also the primary responsibility to prevent, control and prosecute atrocities. Complementarity protects national sovereignty and at the same time

⁸⁵ Rome Statute of the International Criminal Court art 58.

⁸⁶ Brubacher, ‘Prosecutorial Discretion within the International Criminal Court’ (n 37).

⁸⁷ Poes (n 10) 3.

promotes state action.”⁸⁸ This is based on the principle that the primary jurisdiction to prosecute any crime is with the national court and that the ICC prosecutor steps in only if the domestic judicial system is unwilling or unable to investigate or prosecute.⁸⁹

Interpretation of the Criteria

Law and Practice of ‘Gravity’

Article 17(d) of the Statute states that a case is inadmissible if:⁹⁰

“The case is not of sufficient gravity to justify further action by the Court.”

Article 17 is also referred to under Article 53 as a necessary check for the initiation of investigation and prosecution.⁹¹

The idea of the “gravity” of crimes in the exercise of prosecutorial discretion was almost completely absent in both the negotiations for the Rome Statute and a lot of earlier commentary on the same, mostly eclipsed by ideas of ‘complementarity’ and ‘admissibility.’⁹²

Evolution of Concept through Practice

‘Gravity’ as a significant factor in discretion was also absent in the first year of the Court's function. It was absent in the report of the Prosecutor in July 2003, where he discussed Article

⁸⁸ Luis Gabriel Moreno Ocampo, ‘Statement Made by Mr. Luis Moreno-Ocampo at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court’.

⁸⁹ William A Schabas, ‘Complementarity in Practice’: Some Uncomplimentary Thoughts’ (2008) 19 Criminal Law Forum 5 <<http://link.springer.com/10.1007/s10609-007-9054-5>> accessed 9 June 2023.

⁹⁰ Rome Statute of the International Criminal Court art 17.

⁹¹ *ibid* 53.

⁹² For example, see CASSESE, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY (2002), <http://opil.ouplaw.com/view/10.1093/law/9780198298625.001.0001/law-9780198298625> (last visited Jun 9, 2023), in this authoritative text the word ‘gravity’ does not even appear in the index to the commentary, in striking contrast with the word ‘complementarity’, whose entries in the index consume the best part of a page.

15 communications received and decided that the situation in Ituri in DRC warranted his immediate attention.⁹³ Even here, his decision was based on subject matter jurisdiction and complementarity.

The concept as an exercise of discretion was first used when the then Prosecutor Ocampo had to defend his decision of issuing arrest warrants only against one of the parties involved in the situation in Uganda.⁹⁴ Uganda was the first State party who answered the Prosecutor's invitation⁹⁵ and voluntarily referred crimes committed in their own territory to the ICC. The referral letter by the State pointed at the crimes committed by the Lord's Resistance Army (LRA) in northern Uganda.⁹⁶ For almost two decades the LRA has been committing grave atrocities on the Acholi people of Northern Uganda in the name of their freedom and liberation.⁹⁷ However, there were also allegations from various civil society organizations that the government forces - Ugandan People's Defence Forces (UPDF), have also been involved in atrocities in Acholi in the guise of counter-insurgency operations.⁹⁸

Despite the referral being focused on one side of the conflict, and the Prosecutor releasing a statement on 'future co-operation between Uganda and the International Criminal Court [...] for locating and arresting the LRA leadership' the Prosecutor notified Uganda that the OTP would "interpret the referral as concerning all crimes under the Statute committed in Northern

⁹³ Press Release, 'Communications Received By The Office of the Prosecutor of the ICC' (16 July 2003) <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/9B5B8D79-C9C2-4515-906E-125113CE6064/277680/16_july_english1.pdf> accessed 9 June 2023.

⁹⁴ Brubacher, 'Prosecutorial Discretion within the International Criminal Court' (n 37) 737–738.

⁹⁵ The Office of the Prosecutor, 'Report on the Activities Performed During the First Three Years (June 2003 – June 2006)' (n 65).

⁹⁶ Office of the Prosecutor, 'Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court at the Informal Meeting of Legal Advisors of Ministries of Foreign Affairs' <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/9D70039E-4BEC-4F32-9D4A-CEA8B6799E37/143836/LMO_20051024_English.pdf> accessed 27 February 2023.

⁹⁷ Payam Akhavan, 'The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court' (2005) 99 *The American Journal of International Law* 403, 406–409 <<https://www.jstor.org/stable/1562505>> accessed 9 June 2023.

⁹⁸ Rodman and Booth (n 66) 280–282.

Uganda and that our investigation would be impartial.”⁹⁹ However, when the arrest warrants were made public, they were all against LRA commanders.

When he was criticised for being ‘one-sided,’¹⁰⁰ he defended his stance to prosecute the LRA (and not the UPDF) in a statement that read,

*“We analysed the gravity of all crimes in Northern Uganda committed by the LRA and Ugandan forces. Crimes committed by the LRA were much more numerous and of much higher gravity than alleged crimes committed by the UPDF. We, therefore, started with an investigation of the LRA.”*¹⁰¹

Soon after, ‘gravity’ became the most important criterion, even evolving rapidly into something more fundamental to the working of the ICC. It was used in the selection of cases in DRC, the Situation in Iraq, the report to the Security Council on Darfur so on and so forth.¹⁰² In Ocampo’s words:

*“Crimes within our jurisdiction are by definition grave crimes of international concern. But gravity in our Statute is not only a characteristic of the crime but also an admissibility factor, which seems to reflect the wish of our founders that the ICC should focus on the gravest situations in the world.”*¹⁰³

However, even when it was used regularly, there was still no standard for the interpretation of the concept. In the situation in Uganda, one aspect the Prosecutor highlighted was the number

⁹⁹ Office of the Prosecutor, ‘Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court at the Informal Meeting of Legal Advisors of Ministries of Foreign Affairs’ (n 96).

¹⁰⁰ Amnesty International, ‘Uganda: First Ever Arrest Warrants by International Criminal Court - a First Step towards Addressing Impunity’ (14 October 2005).

¹⁰¹ Office of the Prosecutor, ‘Statement by the Chief Prosecutor on the Uganda Arrest Warrants’ 2–3 <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/3255817D-FD00-4072-9F58-FDB869F9B7CF/143834/LMO_20051014_English1.pdf> accessed 27 February 2023.

¹⁰² Schabas, ‘Prosecutorial Discretion v. Judicial Activism at the International Criminal Court’ (n 39) 739–741.

¹⁰³ Office of the Prosecutor, ‘Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court at the Informal Meeting of Legal Advisors of Ministries of Foreign Affairs’ (n 96) 8–9.

of people killed or otherwise had crimes committed against their physical integrity and its impact.¹⁰⁴ A case against the investigation of wilful killings of Iraqi citizens by British troops was made by arguing that there were substantially more victims in Uganda and DRC and thus was of less ‘gravity.’¹⁰⁵ If Uganda set gravity as a criterion to defend prosecutorial choices, Iraq set gravity as a parameter for prioritization of situations.¹⁰⁶ However, when the arrest warrant against Lubanga (in the situation in Uganda) was issued it was only for the crime of enlistment of child soldiers,¹⁰⁷ and no charges of murder were invoked.¹⁰⁸ Here, the Prosecutor and the Pre-Trial chamber followed a qualitative approach referring to ‘the social alarm such conduct may have caused in the international community’ rather than looking at the number of victims.¹⁰⁹

Here, we can see two major holes in the interpretation of gravity, the first one is comparing different types of crimes to determine ‘gravity.’ There is no established hierarchy at the ICC for war crimes and crimes against humanity.¹¹⁰ There was no clear policy by the Prosecutor or determination by the Pre-Trial Chamber on whether the determination of gravity can be done by comparing wilful killings in Iraq and the recruitment of child soldiers in Congo. The second gap in this would be the question of whether during the check for gravity, the Prosecutor will focus on the individual case in question or the conflict itself.¹¹¹ The Statement by the OTP that

¹⁰⁴ Office of the Prosecutor, ‘Statement by the Chief Prosecutor on the Uganda Arrest Warrants’ (n 101).

¹⁰⁵ The Office of the Prosecutor, ‘Letter from Luis Moreno-Ocampo, Chief Prosecutor of the International Criminal Court to the Senders of Article 15 Communications Regarding the Situation in Iraq.’ (9 February 2006) <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf> accessed 30 May 2023.

¹⁰⁶ Badagard and Klamberg (n 13) 714.

¹⁰⁷ When the Arrest Warrant was issued, Lubanga was already in custody in the Congo awaiting prosecution before national courts on charges of genocide and crimes against humanity. Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Decision on the Prosecutor’s Application for a warrant of arrest. Article 58 (2006).

¹⁰⁸ Schabas, ‘Complementarity in Practice’ (n 89) 24.

¹⁰⁹ *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Decision on the Prosecutor’s Application for a warrant of arrest. Article 58* (n 107).

¹¹⁰ Schabas, ‘Prosecutorial Discretion v. Judicial Activism at the International Criminal Court’ (n 39) 741.

¹¹¹ William A Schabas, ‘Chapter 14. Prosecutorial Discretion And Gravity’ in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill | Nijhoff 2009) 546 <https://brill.com/view/book/edcoll/9789004180758/Bej.9789004166554.i-774_016.xml> accessed 9 June 2023.

situation in DRC is graver than in Iraq was based on such a comparison. It does not look fair to compare the number of total victims in the conflicts of DRC or Uganda to the individual torture victims in Iraq. As seen in the Lubanga case, when selected realistically, the victims of individual cases make up only a fraction of the total.¹¹² After declining to investigate Iraq, the OTP used an interpretation of gravity to decline investigations into the Situation referred by the State of the Union of Comoros. Here also, the OTP considered the scale of the alleged crimes to be relatively limited compared to other “cases” under investigation.¹¹³

Current Policy on ‘Gravity’

According to the Prosecutorial Strategy published by the Office of the Prosecutor in 2006, the assessment of ‘gravity’ would include the gravity of the crimes and the level of responsibility of alleged perpetrators. ‘Gravity of crimes’ would include a quantitative and qualitative assessment of “factors relevant in assessing gravity include the scale of the crimes; the nature of the crimes; the manner of commission of the crimes; and the impact of the crimes.”¹¹⁴ The definitions were further explained as the following:

The scale of victims “may be assessed in light of, inter alia, the number of direct and indirect victims, the extent of the damage caused by the crimes, in particular the bodily or psychological harm caused to the victims and their families, and their geographical or temporal spread.”¹¹⁵

The nature of the crimes “refers to the specific factual elements of each offence such as killings, rapes, other sexual or gender-based crimes, crimes committed against or affecting children,

¹¹² *ibid* 245.

¹¹³ Badagard and Klamberg (n 13).

¹¹⁴ The Office of the Prosecutor, ‘Report on Prosecutorial Strategy’ 5–6 <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf> accessed 27 February 2023.

¹¹⁵ The Office of the Prosecutor, ‘Policy Paper on Case Selection and Prioritisation’ para 38 <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf> accessed 9 June 2023.

persecution, or the imposition of conditions of life on a group calculated to bring about its destruction.”¹¹⁶

The manner of commission refers to “the means employed to execute the crime, the extent to which the crimes were systematic or resulted from a plan or organised policy or otherwise resulted from the abuse of power or official capacity, the existence of elements of particular cruelty, including the vulnerability of the victims, any motives involving discrimination held by the direct perpetrators of the crimes, the use of rape and other sexual or gender-based violence or crimes committed by means of, or resulting in, the destruction of the environment or of protected objects.”¹¹⁷

Impact of crimes would include an assessment of “the increased vulnerability of victims, the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities” with special consideration to crimes that result in “the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land.”¹¹⁸

Law and Practice of ‘Interests of Justice’

Article 53 of the ICC Statute authorizes the Prosecutor to decline to proceed with an investigation of any crime under its jurisdiction and admissible under Article 17 if upon evaluation of the available information the Prosecutor concludes that:¹¹⁹

¹¹⁶ *ibid* 39.

¹¹⁷ *ibid* 40.

¹¹⁸ *ibid* 41.

¹¹⁹ Rome Statute of the International Criminal Court.

“There are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.”

Similarly, upon investigation, the Prosecutor can decide not to proceed with prosecution if:¹²⁰

“A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.”

Of these, the ‘gravity of the crime’ and the ‘interests of victims’ are also included in the admissibility criteria that the Court shall consider under Article 17 of the ICC Statute.¹²¹ Article 53 is the only provision in the Rome Statute where ‘interests of justice’ is included in the application of any discretion, prosecutorial or otherwise. However, Article 53 does not specify what ‘interest of justice’ entails and leaves a lot of room for interpretation on the part of the Prosecutor.

Apart from the Prosecutor and the Court,¹²² there is a passionate debate about the ‘interests of justice’ in the wider international justice community.¹²³ This covers the ‘public policy dimension’ of the Court.¹²⁴ At the heart of this discussion on the interpretation of the ‘interests

¹²⁰ *ibid* 53.

¹²¹ *ibid* 17.

¹²² The Office of the Prosecutor, “Policy Paper on the Interests of Justice”; Various Chambers of the ICC has over the years ruled about the ‘interests of justice’ in Article 53; see Trendafilova, Kaul, and Tarfusser, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya; Mindua, Akane, and Aitala, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan; Hofmański and Morrison, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan.

¹²³ See Kai Ambos, ‘Interests of Justice? The ICC Urgently Needs Reforms’ (*EJIL: Talk!*, 11 June 2019) <<https://www.ejiltalk.org/interests-of-justice-the-icc-urgently-needs-reforms/>> accessed 4 June 2023; Gilbert Bitti, ‘The Interests of Justice- Where Does That Come from? Part I’ (*EJIL: Talk!*, 13 August 2019) <<https://www.ejiltalk.org/the-interests-of-justice-where-does-that-come-from-part-i/>> accessed 4 June 2023; David Luban, ‘The “Interests of Justice” at the ICC: A Continuing Mystery’ (*Just Security*, 17 March 2020) <<https://www.justsecurity.org/69188/the-interests-of-justice-at-the-icc-a-continuing-mystery/>> accessed 4 June 2023; Ankita Gupta, “‘The Interests of Justice’ – The ICC and the Case of Afghanistan | OHRH” <<https://ohrh.law.ox.ac.uk/the-interests-of-justice-the-icc-and-the-case-of-afghanistan/>> accessed 4 June 2023.

¹²⁴ Matthew R Brubacher, ‘Prosecutorial Discretion within the International Criminal Court’ (2004) 2 *Journal of International Criminal Justice* 71, 71 <<https://doi.org/10.1093/jicj/2.1.71>> accessed 2 June 2023.

of justice' lies the fundamental question of whether it is possible to separate international law from international politics. There have been multiple instances in the field of international justice where the tension between justice and politics has taken centre stage. Apart from formal amnesties, the premise of subordinating criminal proceedings to negotiate with the very leaders who may face prosecution, in order to use their cooperation to end conflicts is a running theme in international peace talks.

There is a sustained debate on whether political consideration should be a part of legal discretion. On one hand, the legalist tradition stands for the complete isolation of the two.¹²⁵ This follows a narrow interpretation of the Statute to preclude any international policy or political considerations, enabling the prosecutor to act on his primary duty – to prosecute international crimes – without having to compromise on other factors.¹²⁶ It is based on the strong belief that only an uncompromising approach to criminal justice can lead to the Court being a deterrent to international crimes and human rights abuses and in terms of fostering peace and democracy in conflict and post-conflict situations.¹²⁷

However, there is another group of 'pragmatists' that argues that prosecutorial discretion should be broad as the ICC prosecutor, by definition, represents the entire international community. His/her actions can potentially have political ramifications – positive or negative – on the political environment of both the State over which he/she is exercising jurisdiction, but also other international stakeholders in the situation.¹²⁸ They also argue that by including international peace and security considerations in the Rome Statute via the Article 13(b), which

¹²⁵ Kenneth A Rodman, 'Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court' (2009) 22 *Leiden Journal of International Law* 99 <<https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/is-peace-in-the-interests-of-justice-the-case-for-broad-prosecutorial-discretion-at-the-international-criminal-court/C94B0BB6052B0459923026EC57FE64C6>> accessed 27 February 2023.

¹²⁶ *ibid* 101.

¹²⁷ *ibid*.

¹²⁸ Brubacher, 'Prosecutorial Discretion within the International Criminal Court' (n 37) 81.

reads which provides the provision for the Security council to refer situations, it follows a similar logic when the rationale for the referral is the Chapter VII of the United Nations which reads:¹²⁹

“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”

The argument here is that concerns of international peace and security are already institutionalized within the ICC¹³⁰ by this. These arguments are often supported by instances where rigid legalism led to unpleasant consequences including destabilizing already fragile political scenarios and derailing the failure of peace negotiations.

Evolution of Concept

The OTP in its initial years sought to try to define the concept of ‘interests of justice.’ In the biannual consultation in 2004 with non-governmental organizations (NGOs) the OTP circulated a "Consultation Proposal on the Interests of Justice" where the OTP solicited comments by NGOs regarding the meaning of the phrase "in the interests of justice" in the Rome Statute.¹³¹ In response to this, the leading NGOs Amnesty International and Human Rights Watch produced two policy papers proposing a narrow interpretation of Article 53.

¹²⁹ United Nations, ‘UN Charter’ (*United Nations*) <<https://www.un.org/en/about-us/un-charter>> accessed 8 November 2022.

¹³⁰ Brubacher, ‘Prosecutorial Discretion within the International Criminal Court’ (n 37).

¹³¹ ‘The Meaning of “the Interests of Justice” in Article 53 of the Rome Statute’ <<https://www.hrw.org/news/2005/06/01/meaning-interests-justice-article-53-rome-statute>> accessed 27 February 2023.

Amnesty focussed on two main points, the first one concerning the ability (or lack thereof) of the OTP to suspend investigations for political reasons¹³² and the second being a more limited scope for the use of ‘interests of justice’ to suspend an investigation.¹³³

Articles 16, 18 and 19 are only¹³⁴ three provisions in the Rome Statute authorizing suspensions of investigations, of which Article 16 is the only provision that allows the suspension of an investigation or prosecution for political reasons.¹³⁵ Article 16 of the ICC states that:¹³⁶

“No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”

According to AI, the Rome Diplomatic Conference had concluded that the prosecutor does not have any ‘political power’ to suspend investigations for political reasons and that the drafters intended this political power to be exercised only by a political body, in this case, the Security Council.¹³⁷ Such a determination is considered to be a political decision and thus should not be taken by the Prosecutor who should be the representative of an independent and impartial

¹³² The AI Letter comes in the backdrop of speculations that the OTP will be willing to suspend the investigations by invoking ‘interests of justice’ to facilitate the Juba Peace process in northern Uganda, see Noah Weisbord, *Opinion / When peace and justice clash*, THE NEW YORK TIMES, Apr. 29, 2005, <https://www.nytimes.com/2005/04/29/opinion/when-peace-and-justice-clash.html> (last visited Jun 9, 2023); The Meaning of “the Interests of Justice” in Article 53 of the Rome Statute, *supra* note 102; In the end, the government failed to convince the LRA that the arrest warrants could be suspended/withdrawn, ending any hopes of successfully concluding the Juba Peace talks. Kasaija Phillip Apuuli, *The Government of Uganda, the ICC Arrest Warrants for the LRA Leaders and the Juba Peace Talks: 2006-2008*, (2013), <https://papers.ssrn.com/abstract=2363595> (last visited Jun 9, 2023).

¹³³ Amnesty International, ‘Open Letter to the Chief Prosecutor of the International Criminal Court: Comments on the Concept of the Interests of Justice’.

¹³⁴ Article 53 only provides the Prosecutor the discretion for the initiation of an investigation or prosecution, but it does not provide for suspension of investigation.

¹³⁵ Amnesty International (n 133).

¹³⁶ Rome Statute of the International Criminal Court art 16.

¹³⁷ Amnesty International (n 133).

judicial institution.¹³⁸ Only the Security Council can exercise such political power over the ICC investigation, acting according to Chapter VII of the UN Charter and Article 16.

Articles 18 and 19 describe the other two provisions where investigations can be suspended, but for procedural reasons, more specifically admissibility challenges.¹³⁹ Article 18(2) states:

“A State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in Article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.”

Here, the Prosecutor defers from investigating in the spirit of complementarity unless the PTC decides against the request of the State.

And Article 19(7) states:¹⁴⁰

“If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with Article 17.”

Here, the temporary suspension of investigations appears in case a challenge of admissibility of jurisdiction is made by the State which has jurisdiction over a case¹⁴¹ or a State from which acceptance of jurisdiction is required under article 12¹⁴² until a determination is made by the

¹³⁸ *ibid.*

¹³⁹ *ibid.*

¹⁴⁰ Rome Statute of the International Criminal Court art 19(7).

¹⁴¹ *ibid* 19(2)(b).

¹⁴² *ibid* 19(2)(c).

Court. However, both of these provisions do not give any discretion to the Prosecutor. He or she can only seek a judicial review in such situations.

Apart from being not included in the Statutory provisions, the Prosecutor suspending an investigation on the grounds of political considerations will also be against the international standards for prosecutorial duties and discretion, including the United Nations Guidelines on the Role of Prosecutors,¹⁴³ the Council of Europe Recommendation REC 19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system,¹⁴⁴ and the International Association of Prosecutors Standards of professional responsibility and statement of the essential duties and rights of prosecutors.¹⁴⁵

According to AI, such use of prosecutorial discretion can interfere with the independence of the OTP. First and foremost, they would be placed under intense political pressure by the States involved in any negotiations against the resumption of investigations.¹⁴⁶ Given the prolonged nature of peace negotiations, there will also be a risk that the decisions to resume any such suspended investigations will be weighed in the elections for the various higher-level positions at the OTP, thus politicizing the Office itself.¹⁴⁷ It will also demoralize and endanger victims and witnesses and make restarting investigations difficult.¹⁴⁸ A suspended investigation would also drastically increase the cost the Court has to bear for the pre-trial support and protection of the victims and witnesses.¹⁴⁹ Drastic measures should be taken to ensure that evidence is preserved and mitigate any damage to the integrity of the investigation (Article 54(3), 56(3),

¹⁴³ 'Guidelines on the Role of Prosecutors.' <<http://digitallibrary.un.org/record/93805>>.

¹⁴⁴ 'The Role of Public Prosecution in the Criminal Justice System, Recommendation Rec (2000)19 Adopted by the Committee of Ministers of the Council of Europe on 6 October 2000 and Explanatory Memorandum' <<https://rm.coe.int/16804be55a>> accessed 9 June 2023.

¹⁴⁵ 'Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors' <[https://www.iap-association.org/getattachment/Resources-Dokumentation/IAP-Standards-\(1\)/English.pdf.aspx](https://www.iap-association.org/getattachment/Resources-Dokumentation/IAP-Standards-(1)/English.pdf.aspx)> accessed 9 June 2023.

¹⁴⁶ Amnesty International (n 133).

¹⁴⁷ *ibid.*

¹⁴⁸ *ibid.*

¹⁴⁹ *ibid.*

93(1), 94(1)). This is very critical when it comes to material evidence like bodies which will deteriorate over time.¹⁵⁰ The prospect of suspension of the investigation will also make victims, witnesses, governments, and NGOs involved in an ongoing conflict not cooperate with the investigation in the first place as the investigation may be suspended to facilitate political negotiations.

The second point that Amnesty discusses is the limited scope of the ‘interest of justice’ as used in Article 53. The grounds that are provided by the Rome Statute to not initiate an investigation included only “there is no reasonable basis to proceed under this Statute” (Article 53 (1))¹⁵¹ and “there is not a sufficient basis for a prosecution” (Article 53(2)).¹⁵² They do not include political factors like political negotiations or alternatives to prosecution that would lead to impunity.¹⁵³ Thus, using ‘interests of justice’ for political reasons result in damaging the credibility of the Court and questions its reverence to the object and purpose of the Rome Statute. Human Rights Watch cited the Vienna Convention on the Law of Treaties to argue that because the Preamble of the Rome Statute clearly states that, “the most serious crimes of concern to the international community as a whole must not go unpunished,”¹⁵⁴ that makes it clear that ending impunity enjoyed by the perpetrators contributes to the prevention of such crimes.¹⁵⁵ This can be read as the absence of atrocities can be achieved by a consistent policy of prosecution and not compromising based on political considerations and negotiations.¹⁵⁶ It

¹⁵⁰ *ibid.*

¹⁵¹ Rome Statute of the International Criminal Court art 53.

¹⁵² *ibid.*

¹⁵³ Amnesty International (n 133).

¹⁵⁴ Rome Statute of the International Criminal Court s Preamble.

¹⁵⁵ ‘The Meaning of “the Interests of Justice” in Article 53 of the Rome Statute’ (n 131).

¹⁵⁶ D Robinson, ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’ (2003) 14 *European Journal of International Law* 481 <<https://academic.oup.com/ejil/article-lookup/doi/10.1093/ejil/14.3.481>> accessed 26 April 2023.

is thus critical to “prompt states to overcome the considerations of expedience and realpolitik that had so often led them to trade away justice in the past.”¹⁵⁷

It would also open the Court to being subject to blackmail by various actors who face prosecution for international crimes. Even after negotiations have been successful, the OTP will be under constant pressure that the resumption of investigations may trigger more violence. This would in turn weaken its ability to be an effective deterrent.¹⁵⁸

Moreover, Amnesty argues that the entire debate about having to choose between justice or peace over the other is based on “a false premise that international justice was incompatible with political negotiations to end armed conflicts.”¹⁵⁹ HRW paper argues that instead of destabilizing effects, justice measures can contribute to peace and stability by undermining and marginalizing disruptive actors.¹⁶⁰ It also gives the international community political and legal reasons to exclude war criminals and ethnic extremists from peace negotiations and post-war politics.¹⁶¹ This often leads to a better implementation of peace treaties as seen in Dayton Accords.¹⁶² Taking a similar position, scholars like Leila Sadat have argued that “pursuing justice over impunity is a matter of making the right legal choice regardless of the political choices used to address existing power realities.”¹⁶³

When the ICTY indicted Bosnian Serb leaders for crimes committed during the war, there were rampant fears that their indictment would be a complete derailment of the reconciliation process in the post-conflict country. However, as it happens the indictment led to them being

¹⁵⁷ *ibid* 483.

¹⁵⁸ Amnesty International (n 133).

¹⁵⁹ *ibid*.

¹⁶⁰ ‘The Meaning of “the Interests of Justice” in Article 53 of the Rome Statute’ (n 131).

¹⁶¹ Rodman (n 125).

¹⁶² PAUL R. WILLIAMS & MICHAEL P. SCHARF, *PEACE WITH JUSTICE? WAR CRIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA* (2002).

¹⁶³ See LEILA NADYA SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM* (2002) cited in Rodman, *supra* note 96 at 108.

marginalized especially in the international scene.¹⁶⁴ The successful completion of the Dayton despite the ICTY indictments is widely considered a counter-example against the rhetoric that international justice and peace negotiations cannot go hand in hand. According to the then ICTY prosecutor, the indictments even made the peace process better, by reducing the disruptive influence of extremist politicians.¹⁶⁵ The proponents of the duty to prosecute also maintain that the decision to negotiate with Milosevic at Dayton, despite full knowledge of his complicity in ethnic cleansing campaigns in Croatia and Bosnia and Herzegovina, emboldened him to launch criminal violence in Kosovo in three years.¹⁶⁶ Similarly, the Lomé Amnesty deal in Sierra Leone resulted in a power-sharing agreement between the Government of Sierra Leone and the Revolutionary United Front under the leadership of Foday Sankoh.¹⁶⁷ The aim of the deal was to ensure “genuine national unity an reconciliation” by turning RUF into a political party and granting immunity from prosecution for Sankoh and others.¹⁶⁸ However, the agreement fell apart when RUF attacked UN peacekeepers less than a year later.¹⁶⁹ Thus, the absence of legal repercussions can lead to future violence.

Another important argument for the case of a narrow interpretation of ‘interests of justice’ is that criminal justice tribunal promote peace by “individualizing guilt in criminal leaders rather than allowing the victims to collectivize it in entire groups.”¹⁷⁰ This is crucially important in conflicts which have ethnic dimensions to break cycles of violence triggered by revenge. By

¹⁶⁴ Jonathan Moore (ed), *Hard Choices: Moral Dilemmas in Humanitarian Intervention* (Rowman & Littlefield 1998) 205.

¹⁶⁵ Richard Goldstone, ‘Dealing with the Past: Peace and Justice in the Former Yugoslavia’ (2011) 2 *Global Policy* 329 <<https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1758-5899.2011.00080.x>> accessed 9 June 2023.

¹⁶⁶ Williams and Scharf (n 162) 17.

¹⁶⁷ ‘Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front (RUF) (Lomé Peace Agreement) | UN Peacemaker’ <<https://peacemaker.un.org/sierraleone-lome-agreement99>> accessed 10 June 2023.

¹⁶⁸ ‘Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone’ <https://peacemaker.un.org/sites/peacemaker.un.org/files/SL_990707_LomePeaceAgreement.pdf> accessed 10 June 2023.

¹⁶⁹ Rodman (n 125) 109.

¹⁷⁰ *ibid* 107.

assigning guilt for the violence for all sides ensures that the legal mechanism will be an instrument of reconciliation, not revenge.¹⁷¹ Finally, criminal accountability for atrocities committed is crucial to establish the rule of law in post-conflict violence.¹⁷² If impunity is allowed, it “sends the message that such crimes may be tolerated in the future,” and may give way to the return of political violence.¹⁷³

However, both the NGOs agree that the Security Council, using Article 16, can suspend any investigation, as prescribed in the Rome Statute in case of concern to its negative effect on any peace negotiation. They had opposed this provision in the Rome Conference, incompatible with both the Preamble of the Rome Statute which states that “grave crimes threaten the peace, security and well-being of the world,” and the Security Council whose primary objective is to maintain international peace and security. Raising controversy, the Security Council had abused the Article 16 provision to exempt UN Peacekeeping personnel from countries who are not a party to the ICC from prosecution at the ICC.¹⁷⁴ It was also used to do the same for personnel from non-part States who were a part of the Multinational Force or United Nations stabilization force in Liberia.¹⁷⁵ However, they remain committed to the argument that the decision to choose between either should come from a political body and not a judicial body.¹⁷⁶

However, unlike the NGOs who pushed for a narrow interpretation of the criterion, there were also a group of ‘pragmatists’¹⁷⁷ who argue for a broader definition and usage of ‘interests of

¹⁷¹ Richard J Goldstone, ‘Peace versus Justice Address’ (2005) 6 Nevada Law Journal 421, 422 <<https://heinonline.org/HOL/P?h=hein.journals/nevlj6&i=429>> accessed 9 June 2023.

¹⁷² Rodman (n 125).

¹⁷³ Testimony of C. Dufka, Human Rights Watch, in US Congress, House Committee on International Relations, Subcommittee on Africa, Confronting War Crimes in Africa, Hearings, 24 June 2004, cited in *ibid* 107.

¹⁷⁴ United Nations Security Council, ‘S/RES/1422’ <<http://unscr.com/files/2002/01422.pdf>> accessed 11 April 2023; United Nations Security Council, ‘S/RES/1487 (2003)’ <<http://unscr.com/files/2003/01487.pdf>> accessed 11 April 2023.

¹⁷⁵ United Nations Security Council, ‘S/RES/1593 (2005)’ <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/292/73/PDF/N0529273.pdf?OpenElement>> accessed 11 April 2023.

¹⁷⁶ Eric D Blumenson, ‘The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court’ (2 November 2005) <<https://papers.ssrn.com/abstract=834004>> accessed 28 April 2023.

¹⁷⁷ Rodman (n 125).

justice’. They argued that the legalist assumption that law can and should be separated from politics is not true.¹⁷⁸ As evident in the history of international war crimes tribunals and the ICC itself, the reverse is the most accurate description of how law and politics work in tandem. Apart from the factors governed by the Rome Statute, various other factors determine whether a criminal procedure is effective in fulfilling the mandate of international peace including the material power of the perpetrators relative to that arrayed against them and the political strategies of the latter to address the conflict.¹⁷⁹ Hence, the Prosecutor should be given a wider discretion which includes being able to assess the political contexts (apart from legal criteria in the Statute) before initiating further legal proceedings.

They also extend this argument to the question of alternatives to prosecution that are adopted to facilitate transformations from dictatorships or to end armed conflicts and violence.¹⁸⁰ Rodman argues that the complementary provision can be used for the same under Article 17(1)(a).¹⁸¹ The admissibility criteria of the Rome Statute states that a case is admissible only if the State which has jurisdiction over it is “unwilling or unable genuinely to carry out the investigation or prosecution.”¹⁸² However, this complementarity language was designed to promote prosecution. Article 17(2) clearly defines what constitutes ‘unwillingness.’ It can be:

“The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

¹⁷⁸ Bass (n 1) 406.

¹⁷⁹ Rodman (n 125) 101.

¹⁸⁰ Michael P Scharf, ‘The Amnesty Exception to the Jurisdiction of the International Criminal Court’ (1999) 512 <<https://papers.ssrn.com/abstract=3850925>> accessed 28 April 2023.

¹⁸¹ Rodman (n 125) 103.

¹⁸² Rome Statute of the International Criminal Court art 17(1).

There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.”

However, under a strict reading of this text, both the amnesties given by the Truth and Reconciliation Commission in South Africa and those as a part of the end of dictatorial rule in Chile are considered the same, irrespective of the fact that the former was a decision made by a multiracial democratic Parliament and the latter was one granted to itself by a dictatorship trying to escape persecution.¹⁸³ It is here that the Prosecutor will require a broader discretion over the ‘interest of justice’ under Article 53(2)(c) to be able to not prosecute in such cases.

Alternatives forms of justice are also accompanied by non-penal forms of justice like truth commissions, reparations, or lustrations. However, the argument follows that, in theory, referring to Article 17, “a genuine investigation need not be a criminal one.”¹⁸⁴ This was also bought up by the US during the Rome Conference, however as rejected due to strong opposition by NGOs and state supporters.¹⁸⁵ This opposition was also supported by scholars like Michael Walzer, who said “there can be no justice in war if there are not, ultimately, responsible men

¹⁸³ Declan Roche, ‘Truth Commission Amnesties and the International Criminal Court’ (2005) 45 *The British Journal of Criminology* 565, 574 <<https://www.jstor.org/stable/23639255>> accessed 26 April 2023.

¹⁸⁴ Rodman (n 125) 103.

¹⁸⁵ Scharf (n 180).

and women,”¹⁸⁶ but explains that the responsibility is also a moral one, rather than a dichotomy of innocence or guilt as determined by a Court.¹⁸⁷

However, commentators including Scharf and Rodman see the vagueness of ‘interests of justice’ in the Rome Statute as space for exercising ‘creative ambiguity’ by the Prosecutor with respect to alternative justice mechanisms such as the Truth and Reconciliation Commission in South Africa.¹⁸⁸ The ambiguousness of the criteria gives space for the Prosecutor to arbitrate between various interpretations of justice and peace as applicable to a particular situation.¹⁸⁹

Rodman also makes a ‘consequentialist case’ for a broad understanding of prosecutorial discretion.¹⁹⁰ It differentiates prosecution between a relatively stable post-conflict environment and ongoing conflict or a fragile peace process. In the former setting, the alleged war criminals no longer have power, and thus, chances of violent backlash upon their apprehension are less. In the latter, the accused still hold significant political and military power.¹⁹¹ The duty to prosecute is the unambiguous decision in the former case. But in the latter, this decision should be made according to other factors including countervailing power, which more likely involves the use or threat of use of force.¹⁹² Here, the feasibility of prosecution itself is dependent on the ‘political or military strategies designed to bring a conflict to an end.’¹⁹³ Unlike domestic law enforcement, execution of international justice is not a simple case of executing arrest

¹⁸⁶ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (Basic Books 2015) 287.

¹⁸⁷ R. Williams and M. P. Scharf, *Peace with Justice? War Crimes and Accountability in the Former Yugoslavia* (2002), cited in Rodman (n 125).

¹⁸⁸ *ibid* 104; Scharf (n 180) 522.

¹⁸⁹ Rodman (n 125) 104.

¹⁹⁰ *ibid* 108.

¹⁹¹ *ibid*.

¹⁹² Rodman (n 125).

¹⁹³ *ibid* 109.

warrants. Often there is a huge humanitarian cost to apprehend those leaders who have not yet been defeated.¹⁹⁴

Countering the legalist case that narrow aggressive judicial strategy will eventually marginalize and remove leaders from power,¹⁹⁵ he argues that the alternative to engaging with criminal leaders to settle a conflict, “is the deployment not of law, but of countervailing power.”¹⁹⁶ He used the case-study of Bosnia and Herzegovina and Sierra Leone to support this argument. Even though the ICTY was established in 1993, it was not effective in ending impunity or preventing atrocities including Srebrenica as there was no military intervention to stop the ethnic cleansing. It was only after NATO intervened the ICTY could prosecute anyone of significance, thus removing them from the political scene and making the peace process work.¹⁹⁷ Similarly, he argues that there was no hope for peace in Sierra Leone unless RUF was defeated militarily. Noting the absence of foreign military intervention, he says “the alternative to peace with amnesty¹⁹⁸ was not peace with justice, but the continuation of the civil war.”¹⁹⁹ Thus, the feasibility of aggressive judicial interventions is dependent on the political and military strategies designed to end the conflict. The risk of backlashes, including escalation of violence, can only be prevented if perpetrators are weakened or defeated.²⁰⁰ In situations where perpetrators retain power, bargaining with them will result in compromises to criminal justice.²⁰¹

¹⁹⁴ *ibid* 124.

¹⁹⁵ Amnesty International (n 133).

¹⁹⁶ Rodman (n 125) 108.

¹⁹⁷ *ibid* 109.

¹⁹⁸ Here he refers to the amnesty granted to RUF members as a part of the Lome Peace Agreement, ‘Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone’ (n 168).

¹⁹⁹ Rodman (n 125) 109.

²⁰⁰ *ibid*.

²⁰¹ *ibid* 110.

Current OTP Policy

In 2007, the OTP published a policy paper on how the OTP understands the concept of ‘interest of justice’ mentioned in Article 53.²⁰² Following the comments by AI and HRW, the OTP adopted the policy that a broad statutory construction of prosecutorial discretion was “contrary to the ICC’s duty as a legal institution to prosecute those most responsible for the gravest international crimes.”²⁰³ The policy paper outlines “the exceptional circumstances in which a situation or case, which would otherwise qualify for selection by the OTP is not pursued and that decision not to proceed is based solely on a determination by the OTP that the investigation or case would not serve the “interests of justice”, as that term is used in the Rome Statute.”

It emphasized that the exercise of prosecutorial discretion where the interest of justices in work is exceptional that there is a presumption in favour of investigation or prosecution and the criteria for its exercise will naturally be guided by the objects and purpose of the statute namely the prevention of serious crimes of concern to the international community through ending impunity.²⁰⁴ The brief describes ‘the interest of justice test’ as a ‘countervailing consideration’ for not proceeding even when the tests of jurisdiction and admissibility are met.²⁰⁵ This means that the prosecutor does not have to establish that a prosecution/investigation is in favour of the interests of justice but, that “he shall proceed with the investigation unless there are specific circumstances which provide substantial reasons to believe it is not in the interests of justice to do so at that time.”²⁰⁶ The meaning of the phrase is understood here as encompassing the factors of exceptionality, the presumption in favour of prosecution or investigation, the object and purpose of the Statute, and other explicit factors including the gravity of the crime, interest of

²⁰² The Office of the Prosecutor, ‘Policy Paper on the Interests of Justice’ (n 122).

²⁰³ Rodman (n 125) 100.

²⁰⁴ Maria Varaki, ‘Revisiting the “Interests of Justice” Policy Paper’ (2017) 15 *Journal of International Criminal Justice* 455.

²⁰⁵ The Office of the Prosecutor, ‘Policy Paper on the Interests of Justice’ (n 122) 2.

²⁰⁶ *ibid* 3.

victims, and circumstances of the suspects.²⁰⁷ Here, the Policy paper also explicitly discusses other justice mechanisms and peace processes are potential considerations.²⁰⁸

It clarified that there is a difference between the concepts of the ‘interest of justice’ and the ‘interest of peace’ and that the latter falls within the mandate of institutions other than the OTP, thus taking a very restrictive notion of the phrase in support of literal approach to the legal interpretation.²⁰⁹ Some scholars note that by limiting the interest of justice, the OTP, with the support of certain states and NGOs, indirectly amended the ICC statute as this consensus did not arise in the Rome Conference²¹⁰ as discussed in the previous section.

The Policy Paper on preliminary examinations also provides insight into the principles of the OTP when it decides whether to proceed with investigations whatsoever. While discussing the general principle of independence of the OTP when it comes to preliminary examinations, the paper strongly clarifies that “decisions shall not be influenced or altered by the presumed or known wishes of any party, or in connection with efforts to secure cooperation.”²¹¹

²⁰⁷ The Office of the Prosecutor, ‘Policy Paper on the Interests of Justice’ (n 122).

²⁰⁸ *ibid.*

²⁰⁹ Schabas, ‘Prosecutorial Discretion v. Judicial Activism at the International Criminal Court’ (n 39) 749.

²¹⁰ *ibid* 748.

²¹¹ The Office of the Prosecutor, ‘Policy Paper on Preliminary Examination’ (n 47) 7.

ANALYSIS

This section will first look at the procedural aspects that pertain to the various aspects of prosecutorial discretion at ICC. It will then examine how these have been implemented in various situations under the purview of the Court. The Chapter will then focus on interpretative discretion and look closely at how the OTP has used the criteria of ‘interests of justice’ and ‘complementarity’ in pre-trial stages.

Preliminary Examinations

Every situation that reached the ICC first undergoes a preliminary examination at the OTP, irrespective of whether it is referred to the Court or if it is based on Article 15 communications. Once a determination is made, the OTP follows it up with either the initiation of an investigation (in case of UNSC or State Party referral) or with a request to the Pre-Trial Chamber for the initiation of an investigation (in case of proprio motu investigation). Below is a detailed analysis of the procedural guidelines for each of these.

Procedural Aspects

A significant aspect of proprio motu powers of the OTP under Article 15 is the conduct of preliminary investigations of all situations “that are manifestly not outside the jurisdiction of the Court.”²¹² The term that comes from Article 15(6), refers to the function of the OTP to examine all referrals and any substantial information on crimes within the Court's

²¹² *ibid* 2.

jurisdiction.²¹³ These are conducted in order to determine if there is a reasonable basis to proceed with an investigation of any particular situation.

A preliminary examination can be initiated on the basis of:

(a) information sent by individuals or groups, States, intergovernmental or non-governmental organisations.

(b) a referral from a State Party or the Security Council; or

(c) a declaration accepting the exercise of jurisdiction by the Court pursuant to article 12(3) lodged by a State which is not a Party to the Statute.

The preliminary examination of all relevant information by the OTP will happen the same way in all situations irrespective of how was initiated. Given at this stage the OTP cannot use its own evidence-gathering powers, which are available only during investigation, the main source of information will be external sources including written, or oral testimonies sourced from various sources including but not exclusive of States, organs of the United Nations, intergovernmental or nongovernmental organizations (Article (15)(2)).²¹⁴

The legal framework for the preliminary examinations is based on Article 53 (1)(a)-(c) which requires the Prosecutor to consider the following statutory factors:

Jurisdiction:

²¹³ Rome Statute of the International Criminal Court art 42.

²¹⁴ The Office of the Prosecutor, 'Policy Paper on Preliminary Examination' (n 47).

This ‘jurisdictional scope’ that fulfils all the jurisdictional requirements also defines in objective terms the parameters of any future investigation, i.e., the ‘situation.’²¹⁵

Admissibility:

Even though Article 17 sets out admissibility assessments for cases, the OTP at the stage of preliminary examination should take into account potential cases that could be identified based on the information available.

For the purpose of the gravity assessment, the Office has to consider whether the groups of persons that are likely to be the object of an investigation include those who appear to be most responsible for the most serious crimes, including persons with levels of responsibility in directing, ordering, facilitating or otherwise contributing to the commission of the alleged crimes.²¹⁶

Interests of justice

As discussed earlier in the Policy Paper on Interest of Justice, interests of justice under article 53(1)(c) provide a potentially countervailing consideration that may give a reason not to proceed.²¹⁷ While jurisdiction and admissibility are positive requirements, Prosecutor is not required to establish that an investigation serves the interests of justice. Rather, the Office will proceed unless there are specific circumstances which provide substantial reasons to believe that the interests of justice are not served by an investigation at that time.²¹⁸

²¹⁵ *ibid* 10.

²¹⁶ *ibid* 8.

²¹⁷ The Office of the Prosecutor, ‘Policy Paper on the Interests of Justice’ (n 122).

²¹⁸ *ibid*.

Since 2012, the OTP has also laid out four consecutive stages (Phases) for the preliminary examination of any referral/ Article 15 communication as follows:²¹⁹

Preliminary Jurisdiction: “The Office conducts an initial assessment of all information on alleged crimes received under article 15 (“article 15 communications”), to filter out information on crimes that are outside the jurisdiction of the Court.

Subject-matter jurisdiction: it analyses all information on alleged crimes received or collected to determine whether the preconditions to the exercise of jurisdiction under article 12 are satisfied and whether there is a reasonable basis to believe that the alleged crimes fall under the subject matter jurisdiction of the Court.

Admissibility: it analyses admissibility in terms of complementarity and gravity.

Interests of Justice: it will examine the interests of justice. A recommendation that an investigation would not serve the interests of justice will only be made in highly exceptional circumstances.”²²⁰

The OTP Policy Paper clearly states that during the process, the Office must seek to ensure that all concerned parties (States and non-State alike) have had the opportunity to provide all the information they consider appropriate. Depending on the facts and circumstances of each situation, the Office may either decide:

²¹⁹ Office of the Prosecutor, ‘Report on Preliminary Examination Activities 2012’ (2012) <<https://www.legal-tools.org/doc/0b1cfc/pdf>> accessed 27 May 2023.

²²⁰ *ibid.*

to decline to initiate an investigation where the information manifestly fails to satisfy the factors set out in article 53(1) (a)-(c);

to continue to collect information in order to establish a sufficient factual and legal basis to render a determination; or

initiate the investigation, subject to judicial review as appropriate.²²¹

The goal of this process is to reach a fully informed determination of whether there is a reasonable basis to proceed with an investigation.

The ‘reasonable basis’ standard has been interpreted by Pre-Trial Chamber II to require that “there exists a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court ‘has been or is being omitted’.”²²² The reasonable basis standard under article 53(1)(a) “has a different object, a more limited scope, and serves a different purpose” than other, higher evidentiary standards provided for in the Statute.²²³

In particular, at the preliminary examination stage, “the Prosecutor has limited powers which are not comparable to those provided for in Article 54 of the Statute at the investigative stage” and the information available at such an early stage is “neither expected to be ‘comprehensive’ nor ‘conclusive’.”²²⁴

²²¹ The Office of the Prosecutor, ‘Policy Paper on Preliminary Examination’ (n 47).

²²² *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya* (n 122).

²²³ *ibid.*

²²⁴ *ibid.*

The OTP Policy paper on preliminary examinations also makes it clear that regional or geographical balance is not a statutory criterion for the determination.²²⁵ There are no timelines provided in the Statute for a decision on a preliminary examination.²²⁶

Substantive Aspects

Transparency of the activities of the Prosecutor, especially with respect to the very unregulated stage of preliminary examinations has increased over the term of Fatou Bensouda as Prosecutor. Since taking Office in 2012, her Office published Annual Reports on Preliminary Examinations that have detailed all examinations that had cleared Phase 1, i.e., those situations which had fulfilled all the necessary preconditions for the Court's jurisdiction under Article 5. From 2011 to 2017, the report on Preliminary Examinations reported only Article 15 communications that made it to Phase 2. Even though Phase 1 examines the preliminary jurisdiction of the Court, it often included crucial questions on what the Court can and cannot do, which often involve questions of international importance. For example, the question of Palestinian statehood.²²⁷

Since 2019, the Prosecutor also started to issue in her annual reports other Article 15 communications and why they did not proceed to Phase 2. It thus clarified its position on the so-called warrant further analysis (“WFA communications”). They refer to situations where the alleged commission of crimes under the Court's jurisdiction occurs but require more detailed factual and legal analysis to provide an “informed, well-reasoned recommendation on

²²⁵ The Office of the Prosecutor, ‘Policy Paper on Preliminary Examination’ (n 47).

²²⁶ *ibid.*

²²⁷ Office of the Prosecutor, ‘Report on Preliminary Examination Activities 2012’ (n 219).

whether the allegations in question appear to fall within the Court’s jurisdiction and warrant the Office proceeding to Phase 2 of the preliminary examination process.”²²⁸

These may involve situations where alleged crimes “are not manifestly outside the jurisdiction of the Court, but do not clearly fall within its subject-matter jurisdiction.”²²⁹ In such situations, the Office will first consider whether the lack of clarity applies to most, or a limited set of allegations, and in the case of the latter, whether they are nevertheless of such gravity to justify further analysis. In such situations, the Office will consider whether the exercise of the Court’s jurisdiction may be restricted due to factors such as a narrow geographic and/or personal scope of jurisdiction and/or the existence of national proceedings relating to the relevant conduct.

This was changed to an Annual Report of the OTP after Karim Khan took office, the first of which was published in 2022. The report has a passing mention of Article 15 communications and adds that 27 of those received warrant further analysis. The Office then concluded that none warranted any further analysis and so no new preliminary examination has started.

Here is a summary:

Situation	Trigger of Jurisdiction	Preliminary Examination starts	Conclusion of PE	Start of Investigation
Uganda	Self-Referral	Jan 2004	Move forward with investigation	July 2004
DRC	Self-Referral	April 2004	Move forward with investigation	June 2004
Darfur, Sudan	UNSC	March 2005	Move forward with investigation	June 2005

²²⁸ Office of the Prosecutor, ‘Report on Preliminary Examination Activities 2019’ (2019).

²²⁹ *ibid.*

CAR	Self-Referral	December 2004	Move forward with investigation	May 2007
Kenya	Proprio motu			March 2010
Colombia	Proprio motu	2004, Made public during 2006	Closed in October 2021 (Complementarity)	-
Afghanistan	Proprio motu	2006, Made public in 2007	Request to PTC for investigation in November 2017	March 2020
Georgia	Proprio motu	August 2008	Request to PTC for investigation in October 2015	January 2016
Palestine	Proprio motu (with State declaration) Self-Referral in May 2018	January 2009	Closed on April 2012 (Palestinian Statehood)	-
Guinea	Proprio motu	October 2009	Closed in September 2021 (Complementarity)	-
Honduras	Proprio motu	2005, Made public in November 2010	Closed in October 2015 (Crimes lack subject-matter jurisdiction)	-
Nigeria	Proprio motu	November 2010	Closed in December 2020 ²³⁰	
Republic of Korea	Proprio motu	December 2010	Closed in June 2014 (Crimes lack subject-matter jurisdiction)	-
Libya	UNSC	February 2011	Move forward with investigation	March 2011

²³⁰ On 11 December 2020, the then Prosecutor Fatou Bensouda announced the completion of her preliminary examination of the situation in Nigeria. The conclusion of the examination was that there was a reasonable basis to believe that war crimes and crimes against humanity were committed. However, the new Prosecutor has not yet proceeded to the next step, which is to request authorisation from the Pre-Trial Chamber to open an investigation into the situation in Nigeria.

Ivory Coast	Proprio motu (State declaration for assistance) ²³¹	May 2011	Move forward with investigation	June 2011
Mali	Self-Referral	July 2012	Move forward with investigation	January 2013
Union of the Comoros	Self-Referral	May 2013	Closed in November 2014 (Lack of sufficient gravity)	-
CAR II	Self-Referral	September 2014	Move forward with investigation	September 2014
Ukraine	Proprio moto (following 12(3) declaration) Followed by State Party referral in March 2022	April 2014	Request to PTC for investigation in February 2022	March 2022
Iraq	Proprio motu	May 2014	Closed in December 2020 (Complementarity)	-
Palestine	Proprio motu (following accession)	January 2015	Moving Forward with Investigation	December 2019
Burundi	Proprio moto	April 2016	Request to PTC for investigation in September 2017	October 2017
Gabon	Self-Referral	September 2016	Closed in September 2018 (Crimes lack subject-matter jurisdiction)	-

²³¹ Letter from letter from President Ouattara dated 3 May 2011 which states., “the Ivorian judiciary is not at this stage in the best position to address the most serious of the crimes” committed since 28 November 2010, and “any attempt at trying the most responsible individuals may face multiple obstacles.” Office of the Prosecutor, ‘Report on Preliminary Examination Activities 2011’ (2011) 24 <<https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/63682F4E-49C8-445D-8C13-F310A4F3AEC2/284116/OTPreportonPreliminaryExaminations13December2011.pdf>> accessed 27 May 2023.

Philippines	Proprio motu	February 2018	Request to PTC for investigation in May 2021	September 2021
Venezuela	Proprio motu Followed by State Party referral in September 2018	February 2018	Move forward with investigation	November 2021
Myanmar	Proprio motu	September 2018	Request to PTC for investigation July 2019	November 2019
Venezuela II	Self-Referral	Feb 2020	Ongoing	-
Bolivia	Self-Referral	September 2020	Closed in February 2022 (Crimes lack subject-matter jurisdiction)	-

Initiation of investigations

Unlike the preliminary examination, which is uniformly applied to referral and Article 15 communications, the process diverges when a situation passes to the next stage. In case of State Party referral or UNSC referrals, the Prosecutor can go ahead and start an official investigation once the necessary thresholds discussed are met in the preliminary investigation. For initiation of proprio motu initiation of investigation, the Prosecutor has to request the Pre-trial chamber a request for authorization of investigation into the said situation.

Authorization by PTC

Once a request is made, the Chamber will review the Prosecutor's conclusion that "there is a reasonable basis," by examining all available information (the prosecutor's request, supporting

materials, and victim's representations) to come to a conclusion about whether there is a "reasonable basis to proceed." Once this standard is met, the Chamber will authorize an investigation. This decision would be based on Article 53(1)(a) to (c) of the Rome Statute.

The Question of Interest of Justice

Even though Article 53(1)(c) incorporates 'interest of justice' as critical to the decision to not proceed with the investigation, the Prosecutor has to date not used this to decide against the initiation of an investigation or prosecution. The OTP policy emphasises the presumption of investigation or prosecution wherever the criteria established in Article 53(1) (a) and (b) (or Article 53(2)(a) and (b)) have been met.²³²

This countervailing nature of Article 53(1)(c), i.e., that the Prosecutor is not required to establish that an investigation serves the interests of justice unless he/she has substantial reasons to believe otherwise was also supported by the majority of PTC judgments.²³³ The PTC in the Situation to Kenya, the first case to be referred to the PTC using the Prosecutor's proprio motu powers, ruled that judicial review of 'interests of justice' is "unwarranted in the present decision," as the Prosecutor has not determined that an investigation 'would not serve the interests of justice.'²³⁴ Such a review would be triggered only if and when the Prosecutor decides not to proceed with the investigation on the basis that an investigation is not in the interests of justice.²³⁵

²³² The Office of the Prosecutor, 'Policy Paper on the Interests of Justice' (n 122) 1.

²³³ Situation in the Republic of Kenya, Decision pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19, 31 March 2010, para 63. Similar, albeit with a brief reference to victims' interests as an indicator: Situation in Côte d'Ivoire, Decision pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, ICC-02/11-14, 3 October 2011, paras 207–08; Situation in Georgia, Decision on the Prosecutor's Request for Authorization of an Investigation, ICC-01/15-12, 27 January 2016, para 58.

²³⁴ *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya* (n 122) para 63.

²³⁵ *ibid.*

However, the PTC ruling on the request of the Prosecutor to open an investigation into the situation in Afghanistan was a drastic change from both policy and the Court's practice. In responding to the Prosecutor's request, the PTC ruled that the commencement of an investigation would not be in the interests of justice.²³⁶ Contrary to previous rulings on authorisations of *proprio motu* investigations,²³⁷ the PTC here ruled that such a request for authorization of investigation by the Prosecutor "must include a positive determination to the effect that investigations would be in the interests of justice, including in relation to the gravity of the alleged conducts, the potential victims' interests and the likelihood that investigation be feasible and meaningful under the relevant circumstances."²³⁸

It interpreted the Statute as the Court can, "through the filtering role of the Pre-Trial Chamber and the requirement, determine that the investigation would serve the interests of justice, and avoid engaging in investigations which are likely to ultimately remain inconclusive."²³⁹ It concluded that the PTC scrutiny for Article 15 is intended to ensure the functioning and legitimacy of the Court. In addition to the OTP policy against frivolous and ungrounded investigations,²⁴⁰ it concluded that "predictably inconclusive investigations" do not serve "either the interests of justice or any of the universal values underlying the Statute."²⁴¹ The Prosecutor filed an appeal against the PTC decision and the Appeals Chamber amended the decision and the investigation into Afghanistan was authorized in March 2020.²⁴² The Appeals

²³⁶ *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan* (n 122) para 33.

²³⁷ *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya* (n 122).

²³⁸ *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan* (n 122) para 35.

²³⁹ *ibid* 33.

²⁴⁰ 'Policy Paper on the Interests of Justice' (n 122).

²⁴¹ *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan* (n 122) para 34.

²⁴² 'Statement of ICC Prosecutor, Fatou Bensouda, Following the Appeals Chamber's Decision Authorising an Investigation into the Situation in Afghanistan: "Today Is an Important Day for the Cause of International Criminal Justice"' (*International Criminal Court*) <<https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-following-appeals-chambers-decision-authorising>> accessed 30 May 2023.

Chamber's held that the PTC is "limited to determining whether there is a reasonable factual basis to proceed with an investigation and whether the potential case(s) arising from such investigation would appear to fall within the Court's jurisdiction"²⁴³ and it erred by "deciding that 'an investigation into the situation in Afghanistan at this stage would not serve the interests of justice.'"²⁴⁴

Even though overturned, the decision demonstrates a lack of coherence in ICC practice stemming from the vagueness of the concept in the Rome Statute.²⁴⁵ The Appeals Chamber also gave no clarification on whether the criteria used by the PTC to decide that the investigation was 'not in the interest of justice' was an abuse of discretion.²⁴⁶ The PTC had interpreted that 'interests of justice' would involve the evaluation of the "prospective feasibility of a probe and its potential attitude to actually lead to the investigation and prosecution of" and the "realistic expectations for cooperation by the most relevant national authorities."²⁴⁷ This is still contentious,²⁴⁸ as will be discussed in the subsequent section, a flawed interpretation of the interests of justice.

Situations under Investigation

There are 17 situations under investigation by the ICC. The OTP opened its first-ever investigation into the situation in DRC in June 2004.

²⁴³ *Situation in the Islamic Republic of Afghanistan, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan* (n 122) para 39.

²⁴⁴ *ibid* 46.

²⁴⁵ *Pues* (n 10) 152.

²⁴⁶ *Situation in the Islamic Republic of Afghanistan, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan* (n 122) para 48.

²⁴⁷ *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan* (n 122) para 44.

²⁴⁸ Gupta (n 123); Luban (n 123); 'The Significance of the ICC Appeals Chamber's Ruling in the Afghanistan Situation' (*Opinio Juris*, 10 March 2020) <<http://opiniojuris.org/2020/03/10/the-significance-of-the-icc-appeals-chambers-ruling-in-the-afghanistan-situation/>> accessed 11 June 2023.

	Situation	Referral	Start of Investigation	Status of Cases
ICC-01/04	DRC	Self-referral	June 2004	Reparation (3), Closed (2), Pre-Trial (1)
ICC-02/04	Uganda	Self-referral	July 2004	Reparations (1), Pre-Trial (1)
ICC-02/05	Darfur, Sudan	UNSC	June 2005	Pre-Trial (3), Trial (2), Closed (1)
ICC-01/05	CAR	Self	May 2004	Closed (2)
ICC-01/09	Kenya	Proprio motu	March 2010	Pre-Trial (2), Closed (3)
ICC-01/11	Libya	UNSC	March 2011	Pre-Trial (1), Closed (2)
ICC-02/11	Ivory Coast	Proprio motu	October 2011	Closed (2)
ICC-01/12	Mali	Self-referral	January 2013	Reparation (1), Trial (1)
ICC-01/14	CAR 2	Self-referral	September 2014	Pre-Trial (1), Trial (2)
ICC-01/15	Georgia	Proprio motu	January 2016	Arrest Warrants Issued
ICC-01/17	Burundi	Proprio motu	October 2017	Ongoing Investigation
ICC-01/19	Myanmar	Proprio motu	November 2019	Ongoing Investigation
ICC-02/17	Afghanistan	Proprio motu	March 2020	Ongoing Investigation
ICC-01/18	Palestine	Self-referral	March 2021	Ongoing Investigation
ICC-01/21	Philippines	Proprio motu	September 2021	Ongoing Investigation

ICC-02/18	Venezuela	State Party Referral	November 2021	Ongoing Investigation
ICC-01/22	Ukraine	Proprio motu	March 2022	Arrest Warrants Issued

Substantive Analysis

This section will consider the strategic exercise of discretion by the OTP at pre-trial stages and analyse them in relation to statutory criteria of complementarity, gravity and interests of justice.

Complementarity

The complementarity analysis that is part of Phase 3 of the preliminary examination has been given a lot of importance at the OTP.²⁴⁹ As an admissibility criterion, the complementary analysis comes after it has been established that international crimes have been conducted in the ‘situation’ under examination.²⁵⁰

The OTP, especially under Bensouda, has followed a dynamic complementarity assessment for the preliminary examinations, responding timely as countries develop domestic justice responses.²⁵¹ Examples can be seen in the follow-up of not just the Colombian peace process, but also the setting up of trials in Guinea.²⁵²

However, even when the preliminary examination fails to establish the existence of crimes that do not amount to the level of seriousness required to be under the jurisdiction of the ICC, the

²⁴⁹ ‘Policy Paper on Preliminary Examination’ (n 47) para 100.

²⁵⁰ *ibid* 82.

²⁵¹ *Pues* (n 10).

²⁵² ‘Report on Preliminary Examination Activities 2020’ (2020) 40.

OTP highlights the need to have domestic investigations into the grave human rights violations that have occurred. These reports also have detailed examinations and testimonies that can be used by domestic Prosecutors to initiate prosecutions.

Apart from complementarity with States, there has also been an increased complementarity with regional organizations and other international institutions. Complementarity can also be in the form of other institutions like the special Criminal Court in the Central African Republic. Here, more than 700 stakeholders from all over CAR including the transitional government, national political parties, the main opposing armed groups (the Séléka and anti-balaka), the private sector, civil society, traditional chiefs, and religious groups came together to discuss peace and security, justice and reconciliation, social and economic development and governance.²⁵³

Apart from legal institutions, there is an increasing move to include other regional actors to assist the OTP in its work like the Prosecutor joining hands with Eurojust and six other countries in a joint investigative team in the Ukraine Situation.²⁵⁴ Similarly, the investigation into Libya is being held in partnership with Italy, the Kingdom of the Netherlands, the United Kingdom, and Europol.²⁵⁵

However, a key question remains – whether complementarity analysis should look at the judicial capacity of the State or the State as a whole. Raised in the wake of the failure of domestic prosecutions in the UK against alleged crimes committed in Iraq, the Prosecutor

²⁵³ Amy Copley and Amadou Sy, ‘Five Takeaways from the Bangui Forum for National Reconciliation in the Central African Republic’ (*Brookings*, 30 November 1AD) <<https://www.brookings.edu/blog/africa-in-focus/2015/05/15/five-takeaways-from-the-bangui-forum-for-national-reconciliation-in-the-central-african-republic/>> accessed 15 June 2023.

²⁵⁴ The Office of the Prosecutor, ‘Annual Report of the Office of the Prosecutor – 2022’ (2022) 33 <<https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-05-annual-report-of-the-office-of-the-prosecutor.pdf>> accessed 30 May 2023.

²⁵⁵ *ibid* 34.

needs to look into the power and influence of the legislative and executive that can obstruct any well-meaning judicial proceeding, before ruling on complementarity.²⁵⁶

Interests of Justice:

In the section above, we saw the difference in the interpretation of ‘interests of justice’ by the PTC concerning what should be included in an analysis of ‘interests of justice.’ Here, I will discuss another point that was discussed a lot in the previous chapter, the relationship of the ICC with alternative forms of justice. I will use the Columbia case and how the ICC followed its truth and reconciliation mechanism which ended decades of conflict.

Ever since the first ICC prosecutor Luis Moreno Ocampo took office, scholars highlighted the need for having a clear policy on how to effectively establish the Rule of law while at the same time dealing with the need to have state support to be able to effectively work in those very situations.²⁵⁷ However, as I will discuss below, the OTP seems to have navigated the situation well with the situation in Colombia.

Colombia has been a site of a non-international armed conflict since the 1950s – a period known as *La Violencia*²⁵⁸ - between governmental forces (the police and the military) and rebel-armed groups including right-wing paramilitary armies, and left-leaning guerrilla groups.²⁵⁹ The most significant non-state actors were the guerrilla groups *Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo* (“FARC”) and the *Ejército de Liberación Nacional* (“ELN”) and the paramilitary armed groups collectively known as the *Autodefensas Unidas de Colombia*

²⁵⁶ ‘The ICC, British War Crimes in Iraq and a Very British Tradition’ (*Opinio Juris*, 11 December 2020) <<http://opiniojuris.org/2020/12/11/the-icc-british-war-crimes-in-iraq-and-a-very-british-tradition/>> accessed 31 May 2023.

²⁵⁷ Matthew R Brubacher, ‘Prosecutorial Discretion within the International Criminal Court’.

²⁵⁸ Diego Acosta Arcazo, Russell Buchan and Rene Ureña, ‘Beyond Justice, Beyond Peace? Colombia, the Interests of Justice, and the Limits of International Criminal Law’ (2015) 26 Criminal Law Forum 291, 292 <<http://link.springer.com/10.1007/s10609-015-9248-1>> accessed 15 June 2023.

²⁵⁹ *ibid.*

(“AUC”).²⁶⁰ After multiple failed attempts at peace negotiations, the Justice and Peace Law (“JPL”) adopted in 2005 led to the demobilisation of the AUC. Following further negotiations, in 2016, the Colombian government and the FARC reached an agreement and established a “Special Jurisdiction for Peace” (“SJP”) via a constitutional amendment which would investigate and prosecute grave violations of human rights and international human rights law committed by FARC guerrillas and members of the Colombian armed forces, amongst others.²⁶¹

However, there were fears that the SJP legislative framework adopted as a part of transitional justice may raise issues of consistency or compatibility with customary international law and the Rome Statute.²⁶² The peace process, initiated in Ecuador and then continued in Cuba had six major concerns on its agenda: (i) societal participation in the construction of peace; (ii) democracy for peace; (iii) transformations for peace; (iv) victims; (v) end of the armed conflict, and (vi) implementation.

Over the course of the transitional justice proceedings which first started in 2013, there were concerns raised regarding amnesty for political crimes,²⁶³ cases of sexual violence, and conduct of military and paramilitary officials during the conflict – which were all determined by the OTP to fall within the jurisdiction of the Court.²⁶⁴ However, the OTP was able to carefully manoeuvre these and ensure that the national proceedings that were focussing on transitional justice and lasting peace were in lieu of the Rome Statute. Even though the OTP officially closed the preliminary examination, it continues to be an active part of the transitional justice process to “ensure that the significant progress achieved by domestic prosecutorial and judicial

²⁶⁰ ‘Situation in Colombia - Interim Report’ para 25.

²⁶¹ ‘ICC Starts Next Chapter in Colombia’ (*Human Rights Watch*, 16 December 2021) <<https://www.hrw.org/news/2021/12/16/icc-starts-next-chapter-colombia>> accessed 15 June 2023.

²⁶² Office of the Prosecutor, ‘Report on Preliminary Examination Activities 2017’ (2017).

²⁶³ Office of the Prosecutor, ‘Report on Preliminary Examination Activities 2016’ (2016).

²⁶⁴ *ibid.*

entities, and in particular by the Special Jurisdiction for Peace, is sustained and strengthened.”²⁶⁵

As this illustrates, the ICC practice has created a potential space for peace mechanisms based on the local context. Given the fear that existed among scholars about the co-existence of ICC with other peace and justice mechanisms to negotiate the end of long-drawn conflicts, this is a positive development carved out of the practice of the ICC. Moving beyond the Western conceptions of justice, it opens up space for the moulding of ICC as a ‘genuinely international’²⁶⁶ justice mechanism. Such a principled understanding of the ‘interests of justice’ not only dissolves the false dichotomy between peace and justice but also instils a sense of local ownership over justice processes.²⁶⁷ It creates avenues for human rights and peace to be a part of justice, without necessarily having to give up accountability for crimes. However, the question of whether the Prosecutor will be ready to drop charges or halt ongoing investigations in case of transitional arrangements is yet to be tested.

Another point of concern is whether as seen in the Afghanistan judgement, considerations like budgetary allocations, political pressure, potential availability and preservation of evidence are being included in the determination of ‘interests of justice.’²⁶⁸ As Pues argues, the interpretative dimension of prosecutorial discretion does not give space for such managerial considerations. However, given the Appeals Chamber judgement in the PTC decision did not answer it, the question remains open till the Prosecutor openly addresses it.²⁶⁹

²⁶⁵ ‘Colombia’ (*International Criminal Court*) <<https://www.icc-cpi.int/colombia>> accessed 31 May 2023.

²⁶⁶ Pues (n 10) 2.

²⁶⁷ *ibid* 159.

²⁶⁸ *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan* (n 122).

²⁶⁹ *Situation in the Islamic Republic of Afghanistan, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan* (n 122).

DISCUSSION

Based on the analysis of the exercise of prosecutorial discretion at the various pre-trial stages, this chapter will first discuss how it shapes the ICC and the global anti-impunity project it represents. Further, the chapter will see how this constructs a certain image of who the prosecutor is and who an international criminal is.

How does Prosecutorial Discretion shape the ICC?

As discussed in the previous two chapters the ICC must be a highly selective Court in order for the system to work. Over its twenty years of establishment, only 17 situations were brought to the stage of an investigation. This gatekeeping is institutionalized in the Court by Articles 17 and 53 giving wide discretionary powers to the Prosecutor. However, this use of discretion has not been uniform and has resulted in the shaping of the Court in a certain way.

Multiplier Effect and The Ownership of Justice

The aims of the Rome Statute were never to be able to fully prosecute all the crimes that fall within its jurisdiction.²⁷⁰ In the Prosecutor's words, "The Hague itself should be a city of last resort [...] wherever possible we should be having trials in the country, in the region."²⁷¹ The creation of accountability was to be achieved not only by its own ability to prosecute but also by the "multiplier effect of its complementary jurisdiction."²⁷² This was aimed at encouraging

²⁷⁰ Luc Reydamas and Jed Odermatt, '3 Mandates' in Luc Reydamas, Jan Wouters and Cedric Ryngaert (eds), *International Prosecutors* (Oxford University Press 2012) <<https://doi.org/10.1093/acprof:oso/9780199554294.003.0003>> accessed 5 June 2023.

²⁷¹ 'Swearing-in Ceremony: Speech of New ICC Prosecutor Karim Asad Ahmad Khan QC, 16 June 2021 - YouTube' <https://www.youtube.com/watch?v=tDldr2ma1S0&ab_channel=IntlCriminalCourt> accessed 2 June 2023; Susan Kendi, 'Karim Khan's First Speech as ICC Prosecutor' (*JFJ - Journalists for Justice*, 16 June 2021) <<https://jfjustice.net/karim-khans-first-speech-as-icc-prosecutor/>> accessed 2 June 2023.

²⁷² Robinson (n 156) 482.

more states to apprehend and prosecute individuals responsible for international crimes. This effect seems to have had positive results in many cases and has pushed for a domestic investigation into cases like Guinea and the United Kingdom. In the UK, for instance, the ICC scrutiny led to a re-examination of all historical allegations against members of the UK armed forces arising from the conflict in Iraq which led to the initiation of both criminal and non-criminal proceedings.²⁷³ Unlike the UK government's initial investigation, the re-opened investigations also looked into patterns of 'systematic or systemic criminal behaviour' that extend beyond physical perpetrators and their immediate supervisors.²⁷⁴ In Guinea, the domestic investigation into the events of the '28 September massacre,' was opened one year after the events, a few months after the OTP opened preliminary examinations following Article 15 communications.²⁷⁵ These investigations were slow and had to be severely impacted by security and logistical issues, but were successful in charging 11 accused for various international crimes under Guinean law.²⁷⁶ This was also further strengthened by a Memorandum of Understanding between the Transitional Government of the Republic of Guinea and the OTP to ensure that despite closing the preliminary examination, the two parties will further collaborate to ensure "accountability for international crimes committed in Guinea in the context of the 28 September 2009 events."²⁷⁷

Apart from domestic proceedings, the impact of the ICC can also be seen if the form of other anti-impunity tribunals set up over the years. The ICC was closely followed by the UN tribunals

²⁷³ The Office of the Prosecutor, 'Final Report on Situation In Iraq/UK' (2020) para 495 <<https://www.icc-cpi.int/sites/default/files/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf>> accessed 30 May 2023.

²⁷⁴ *ibid* 497.

²⁷⁵ Office of the Prosecutor, 'Report on Preliminary Examination Activities 2011' (n 231) 21.

²⁷⁶ 'Statement by ICC Prosecutor Karim A.A. Khan KC Regarding the Opening of the Trial Related to Events of 28 September 2009 in Guinea, Signature of Agreement with Transitional Government on Complementarity and Closure of the Preliminary Examination' (*International Criminal Court*) <<https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-regarding-opening-trial-related-events-28-september>> accessed 15 June 2023.

²⁷⁷ 'Memorandum of Understanding Between The Republic of Guinea and The Office of the Prosecutor of the International Criminal Court' <<https://www.icc-cpi.int/sites/default/files/2022-09/2022-09-29-mou-icc-guinea-ns-eng.pdf>> accessed 15 June 2023.

of ICTY, ICTR, SCSL and ECCC. The CAR Special Criminal Court²⁷⁸ and Special Tribunal for Lebanon²⁷⁹ are two examples. The Special Tribunal for Lebanon was set up in 2007 following a UN Security Council Resolution 1757 to investigate the terrorist attack in Beirut in 2005 which killed among others former Lebanese prime minister Rafiq Hariri.²⁸⁰ Apart from enhancing the national crime investigation procedures and national criminal law,²⁸¹ the hybrid tribunal incorporated into domestic practice key components of international tribunals – independent prosecutor, specialised units to investigate and prosecute the most serious crimes, publicized hearings with participating victims, an outreach program with close integration of civil society, witness and victim protection and reparations.²⁸²

The situation in CAR was referred to the ICC by the CAR government twice – first in 2004 with respect to crimes committed during the violence in 2002-03,²⁸³ and another referral in May 2014 in the context of renewed violence since 2012.²⁸⁴ The OTP opened investigations into both, in 2007 and 2014 respectively. However, in the first investigation that was opened in 2007, the OTP was not successful as the only two cases it brought before the Court ended in acquittals.²⁸⁵ The second investigation is in its trial stages.²⁸⁶ The SCC was set up with the cooperation of the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA) and the CAR Ministry of Justice following the Bangui Forum for National Reconciliation.²⁸⁷ Beyond accountability, the SCC also has also boosted

²⁷⁸ ‘CAR Special Criminal Court (SCC) Now Fully Operational’ (*United Nations Peacekeeping*) <<https://peacekeeping.un.org/en/car-special-criminal-court-scc-now-fully-operational>> accessed 15 June 2023.

²⁷⁹ ‘Special Tribunal for Lebanon’ <<https://www.stl-tsl.org/en/home>> accessed 15 June 2023.

²⁸⁰ *ibid.*

²⁸¹ ‘The Dilemma on the Special Tribunal for Lebanon | Finnish Institute in the Middle East’ <<https://www.fime.fi/en/the-dilemma-on-the-special-tribunal-for-lebanon/>> accessed 15 June 2023.

²⁸² David Re, ‘The Special Tribunal for Lebanon and National Reconciliation’.

²⁸³ ‘Central African Republic’ (*International Criminal Court*) <<https://www.icc-cpi.int/car>> accessed 2 June 2023.

²⁸⁴ ‘Central African Republic II’ (*International Criminal Court*) <<https://www.icc-cpi.int/carII>> accessed 2 June 2023.

²⁸⁵ ‘Central African Republic’ (n 283).

²⁸⁶ ‘Central African Republic II’ (n 284).

²⁸⁷ ‘Secretary-General Commends Central African Republic for Adopting Peace, Reconciliation Pact at Bangui National Forum | UN Press’ <<https://press.un.org/en/2015/sgsm16739.doc.htm>> accessed 15 June 2023.

the domestic ownership of the justice mechanism. The special efforts by the SCC to increase the outreach of the Court including a partnership with local radio stations have made the proceedings accessible to the local population.²⁸⁸ In a press statement announcing the cooperation with the SCC, he also announced he would explore possibilities of holding hearings outside of The Hague.²⁸⁹ The new prosecutor has also included in his agenda plans to open new field offices in 5 locations other than Hague – Caracas, Khartoum, Kyiv, and Cox’s Bazar.²⁹⁰ This is intended to bring the work of the OTP closer to the affected communities.²⁹¹ Apart from this, it also intended at strengthening investigation and prosecution as the Independent Expert Review report noted that the lack of situation-specific knowledge hampered the performance of the OTP. This more field-centric model is aimed at improving knowledge of the political, social, cultural and linguistic context of the situation under the preview.²⁹² The Prosecutor also hopes that this would support more “effective synergies”²⁹³ and increase domestic accountability efforts and thus give a boost to the effective implementation of complementarity.

Establishing the ‘Truth’ and the Centrality of Victims

Even though establishing truth is traditionally associated with non-judicial mechanisms like truth commissions and reconciliation missions,²⁹⁴ the Prosecutor is duty-bound by Article 54(1)(a) of the Statute to seek the truth, covering all the facts and evidence.²⁹⁵ This is especially

²⁸⁸ ‘Central African Republic: First Trial at the Special Criminal Court’ (*Human Rights Watch*, 12 April 2022) <<https://www.hrw.org/news/2022/04/12/central-african-republic-first-trial-special-criminal-court>> accessed 2 June 2023.

²⁸⁹ ‘ICC Prosecutor Underlines Commitment to Support the Special Criminal Court of the Central African Republic Following Address by Deputy Prosecutor, Mr Mame Mandiaye Niang at Opening of First Trial in Bangui’ (*International Criminal Court*) <<https://www.icc-cpi.int/news/icc-prosecutor-underlines-commitment-support-special-criminal-court-central-african-republic>> accessed 15 June 2023.

²⁹⁰ The Office of the Prosecutor, ‘Annual Report of the Office of the Prosecutor – 2022’ (n 254) 24.

²⁹¹ *ibid* 20.

²⁹² *ibid* 18.

²⁹³ *ibid*.

²⁹⁴ Robinson (n 156) 484.

²⁹⁵ Rome Statute of the International Criminal Court art 54.

important for crimes that have the attention of the Court because the situation is almost always that of mass violence and atrocity, and the role of establishing the truth goes beyond individual legal responsibility.²⁹⁶ Even though the high selectivity of ICC proceedings at trial may lead to unavoidable exclusions,²⁹⁷ my concern here is primarily how pre-trial activities of the OTP give space for truth and voice to the victims.

The policy for preliminary examinations follows the same standards of objectivity as described in Article 54(1).²⁹⁸ Even though the Prosecutor at this stage does not have its own evidence-gathering powers, it collects information from not just States and victims, but also other international institutions, fact-finding missions, NGO submissions etc.²⁹⁹ There is a thorough inspection of the collected information for coherence to ensure, to the extent it can, that there is no bias.³⁰⁰

Even when the OTP decides to not go ahead with an investigation, the comprehensiveness of the preliminary examination provides a clear historic record of the crimes committed in the context of the conflict. Even when the crimes do not amount to war crimes, crimes against humanity or genocide or are not of sufficient gravity to warrant an ICC investigation, the OTP acknowledges the human rights violations that have occurred and push for domestic investigations into them. For example, post-election violence in Gabon³⁰¹ and Honduras,³⁰² the crimes committed in the Bajo Aguán region in Honduras against the members of the *campesino* movement,³⁰³ and those in the territory of Bolivia during the nationwide road blockade

²⁹⁶ Pues (n 10) 107.

²⁹⁷ *ibid* 108.

²⁹⁸ The Office of the Prosecutor, 'Policy Paper on Preliminary Examination' (n 47) para 30.

²⁹⁹ *ibid* 31.

³⁰⁰ *ibid* 32.

³⁰¹ Office of the Prosecutor, 'Report on Preliminary Examination Activities 2018' (2018) para 311.

³⁰² Office of the Prosecutor, 'Report on Preliminary Examination Activities 2015' (2015) para 274.

³⁰³ *ibid* 280.

demonstrations.³⁰⁴ Similarly, in the final report on the conclusion of the preliminary examination into the Israeli interception of a humanitarian aid flotilla bound for the Gaza Strip, the Prosecutor made it clear that the “situation with regard to the civilian population in Gaza is a matter of international concern” even though she had no jurisdiction over other alleged crimes committed in the context of the Israel-Hamas conflict, nor in the broader context of any conflict between Israel and Palestine.³⁰⁵

The ICC structure has over the years pushed efforts to give a more central role to victims. Unlike in the ICC, victim participation and reparations were absent in the ICTR and ICTY where they were mere witnesses.³⁰⁶ The ICC offers victims and their representatives a voice to make their own submissions.³⁰⁷ The Office of Public Counsel for Victims is also set up to ensure victims’ ‘right to contribute to the search for the truth, the right to be heard, and the right to reparation.’³⁰⁸

But the more the ‘victim’ comes into focus, the more it becomes a generic construction closely related to the crime itself and not an individual in their particularity.³⁰⁹ In his solemn undertaking as the new Prosecutor Karim Khan said the following, “The survivors are the hero of the story that we have the honour to tell. Their indefatigable energy, their stamina and persistence for justice I have found repeatedly all over the world.”³¹⁰ Romanticising the survivor and their struggles is a constant and common theme at the ICC and especially at the

³⁰⁴ ‘Situation in the Plurinational State of Bolivia, Final Report’ para 24 <<https://www.icc-cpi.int/sites/default/files/2022-06/2022-02-14-otp-report-bolivia-eng.pdf>> accessed 16 June 2023.

³⁰⁵ Office of the Prosecutor, ‘Report on Preliminary Examination Activities 2017’ (n 262) para 333.

³⁰⁶ Sara Kendall and Sarah Nouwen, ‘Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood’ (2013) 76 *Law and Contemporary Problems* 235, 238 <<https://www.jstor.org/stable/24244678>> accessed 16 June 2023.

³⁰⁷ Rome Statute of the International Criminal Court art 15,19.

³⁰⁸ The Office of Public Counsel for Victims, ‘Representing Victims before the International Criminal Court, A Manual for Legal Representatives’ 7 <<https://www.icc-cpi.int/sites/default/files/manual-victims-legal-representatives-fifth-edition-rev1.pdf>> accessed 16 June 2023.

³⁰⁹ Schwöbel-Patel (n 4) 131.

³¹⁰ ‘Swearing-in Ceremony: Speech of New ICC Prosecutor Karim Asad Ahmad Khan QC, 16 June 2021 - YouTube’ (n 271); Kendi (n 271).

OTP³¹¹. This increased importance given to the victim also leads to the creation of an idealized victim – a deity-like and seemingly sovereign entity, but at the same time weak and vulnerable, awaiting justice from the Court.³¹² Clarke noted the following as the ideal victim for the international legitimacy of the SCSL; “the third-world sufferer - the indigent individual, the defenceless child soldier forced to bear arms, the raped or violated concubine, the (African, Christian, Muslim, Jewish) refugee, or the internally displaced.”³¹³ This can be seen echoed as Karim Khan begins his speech by describing an exhilarating experience where he was welcomed in a refugee camp north of Darfur, by “men, women, and children that have been living in the camp for almost over 20 years.”³¹⁴

This ‘ideal victim of global injustice’³¹⁵ transcends all individual victims and becomes the source of legitimacy for any of the Prosecutor’s decisions.³¹⁶ Apart from being a source of its legitimacy, it also de-politicizes crime. When the aim of the Prosecutor is to “tell them the unvarnished truth,”³¹⁷ the aim of international justice is reduced to that of victim catharsis. The underlying ‘truth’ of long-lasting conflicts becomes individualized and de-political.³¹⁸ It implicates only the crime that is committed on an individual victim, rather than on communities and the polity in general.³¹⁹

³¹¹ Schwöbel-Patel (n 4) 144.

³¹² *ibid* 131.

³¹³ Clarke, ‘The Rule of Law Through Its Economies of Appearances: The Making of the African Warlord’ (2011) 18 *Indiana Journal of Global Legal Studies* 7, 13 <<https://muse.jhu.edu/article/445802>> accessed 16 June 2023.

³¹⁴ Karim A.A. Khan KC (n 15).

³¹⁵ Schwöbel-Patel (n 4) 132.

³¹⁶ Frédéric Mégret, ‘In Whose Name? The ICC and the Search for Constituency’ in Carsten Stahn, Christian De Vos and Sara Kendall (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press 2015) 43 <<https://www.cambridge.org/core/books/contested-justice/in-whose-name/647FD02936B376A6D0C2B77874BDF810>> accessed 16 June 2023.

³¹⁷ ‘Swearing-in Ceremony: Speech of New ICC Prosecutor Karim Asad Ahmad Khan QC, 16 June 2021 - YouTube’ (n 271).

³¹⁸ Schwöbel-Patel (n 4) 144.

³¹⁹ Mégret (n 316) 37.

Politics of Material Challenges, State Cooperation and International Politics

The ICC, like any other major international institution, depends on its State Parties to fund its activities. The Court's budget is discussed and adopted by the Assemble of State Parties according to the Article 115 of the Rome Statute.³²⁰ The prosecutor requires enormous resources to look into a large number of alleged crimes that have been reported and continue to be reported, verify the seriousness of allegations and obtain the detailed information required to conduct a proper legal assessment of each reported incident, starting at the stage of preliminary examinations.³²¹ This process is challenging, time-consuming, and expensive, especially if the conflict is ongoing and the State is not supportive. Apart from this, the Court's budget also supports legal aid payments for defence teams, the Secretariat for the Trust Fund for Victims (SFTV), and the work of the Registry.³²² However, the ASP has not been sympathetic towards the Court when it comes to financing, imposing a zero-growth budget for more than a decade.³²³ This approach does not reflect the needs and work of the Court and damages the Court's ability to deliver justice.³²⁴

Despite the increasing dossier of the OTP, there is a clear mismatch between the expectations and the resources given to the Office.³²⁵ Karim Khan's policy comes with a noted shift with regard to making the ICC, and specifically the OTP 'more efficient.'³²⁶ This echo with the PTC judgement in Afghanistan where the Chamber looked at whether "it appears suitable to result in the effective investigation and subsequent prosecution of cases within a reasonable time

³²⁰ Rome Statute of the International Criminal Court art 115.

³²¹ The Office of the Prosecutor, 'Policy Paper on Preliminary Examination' (n 47).

³²² Stuart Ford, 'Funding the ICC for Its Third Decade' [2023] SSRN Electronic Journal 2–6 <<https://www.ssrn.com/abstract=4323894>> accessed 11 June 2023.

³²³ Stuart Ford, 'How Much Money Does the ICC Need?' (12 April 2015) 2 <<https://papers.ssrn.com/abstract=3371046>> accessed 16 June 2023.

³²⁴ *ibid* 5.

³²⁵ Janet H Anderson, 'ICC Investigations: What Prosecutor Bensouda Leaves Behind' (*JusticeInfo.net*, 26 January 2021) <<https://www.justiceinfo.net/en/68812-icc-investigations-what-prosecutor-bensouda-leaves-behind.html>> accessed 11 June 2023.

³²⁶ The Office of the Prosecutor, 'Annual Report of the Office of the Prosecutor – 2022' (n 254).

frame.”³²⁷ It counited that “In the foreseeable absence of additional resources for the coming years in the Court's budget, authorising the investigation would therefore result in the Prosecution having to reallocate its financial and human resources; in light of the limited amount of such resources, this will go to the detriment of other scenarios (be it preliminary examinations, investigations or cases) which appear to have more realistic prospects to lead to trials and thus effectively foster the interests of justice, possibly compromising their chances for success.”³²⁸

Despite being a pragmatic approach, this sets a dangerous precedent. Former Prosecutor Bensouda admits that when the OTP is overstretched due to finite resources, preliminary examinations become more important and integrated into the functioning of the OTP than ever before, as they are simultaneously retaining the essential gatekeeper function of the OTP along with ensuring that the Court's finite resources are best prioritised.³²⁹ Thus, dropping ‘unrealistic’ examinations and investigations in the name of limited resources puts the legitimacy of the Court into question.

The ICC works with the States. In the words of Moreno Ocampo, “the ICC is independent and interdependent at the same time. It cannot act alone. It will achieve efficiency only if it works closely with other members of the international community.”³³⁰ State cooperation thus is critical at every stage of the work of the ICC, from preliminary examinations to trial and

³²⁷ *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan* (n 122) para 56.

³²⁸ *ibid* 95.

³²⁹ Fatou Bensouda, “‘Without Fear or Favour’: Reflections on My Term as Prosecutor of the International Criminal Court’.

³³⁰ Ocampo (n 88) 2.

conviction. In the absence of State cooperation, the preliminary investigations itself can stretch for decades like in the case of Afghanistan.³³¹

Material funding for the ICC is also dependent on its complementarity with international politics. The most glaring example would be the extra funding pledged by various EU states upon the announcement of investigations on war crimes and crimes against humanity committed in Ukraine by the joint-investigation team consisting of the Ukrainian General Prosecution Office, 13 EU Member States and the Office of the Prosecutor of the International Criminal Court (ICC).³³²

At the mercy of Powerful States?

From the Rome Conference when NGOs loudly opposed the inclusion of provisions that gave the UNSC role in the functioning of the Court, the Court has been criticised for its inability to be truly independent of the interests of the powerful states – specifically the five Permanent members of the ICC.³³³ Despite issuing arrest warrants against Russian President Putin, the Court is nowhere close to discrediting this criticism, because of two major reasons. First it the non-committal nature of the 3 out of the 5, Russia, China and the US. This has been a thorn for the ICC for a long time, with other countries using this as an excuse for non-ratification.³³⁴ My focus, however, will be on the second reason – that the lack of enforcement mechanism results

³³¹ ‘Report on Preliminary Examination Activities (2017) - Afghanistan’ (Office of the Prosecutor 2017) <https://www.icc-cpi.int/sites/default/files/itemsDocuments/2017-PE-rep/2017-otp-rep-PE-Afghanistan_ENG.pdf> accessed 27 May 2023.

³³² ABC News, ‘Millions in Extra Funding Pledged for ICC Work in Ukraine’ (*ABC News*) <<https://abcnews.go.com/International/wireStory/countries-urged-rally-court-probes-ukraine-97988612>> accessed 31 May 2023; ‘Russian War Crimes in Ukraine: EU Supports the International Criminal Court Investigation with €7.25 Million - Ukraine | ReliefWeb’ (9 June 2022) <<https://reliefweb.int/report/ukraine/russian-war-crimes-ukraine-eu-supports-international-criminal-court-investigation-eu725-million>> accessed 31 May 2023.

³³³ Amnesty International (n 133); ‘The Meaning of “the Interests of Justice” in Article 53 of the Rome Statute’ (n 131).

³³⁴ Devasheesh Bais, ‘The Raison D’Etre of Non-Ratification of the Rome Statute by Asian States’ (28 April 2012) 11 <<https://papers.ssrn.com/abstract=2149964>> accessed 16 June 2023.

in the Prosecutor being at the mercy of powerful States to be able to carry out his/her duties without disruption.

The hostility of powerful states towards the ICC is not a new observation. The US is an easy example, having maintained a policy of non-cooperation.³³⁵ It soon turned into active hostility when the US revoked Fatou Bensouda's entry visa when she announced investigations into the activities of the CIA in Afghanistan.³³⁶ Even though this ban has been since revoked, the US has made it clear that it is against both the investigation of US personnel for their conduct in Afghanistan and the investigation of crimes committed by Israeli forces in Palestine.³³⁷ Similarly, the UK infamously pushes for time frames for preliminary examinations as a way of forcing the Prosecutor to close it's the preliminary examination into the conduct of British soldiers in Iraq.³³⁸ In another instance of a blatant display of hostility, the Russian government issued an arrest warrant against Karim Khan as an act of retribution for the ICC arrest warrant against Putin.³³⁹

Even though this may seem unsurprising, the problem is when the Prosecutor's exercise of discretion seems to be influenced by this hostility. The decision of the Prosecutor to deprioritize investigations into the crimes committed by the CIA in Afghanistan was seen as

³³⁵ 'The United States and International Criminal Justice: A Complex and Challenging Relationship' (*Parliamentarians for Global Action - Mobilizing Legislators as Champions for Human Rights, Democracy and a Sustainable World.*) <<https://www.pgaction.org/ilhr/rome-statute/united-states-and-international-criminal-justice.html>> accessed 16 June 2023.

³³⁶ Patrick Wintour, Owen Bowcott and Julian Borger, 'US Revokes ICC Prosecutor's Visa over Afghanistan Inquiry' *The Guardian* (5 April 2019) <<https://www.theguardian.com/law/2019/apr/05/us-revokes-visa-of-international-criminal-courts-top-prosecutor>> accessed 16 June 2023.

³³⁷ 'Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court' (*United States Department of State*) <<https://www.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court/>> accessed 11 June 2023.

³³⁸ Carla Ferstman, Thomas Obel Hansen, and Noora Arajärvi, 'The UK Military In Iraq: Efforts and Prospects For Accountability For International Crimes Allegations?' (2018) <https://www1.essex.ac.uk/hrc/documents/THE_UK_MILITARY_IN_IRAQ_1Oct2018.pdf> accessed 30 May 2023.

³³⁹ Andrew Roth, 'Russia Issues Arrest Order for British ICC Prosecutor after Putin Warrant' *The Guardian* (19 May 2023) <<https://www.theguardian.com/law/2023/may/19/russia-arrest-order-international-criminal-court-prosecutor-karim-khan>> accessed 16 June 2023.

a ‘thinly-guised surrender to power politics in the context of open and unprecedented US hostility towards the ICC.’³⁴⁰ Similarly, the ICC is silent on both the Article 15 communication concerning EU migration policies in the Mediterranean and reconsidering the closing of preliminary examination into British war crimes in Iraq in the light of the failure of domestic investigations.³⁴¹

Who is the criminal and who is the prosecutor?

While looking at the prosecutorial discretion at the ICC, Matthew Brubacher notes that its inclusion was intended to bring an “equitable and uniformly applied international legal system” to “distance itself from the influences of power politics that pervaded the Nuremberg and Tokyo military tribunals.”³⁴² However, after almost twenty years, more than 30 preliminary examinations, 17 investigations and 31 cases³⁴³ of exercise of this discretion have only created a particular image of who prosecutes whom at this temple of international justice.

Prosecutor as an independent, impartial figure of international justice

Given the importance of the role of the ICC Prosecutor and the role of the ICC in international justice, the statutory bar for the Prosecutor is set very high. The Prosecutor should be independent³⁴⁴ and “apply consistent methods and criteria, irrespective of the States or parties involved or the person(s) or group(s) concerned.”³⁴⁵ He is thus a de-political, neutral, rational

³⁴⁰ Sergey Vasiliev, ‘Not Just Another “Crisis”: Could the Blocking of the Afghanistan Investigation Spell the End of the ICC? (Part I)’ (*EJIL: Talk!*, 19 April 2019) <<https://www.ejiltalk.org/not-just-another-crisis-could-the-blocking-of-the-afghanistan-investigation-spell-the-end-of-the-icc-part-i/>> accessed 16 June 2023.

³⁴¹ Even though these submissions were made before the Annual Report 2022 was published, they are not mentioned in the Report or in any statements Karim Khan has made in the last two years.

³⁴² Brubacher, ‘Prosecutorial Discretion within the International Criminal Court’ (n 124) 71.

³⁴³ ‘International Criminal Court’ <<https://www.icc-cpi.int/>> accessed 2 June 2023.

³⁴⁴ Rome Statute of the International Criminal Court art 42.

³⁴⁵ *ibid* 21.

observer in a conflict or post-conflict situation. He will work objectively to establish the truth³⁴⁶ and will work towards fulfilling the objectives of the Rome Statute: the ending of impunity, by encouraging genuine national proceedings, and the prevention of crimes.³⁴⁷

Most importantly, by being the public face of international criminal justice, he or she represents a Court that is independent and impartial.³⁴⁸ ‘International’ connotations such as ‘disinterested’ and ‘neutral,’³⁴⁹ often contrary to the reality of the inseparable nature of international politics to the functioning of the international criminal justice project.³⁵⁰ At the same time as critics of the Court reiterate, the Prosecutor also becomes an executor of those who have the most influence over global politics, often draped in the apparent neutrality of legal logic.³⁵¹

Universal Moral Authority

Apart from investigations and prosecutions, the Prosecutors position also gives her tremendous moral and legal power over domestic politics. The Prosecutors proprio motu powers give her the competence to constantly monitor the world’s conflict ‘hot spots,’ and the handling of atrocities by national authorities, to decide when to step in.³⁵² The Prosecutor can be seen calling for peace after an election or escalations in tension, and warning that the ICC is

³⁴⁶ *ibid* 54.

³⁴⁷ The Office of the Prosecutor, ‘Policy Paper on Preliminary Examination’ (n 47).

³⁴⁸ Luc Côté, ‘6 Independence and Impartiality’ in Luc Reydam, Jan Wouters and Cedric Ryngaert (eds), *International Prosecutors* (Oxford University Press 2012) 401 <<https://doi.org/10.1093/acprof:oso/9780199554294.003.0006>> accessed 5 June 2023.

³⁴⁹ Reydam and others (n 49).

³⁵⁰ Frédéric Mégret, ‘What Sort of Global Justice Is “International Criminal Justice”?’ (2015) 13 *Journal of International Criminal Justice* 77, 96 <<https://doi.org/10.1093/jicj/mqu080>> accessed 10 June 2023.

³⁵¹ Phil Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics* (Cambridge University Press 2018) <<https://www.cambridge.org/core/books/distant-justice/FD4410B6160CD17836297D9503A219DD>> accessed 16 June 2023; Mégret (n 350); Mégret (n 316).

³⁵² Reydam and Odermatt (n 270) 108.

‘watching’ the events where it has jurisdiction including CAR,³⁵³ Burundi,³⁵⁴ Palestine,³⁵⁵ and Gabon³⁵⁶ to name a few. Even when the Prosecutor concludes a preliminary examination without proceeding to an investigation, it is always accompanied by a statement that addresses the international crimes or other human rights violations that have happened and are concluded with a warning “should further information becomes available in the future which would lead the Office to reconsider these conclusions in the light of new facts or evidence, the preliminary examination could be re-opened.”³⁵⁷

In most of the instances listed above where the Prosecutor issued said ‘warnings’ regarding the events going on in a State, they have been from the ‘Global South.’ When in 2020, the Prosecutor decided not to proceed with an investigation into war crimes committed by UK soldiers in Iraq for reasons of complementarity, she had clearly stated her concerns over the effectiveness of domestic proceedings.³⁵⁸ Despite this, there were no ‘warnings’ from the Prosecutor when the domestic investigations into war crimes in Iraq by the UK fizzled out.³⁵⁹ Similarly, even after the Prosecutor admitted that the Article 15 communication submitted

³⁵³ ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, Ahead of Elections in the Central African Republic: “The Peaceful Course of Elections in the Central African Republic Is Essential to Prevent Cycles of Violence.”’ (*International Criminal Court*) <<https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-fatou-bensouda-ahead-elections-central>> accessed 16 June 2023.

³⁵⁴ ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, Regarding the Recent Pre-Election Violence in Burundi’ (*International Criminal Court*) <<https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-fatou-bensouda-regarding-recent-pre-election>> accessed 16 June 2023.

³⁵⁵ ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, Regarding the Worsening Situation in Gaza’ (*International Criminal Court*) <<https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-fatou-bensouda-regarding-worsening-situation>> accessed 16 June 2023.

³⁵⁶ ‘International Criminal Court Prosecutor on Gabon: “The Legal Criteria for This Court to Investigate Have Not Been Met”’ (*International Criminal Court*) <<https://www.icc-cpi.int/news/international-criminal-court-prosecutor-gabon-legal-criteria-court-investigate-have-not-been>> accessed 16 June 2023.

³⁵⁷ The Office of the Prosecutor, ‘Policy Paper on Preliminary Examination’ (n 47).

³⁵⁸ ‘Situation in Iraq/UK, Final Report’ para 504 <<https://www.icc-cpi.int/sites/default/files/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf>> accessed 15 June 2023.

³⁵⁹ ‘The ICC, British War Crimes in Iraq and a Very British Tradition’ (n 256); Samira Shackle, ‘Why We May Never Know If British Troops Committed War Crimes in Iraq’ *The Guardian* (7 June 2018) <<https://www.theguardian.com/news/2018/jun/07/british-troops-war-crimes-iraq-historic-allegations-team>> accessed 16 June 2023.

against EU migration policies in the Mediterranean³⁶⁰ warrants examination,³⁶¹ there have not been any statements against continuing deaths in the Mediterranean.³⁶² This notion of the Prosecutor as a higher moral authority, watching and supervising states as ‘passive objects’ is both patronizing³⁶³ and masquerading hegemonic tendencies as the application of universality.³⁶⁴

The Prosecutor for Stands by the Victims

Every Article 15 communication made by any person in the world, about any crime under its jurisdiction, warrants a reply from the OTP.³⁶⁵ Any person in the world who has been a victim of a crime committed under the Court’s jurisdiction can theoretically request the Prosecutor for justice. The International Prosecutor is the one whom the victims can turn to for justice when all other doors have been closed to them.

The Prosecutor, like anti-impunity actors elsewhere, place victim’s interests as the central driving force for not just their endeavours, but also their choices.³⁶⁶ Karim Khan in his speech to the ASP last December talked about the importance of the work of the ICC as it “will mean an awful lot to the men and women and children of Kalma camp that I referred to at the outset, the refugees we see around the world that are displaced because of conflict and crimes.”³⁶⁷ The

³⁶⁰ ‘Suing EU Officials at the ICC’ (*front-lex*) <<https://www.front-lex.eu/icc-case>> accessed 31 May 2023.

³⁶¹ ‘Committee on Human Rights’ (*European Parliament Multimedia Centre*) <https://multimedia.europarl.europa.eu/fr/webstreaming/droi-committee-meeting_20200529-1100-COMMITTEE-DROI> accessed 1 June 2023.

³⁶² ‘Endless Tragedies in the Mediterranean Sea’ (*Human Rights Watch*, 13 September 2022) <<https://www.hrw.org/news/2022/09/13/endless-tragedies-mediterranean-sea>> accessed 16 June 2023; ‘Central Mediterranean: Deadliest First Quarter for Migrant Deaths in Six Years | UN News’ (12 April 2023) <<https://news.un.org/en/story/2023/04/1135577>> accessed 16 June 2023; ‘Mediterranean | Missing Migrants Project’ <<https://missingmigrants.iom.int/region/mediterranean>> accessed 16 June 2023.

³⁶³ Douglas Guilfoyle, ‘Reforming the International Criminal Court: Is It Time for the Assembly of State Parties to Be the Adults in the Room?’ (*EJIL: Talk!*, 8 May 2019) <<https://www.ejiltalk.org/reforming-the-international-criminal-court-is-it-time-for-the-assembly-of-state-parties-to-be-the-adults-in-the-room/>> accessed 16 June 2023.

³⁶⁴ Clark (n 351) 309.

³⁶⁵ The Office of the Prosecutor, ‘Policy Paper on Preliminary Examination’ (n 47) para 88.

³⁶⁶ Schwöbel-Patel (n 4) 128.

³⁶⁷ Karim A.A. Khan KC (n 15).

justification of ‘victim’s interests’ gives the exertion of prosecutorial discretion the ability to deflect any criticism as victims of all the innumerable situations/cases in front of the ICC deserve justice. Irrespective of why a case gets prioritized over the other, the veneer of victim catharsis makes the OTP decisions unquestionable.

When the Prosecutor decides to prosecute the Taliban and not US forces,³⁶⁸ it is impossible not to wonder how much it has to do with the victim. The image of Afghan girls suppressed under the Taliban fits much better into the image of a ‘victim’ than ‘suspected terrorists’ being tortured in CIA dark sites.³⁶⁹ Emotional language often associated with crimes involving children³⁷⁰ can be seen repeated in the indictment of Putin.³⁷¹ Thus, the exercise of discretion institutionalizes who the Prosecutor must help. It develops into a ‘morally corrosive language of a ‘hierarchy of victims,’³⁷² where those categories of those who deserve justice are created by the discretion of the Prosecutor.

Locating the ‘Criminal’

Andrew Cayley, the UK’s Director of Service Prosecutions in an interview was asked about the progress of the domestic investigations into Iraq torture cases. Replying to whether the UK investigations are a show to keep the ICC off its back, he said, “I have worked in other places of the world where these things go on. I know what it looks like in Southeast Asia, in North

³⁶⁸ ‘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’ (*International Criminal Court*) <<https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-following-application>> accessed 11 June 2023.

³⁶⁹ Kieran McEvoy and Kirsten McConnachie, ‘Victimology in Transitional Justice: Victimhood, Innocence and Hierarchy’ (2012) 9 *European Journal of Criminology* 527 <<https://doi.org/10.1177/1477370812454204>> accessed 8 June 2023.

³⁷⁰ Schwöbel-Patel (n 4) 134.

³⁷¹ ‘Ukraine War: The Mothers Going to Get Their Children Back from Russia’ *BBC News* (31 May 2023) <<https://www.bbc.com/news/world-europe-65641304>> accessed 16 June 2023; Peter Beaumont, “‘I Was so Scared’: The Ukrainian Children Taken to Russia for Financial Gain’ *The Guardian* (29 May 2023) <<https://www.theguardian.com/world/2023/may/29/i-was-so-scared-the-ukrainian-children-taken-to-russia-for-financial-gain>> accessed 16 June 2023.

³⁷² McEvoy and McConnachie (n 369) 532.

Africa. The one thing I am proud of in my country is the Rule of Law. We are a nation of law and not of men.”³⁷³ As Schwobel-Patel notes, “The placing of both perpetrators and victims in the Global South is illustrated as being the most ‘on brand’ version of marketized global justice [...] it sets sight for which State can be a ‘feasible’ investigation for the Court.”³⁷⁴ The prosecutorial discretion at the ICC mirrors this, with the Prosecutor's decisions exhibiting a clear notion of where the ‘criminal’ cannot be from.

There was a striking difference in the way domestic proceedings are examined by the same Office, under the same prosecutor (Fatou Bensouda). The domestic proceedings in Guinea and Colombia were followed with a microscope almost up to the beginning of the trial.³⁷⁵ The prosecutions of the crimes committed in CAR were ongoing even though the SCC was established for domestic proceedings.³⁷⁶ But even after multiple reports about the lack of proper attention from the UK domestic courts³⁷⁷ and statements by British politicians against the prosecution of soldiers who were accused of committing Crimes Against Humanity,³⁷⁸ the OTP decided to close the preliminary examination into the situation for reasons of positive complementarity. In July 2021, the European Centre for Constitutional and Human Rights (ECCHR) submitted an article 15 communication regarding the need to re-open the preliminary

³⁷³ Janet Anderson, ‘Episode 13 – Double Standards with Carla Ferstman’ (*asymmetrical haircuts*, 16 November 2019) <<https://www.asymmetricalhaircuts.com/episodes/episode-13-double-standards-with-carla-ferstman/>> accessed 16 June 2023.

³⁷⁴ Christine Schwöbel-Patel (ed), ‘Introduction’, *Marketing Global Justice: The Political Economy of International Criminal Law* (Cambridge University Press 2021) <<https://www.cambridge.org/core/books/marketing-global-justice/introduction/50A51DC464A498D7F8CE0CCF81F00910>> accessed 25 May 2023.

³⁷⁵ Office of the Prosecutor, ‘Report on Preliminary Examination Activities 2020’ (n 252).

³⁷⁶ ‘Central African Republic: First Trial at the Special Criminal Court’ (n 288).

³⁷⁷ Carla Ferstman, Thomas Obel Hansen, and Noora Arajärvi, ‘The UK Military In Iraq: Efforts and Prospects For Accountability For International Crimes Allegations?’ (2018) <https://www1.essex.ac.uk/hrc/documents/THE_UK_MILITARY_IN_IRAQ_1Oct2018.pdf> accessed 30 May 2023.

³⁷⁸ ‘United Kingdom: ICC Prosecutor Ends Scrutiny of Iraq Abuses’ (*Human Rights Watch*, 10 December 2020) <<https://www.hrw.org/news/2020/12/10/united-kingdom-icc-prosecutor-ends-scrutiny-iraq-abuses>> accessed 31 May 2023.

examination in light of the unwillingness of the UK authorities to hold those accountable, but there has been no update so far.³⁷⁹

What the ‘international’ crime does he commit?

Similar to the point of where the criminal is from, there is also a question of what crime was committed. Mutilated bodies and graphic evidence create an image of mindless violence, exoticizing both the victims and the violence are a staple of how an international crime is depicted.³⁸⁰ Visually cruel, de-politicized crimes become the bedrock of international crime whose value is increased by individualized criminal guilt that gives an evil perpetrator almost on the ‘borders of humanity.’³⁸¹

This image of an ‘international crime’ is currently being challenged at the ICC. Venezuela in 2020, referred itself to the OTP requesting an investigation into Crimes Against Humanity being allegedly committed in its territory “as a result of the application of unlawful coercive measures adopted unilaterally by the government of the United States of America against Venezuela, at least since the year 2014.”³⁸² Similarly, the 2019 submission by Adv. Omer Shatz and Adv. Juan Branco identified as perpetrators ‘European Union and Member States’ officials’ and focuses on EU migration policies from 2015 to 2019.³⁸³ The situation in Venezuela is under preliminary examination and the Prosecutor has given no comments regarding the latter.³⁸⁴ This is a perfect opportunity for both the Prosecutor and the global

³⁷⁹ ‘Never Two Without Three: On the – To Be Reopened – ICC Preliminary Examination in Iraq’ (*Opinio Juris*, 9 July 2021) <<http://opiniojuris.org/2021/07/09/never-two-without-three-on-the-to-be-reopened-icc-preliminary-examination-in-iraq/>> accessed 16 June 2023.

³⁸⁰ Schwöbel-Patel (n 4) 161.

³⁸¹ Sofia Stolk, ‘A Sophisticated Beast? On the Construction of an “Ideal” Perpetrator in the Opening Statements of International Criminal Trials’ (2018) 29 *European Journal of International Law* 677, 678 <<https://doi.org/10.1093/ejil/chy041>> accessed 16 June 2023.

³⁸² ‘Venezuela II’ (*International Criminal Court*) <<https://www.icc-cpi.int/venezuela-ii>> accessed 16 June 2023.

³⁸³ ‘Suing EU Officials at the ICC’ (n 360).

³⁸⁴ ‘Venezuela II’ (n 382).

justice community to challenge a critical pre-conceived notion of what an international crime entails. It needs to be seen how the Prosecutor will use his discretion in these critical cases.

To summarize, as the prosecutor becomes the image of international justice, the criminal represents the suffering of innumerable victims. It is an antagonistic relationship with justice hinging on a single decision - conviction or acquittal. What is often forgotten here, is that the ICC represents one form of global justice. However, as we can see, the system of the ICC as of now, even though promotes domestic accountability, creates a universal truth, and is often bound by political pressures. The impartial and independent prosecutor's decisions are often based perceived as politically motivated and biased and lack a structured approach and thus often lack legitimacy among both victims and observers.

CONCLUSION

As discussed so far, the exercise of prosecutorial discretion has created a particular image of who can be prosecuted by the Court and by whom. These decisions by the Prosecutor have also considerably shaped the image of the ICC itself.

Future of ICC

It is impossible to not consider the personal style of the Prosecutor while discussing how their choices have shaped the Court. Fatou Bensouda, the second Prosecutor, projected her identity as an activist.³⁸⁵ She continuously took decisions that are ‘bold,’ including a willingness to challenge major powers.³⁸⁶ She opened investigations into Afghanistan (which included the crimes allegedly committed by the US forces in Afghanistan) and Israel-Palestine conflicts, arguably the two of the most long-standing and controversial topics of the last twenty years.³⁸⁷ Keeping in mind the role of the ICC to be an authoritative record of historical injustices, these investigations themselves will go a long way in establishing the ‘truth’ as much as possible. It is thus imperative to discuss the prosecutorial strategy of her successor to be able to determine how the ICC and the model of justice it represents will be shaped over the next decade.

³⁸⁵ Alex Batesmith, ‘International Prosecutors as Cause Lawyers’ (2021) 19 *Journal of International Criminal Justice* 803, 811 <<https://doi.org/10.1093/jicj/mqab068>> accessed 5 June 2023.

³⁸⁶ Anderson (n 325).

³⁸⁷ *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan* (n 122); ‘Statement of ICC Prosecutor, Fatou Bensouda, Respecting an Investigation of the Situation in Palestine’ (*International Criminal Court*) <<https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-respecting-investigation-situation-palestine>> accessed 11 June 2023.

New Prosecutor, New Strategy

Karim Khan was elected as the new ICC Prosecutor in February 2021³⁸⁸ after a much controversial election.³⁸⁹ After being sworn in as the Prosecutor of the ICC in June 2021, Karim Khan has envisioned his idea for organisational and cultural changes for the OTP.³⁹⁰ These changes are very important because his appointment was closely following the scathing remarks of the Independent Expert Review which looked into the systemic issues of the ICC and the Rome Statute System.³⁹¹ Apart from the remarks on the workplace culture in the IER,³⁹² the Court's performance as a judicial institution has been criticized for not matching its central message.³⁹³

Karim Khan is yet to publish his Strategic Plan for 2023-2025, but the Annual Report published in December 2022 and the draft of the Strategic Plan circulated to NGOs speak volumes of what is to be expected. From his report and his engagement so far, his Office seems to be more focused to ensure "greater efficiency and greater impact."³⁹⁴ His main objective is to ensure that there are concrete aims which are measurable using performance indicators.³⁹⁵ His Office is devising a more streamlined approach with situation-specific completion strategies to guide the progress of a situation from preliminary examination to trial and conviction by making the

³⁸⁸ 'British Human Rights Lawyer Elected Chief Prosecutor of the International Criminal Court | UN News' (12 February 2021) <<https://news.un.org/en/story/2021/02/1084582>> accessed 10 June 2023.

³⁸⁹ Patrick Wintour, 'British Barrister Karim Khan Elected ICC's New Chief Prosecutor' *The Guardian* (12 February 2021) <<https://www.theguardian.com/law/2021/feb/12/karim-khan-international-criminal-court-prosecutor>> accessed 10 June 2023.

³⁹⁰ The Office of the Prosecutor, 'Annual Report of the Office of the Prosecutor – 2022' (n 254) 12.

³⁹¹ 'Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report' (2020) para 17 <https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP19/IER-Final-Report-ENG.pdf> accessed 2 June 2023.

³⁹² *ibid* 66.

³⁹³ Ashish Sen, 'The International Criminal Court Needs Fixing' (*Atlantic Council*, 24 April 2019) <<https://www.atlanticcouncil.org/blogs/new-atlanticist/the-international-criminal-court-needs-fixing/>> accessed 14 June 2023.

³⁹⁴ 'Swearing-in Ceremony: Speech of New ICC Prosecutor Karim Asad Ahmad Khan QC, 16 June 2021 - YouTube' (n 271).

³⁹⁵ The Office of the Prosecutor, 'Annual Report of the Office of the Prosecutor – 2022' (n 254) 13.

most efficient use of its finite resources.³⁹⁶ His Office also actively working on a ‘Situation Completion’ strategy for investigations which are already in the trial stages.³⁹⁷ This means that the OTP will not pursue any additional cases and will focus on the arrest and surrender of suspects and their successful prosecution.³⁹⁸

He is approaching his vision for shaping the ICC through a two-pronged approach - first by increasing dynamic complementarity and cooperation with domestic authorities³⁹⁹ and the second by increasing the Courts legitimacy by getting more convictions in the trial.⁴⁰⁰ He has already made strides in increasing the role of national authorities. Apart from joint investigative teams with national authorities for investigations into Ukraine and Libya, he has signed MoU with Colombia, Venezuela and the Republic of Guinea to strengthen domestic trials and investigations, extended support for the CAR Special Criminal Court, and increased partnership with regional organizations.⁴⁰¹ His office has also announced that a much-awaited Policy Paper on Complementarity will be published in 2023.⁴⁰²

Even though he took charge only 18 months ago, his decisions have already exacerbated some of the pitfalls of not having structured prosecutorial discretion. Karim Khan’s quest for ‘better results,’ coupled with resource constraints makes the OTP more selective than ever.⁴⁰³ The focus on increasing legitimacy through results in the form of conviction has resulted in reducing “the sheer volume of situations before the Court.” All but one of the preliminary investigations and not opening any new ones. However, as discussed in the previous chapters the role preliminary examinations play, even when they do lead to investigations or

³⁹⁶ *ibid* 53.

³⁹⁷ *ibid* 52.

³⁹⁸ *ibid*.

³⁹⁹ *ibid* 32.

⁴⁰⁰ Wintour (n 389).

⁴⁰¹ The Office of the Prosecutor, ‘Annual Report of the Office of the Prosecutor – 2022’ (n 254) 33–51.

⁴⁰² *ibid* 50.

⁴⁰³ Ford (n 322).

prosecution, is critical to the legitimacy of the Court. Expanding the work of the Court through preliminary examinations not only pushes for more complementarity but also strengthens global networks of victims, advocates and civil society, all who work towards the same goals.

Some of the choices made by the Prosecutor to achieve ‘efficiency’ have already caused concerns among commentators.⁴⁰⁴ Soon after taking office, Khan filed for authorization to resume the investigation into the situation in Afghanistan.⁴⁰⁵ However, his resumed investigation focuses on crimes allegedly committed by the Taliban and the Islamic State – Khorasan Province ("IS-K"), deprioritizing investigation and thus prosecution into the crimes allegedly committed by the US and former Afghan government forces.⁴⁰⁶ In his Statement he also said concerning the crimes that are deprioritized, his Office will “promote accountability efforts within the framework of the principle of complementarity.”⁴⁰⁷ However, domestic investigations in the US have been discussed in depth in the preliminary examination.⁴⁰⁸ His predecessor, after looking at the Senate various reports commissioned by the US government and military investigations had concluded that the successive US governments have been unwilling to hold the alleged perpetrators accountable.⁴⁰⁹ The US has also openly taken a stance against any prosecution of the allegations and the ICC's investigation into them.⁴¹⁰ Apart from this, this is also in contrast with the duties of the Prosecutor to uncover all facts necessary to

⁴⁰⁴ ‘Victims Could Lose out with States’ Double-Standard on International Criminal Court Resources | Coalition for the International Criminal Court’ <https://coalitionfortheicc.org/news/20220330/OpenLetter_ICCresources> accessed 11 June 2023; ‘Human Rights Watch Briefing Note for the Twenty-First Session of the International Criminal Court Assembly of States Parties’ (*Human Rights Watch*, 22 November 2022) <<https://www.hrw.org/news/2022/11/22/human-rights-watch-briefing-note-twenty-first-session-international-criminal-court>> accessed 11 June 2023.

⁴⁰⁵ ‘ICC: Afghanistan Inquiry Can Resume’ (*Human Rights Watch*, 31 October 2022) <<https://www.hrw.org/news/2022/10/31/icc-afghanistan-inquiry-can-resume>> accessed 12 June 2023.

⁴⁰⁶ ‘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’ (n 368).

⁴⁰⁷ *ibid.*

⁴⁰⁸ ‘Report on Preliminary Examination Activities (2017) - Afghanistan’ (n 331).

⁴⁰⁹ *Request for authorisation of an investigation pursuant to article 15, Situation in Islamic Republic of Afghanistan* [328].

⁴¹⁰ ‘Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court’ (n 337).

establish the truth, regardless of the identity of the perpetrators.⁴¹¹ Another key aspect of the Rome State is the importance given to victims. However, the Prosecutor did not consult the victims or their representatives before taking the decision.⁴¹² Apart from significantly impacting victims' access to justice,⁴¹³ it has also caused rifts between victims from different groups.⁴¹⁴

Even though this de-prioritisation is attributed to 'limited resources,' it exemplifies the pitfalls of increased selectivity with no principled approach. The decision is being increasingly perceived as one of "double standards and a lack of independence."⁴¹⁵ Even considering some merit to the Prosecutor's justification, it is hard to believe that the success of investigation and prosecution against the Taliban who is now in power in Afghanistan is in any way easier than against the US military.⁴¹⁶

Apart from these worries about bowing to political pressure, he has also announced his plans to increase the reliance on the secondment of personnel and voluntary contributions to increase the capacity of the ICC.⁴¹⁷ HRW voices concern that this would lead to further politicization

⁴¹¹ 'Limits to Prosecutorial Discretion: The ICC Prosecutor's Deprioritisation Decision in Afghanistan' (*Opinio Juris*, 26 November 2021) <<http://opiniojuris.org/2021/11/26/limits-to-prosecutorial-discretion-the-icc-prosecutors-deprioritisation-decision-in-afghanistan/>> accessed 11 June 2023.

⁴¹² Julian Elderfield, 'Uncertain Future for the ICC's Investigation into the CIA Torture Program' (*Just Security*, 12 November 2021) <<https://www.justsecurity.org/79136/uncertain-future-for-the-iccs-investigation-into-the-cia-torture-program/>> accessed 11 June 2023.

⁴¹³ 'Human Rights Watch Briefing Note for the Twenty-First Session of the International Criminal Court Assembly of States Parties' (n 404).

⁴¹⁴ 'Limits to Prosecutorial Discretion: The ICC Prosecutor's Deprioritisation Decision in Afghanistan' (n 411).

⁴¹⁵ 'Office of the Prosecutor, International Criminal Court "[Draft] Strategic Plan for 2023-2025"' (*Human Rights Watch*, 31 January 2023) <<https://www.hrw.org/news/2023/01/31/office-prosecutor-international-criminal-court-draft-strategic-plan-2023-2025>> accessed 11 June 2023.

⁴¹⁶ 'Afghanistan: ICC Prosecutor's Statement on Afghanistan Jeopardises His Office's Legitimacy and Future' (*Amnesty International*, 5 October 2021) <<https://www.amnesty.org/en/documents/ior53/4842/2021/en/>> accessed 11 June 2023.

⁴¹⁷ The Office of the Prosecutor, 'Annual Report of the Office of the Prosecutor – 2022' (n 254) 14.

of the OTP, especially with respect to the situation in Ukraine where various States and the EU have pledged additional funding to the OTP to conduct investigations.⁴¹⁸

As discussed in Chapter 3, the Prosecutor exercises the broadest discretion during preliminary examinations. Over her years in Office, Bensouda had developed a more transparent system when it came to this unregulated stage.⁴¹⁹ Her annual report on preliminary examinations covered details of what was done by the OTP on every case under preliminary examination and the reasons for her decision regarding decisions related to them. This has increased the transparency when it came to the exercise of discretion in the pre-trial stages. Despite her choices being criticised often, the scope for nuanced discussion was more when the information regarding the choices was also more. However, the new prosecutor has replaced this system with one consolidated Annual Report. The report gives summaries and conclusions of each situation but is nowhere as detailed as his predecessors' reports. Given the Khans Office is going to be more selective than Bensouda's, any decrease in information will only exacerbate the concerns regarding the impartiality and legitimacy of his decisions.

Moving forward

The idea of an independent and impartial Prosecutor has come a long way from Nuremberg.⁴²⁰ Despite a degree of judicial oversight in proprio motu investigations, the ICC Statute gives the Prosecutor guarantees of individual and institutional independence.⁴²¹ This gives the Prosecutor the discretion to choose from “many meritorious complaints the appropriate ones for international intervention, rather than to weed out weak or frivolous ones.”⁴²² However,

⁴¹⁸ ‘Human Rights Watch Briefing Note for the Twenty-First Session of the International Criminal Court Assembly of States Parties’ (n 404).

⁴¹⁹ The Office of the Prosecutor, ‘Policy Paper on Preliminary Examination’ (n 47) para 94.

⁴²⁰ Côté (n 348) 322.

⁴²¹ *ibid* 401.

⁴²² Arbour (n 32) 213.

unless the Prosecutor applies consistent methods and criteria in his/her decisions, irrespective of State(s), group(s) or person(s) involved,⁴²³ the legitimacy of the Office and the Court would be questioned.⁴²⁴

The Courts dossier has a lot of ongoing conflicts including Israel-Palestine, and the invasion of Ukraine. Speculations regarding whether the work of the ICC would be effective until political solutions are found are an active question among commentators.⁴²⁵ Apart from being zones of active hostilities, they also have active involvement of other major powers, making the work of the ICC extremely political.⁴²⁶ In the wake of the Russian invasion of Ukraine, there are also calls for setting up a new Tribunal to try the crime of aggression.⁴²⁷ There has been a lot of discussion on this, with commentators arguing for and against this.⁴²⁸ However, the Prosecutor has not been welcoming of the new tribunal stating, “When we recognise that there is a gap in that architecture, in my view, we should try to address it through the Rome Statute that was carefully negotiated and carefully built and which we are trying to fund to

⁴²³ The Office of the Prosecutor, ‘Policy Paper on Preliminary Examination’ (n 47) para 28.

⁴²⁴ Pues (n 10) 169.

⁴²⁵ Marti Flacks, “The ICC Wants Putin. Now What?,” March 20, 2023, <https://www.csis.org/analysis/icc-wants-putin-now-what>; <https://www.facebook.com/middleeastmonitor>, “How Far Can the ICC Go in Seeking out Israel for Its Crimes in Palestine?,” *Middle East Monitor* (blog), December 8, 2022, <https://www.middleeastmonitor.com/20221208-how-far-can-the-icc-go-in-seeking-out-israel-for-its-crimes-in-palestine/>; “Israel ‘will Not Co-Operate’ with ICC War Crimes Investigation,” *BBC News*, April 9, 2021, sec. Middle East, <https://www.bbc.com/news/world-middle-east-56687437>.

⁴²⁶ ‘The United States Opposes the ICC Investigation into the Palestinian Situation’ (*United States Department of State*) <<https://www.state.gov/the-united-states-opposes-the-icc-investigation-into-the-palestinian-situation/>> accessed 2 June 2023; ‘Department Press Briefing – September 27, 2021’ (*United States Department of State*) <<https://www.state.gov/briefings/departments-press-briefing-september-27-2021-2/>> accessed 11 June 2023.

⁴²⁷ ‘Combined Statement Calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression Against Ukraine’ <<https://gordonandsarahbrown.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration.pdf>> accessed 16 June 2023.

⁴²⁸ Jennifer Hansler, ‘US Announces It Supports Creation of Special Tribunal to Prosecute Russia for “crime of Aggression” in Ukraine | CNN Politics’ (*CNN*, 28 March 2023) <<https://www.cnn.com/2023/03/28/politics/us-support-special-tribunal-crime-of-aggression/index.html>> accessed 16 June 2023; Sergey Vasiliev, ‘Aggression against Ukraine: Avenues for Accountability for Core Crimes’ (*EJIL: Talk!*, 3 March 2022) <<https://www.ejiltalk.org/aggression-against-ukraine-avenues-for-accountability-for-core-crimes/>> accessed 16 June 2023; *ibid*; ‘Creating a Special Tribunal for Aggression Against Ukraine Is a Bad Idea’ (*Opinio Juris*, 7 March 2022) <<http://opiniojuris.org/2022/03/07/creating-a-special-tribunal-for-aggression-against-ukraine-is-a-bad-idea/>> accessed 16 June 2023; Jennifer Trahan, ‘Why a “Hybrid” Ukrainian Tribunal on the Crime of Aggression Is Not the Answer’ (*Just Security*, 6 February 2023) <<https://www.justsecurity.org/85019/why-hybrid-ukrainian-tribunal-on-crime-of-aggression-is-not-the-answer/>> accessed 16 June 2023.

vindicate the rights of the survivors that I have mentioned. We don't want dilution, we want consolidation.”⁴²⁹ Apart from dilution, there are also fears that an ad hoc tribunal (unlike a permanent one) will yet again be a manifestation of selective justice.⁴³⁰ However, at the same time, there are groups campaigning for the inclusion of ecocide in the Rome Statute reiterating the symbolic role of the Court in the world.⁴³¹ Thus, the ICC is at an impasse. It's twenty years as a Court has cemented its role in post-conflict justice. But the overarching aims of the Rome Statute the Court reiterates it stands for have also led to expectations of a universal, unbiased Court.⁴³² This can only be realised if the Prosecutor and his exercise of discretion is based on a structured approach based on open policies and open reasons.⁴³³

A structured approach does not refer to strict guidelines for the Prosecutor as this would tamper the flexibility required to be selective.⁴³⁴ A structured and principled approach on the other hand ensures substantive and procedural coherence. This will mean having a sound policy on the interpretation of substantive criteria like – How will the gravity of two situations be compared? How will the Prosecutor prioritize two different types of crimes? Do managerial considerations like resources and State cooperation factor in during the prioritization of situations? Will an investigation be dropped if there are no reasonable prospects of prosecution in the current political scenario? This approach would also ensure more transparency and thus a more accountable Prosecutor and responsive legal system.⁴³⁵ Having such open policies will decrease arbitrariness and increase legitimacy.⁴³⁶ Open policies combined with open reasons will result in scrutiny of the OTP policies and thus make it easier to improve decision-making

⁴²⁹ Karim A.A. Khan KC (n 15).

⁴³⁰ ‘Creating a Special Tribunal for Aggression Against Ukraine Is a Bad Idea’ (n 428).

⁴³¹ ‘Stop Ecocide International’ <<https://www.stopecocide.earth/>> accessed 16 June 2023.

⁴³² Poes (n 10) 4.

⁴³³ Poes (n 10).

⁴³⁴ Davis, Kenneth Culp, *Discretionary Justice A Preliminary Inquiry* (University of Illinois Press 1976) 98.

⁴³⁵ Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (Octagon Books 1978) 16–18.

⁴³⁶ Danner (n 68).

process.⁴³⁷ Open reasons will ensure that any exercise of discretion can be discussed and deliberated, irrespective of whether the reason is political or not.

The high selectivity of the OTP results in the inevitable need to choose between when and where to interfere. This would inevitably lead to not unfulfilled expectations from those who are left behind. Openly acknowledging the Court's limitations due to practical reasons is important. Only then can we look for solutions either as an increase in capacities or as alternative forms of justice. Apart from accepting that international law is interdependent on international politics, we also need to rethink how we think of other forms of justice⁴³⁸ and discuss solutions that can focus on the right measures to be undertaken in case of the existing social pressures.

Quoting Karim Khans' inaugural speech, “this court and the whole Rome Statute architecture represents, in my view, a promise to the future. That tomorrow need not be as bleak, as sorrowful as yesterday.”⁴³⁹

⁴³⁷ Pues (n 10) 51.

⁴³⁸ *ibid.*

⁴³⁹ Kendi (n 271).

BIBLIOGRAPHY

‘About the Court’ (*International Criminal Court*) <<https://www.icc-cpi.int/about/the-court>> accessed 24 April 2023

‘Afghanistan: ICC Prosecutor’s Statement on Afghanistan Jeopardises His Office’s Legitimacy and Future’ (*Amnesty International*, 5 October 2021) <<https://www.amnesty.org/en/documents/ior53/4842/2021/en/>> accessed 11 June 2023

‘Africa Question Is the International Criminal Court (ICC) Targeting Africa Inappropriately?’ (*The International Criminal Court Forum*) <<https://iccforum.com/africa>> accessed 10 June 2023

Akhavan P, ‘The Lord’s Resistance Army Case: Uganda’s Submission of the First State Referral to the International Criminal Court’ (2005) 99 *The American Journal of International Law* 403 <<https://www.jstor.org/stable/1562505>> accessed 9 June 2023

Ambos K, ‘Interests of Justice? The ICC Urgently Needs Reforms’ (*EJIL: Talk!*, 11 June 2019) <<https://www.ejiltalk.org/interests-of-justice-the-icc-urgently-needs-reforms/>> accessed 4 June 2023

Amirthalingam K, ‘Prosecutorial Discretion Is A Shield Not A Sword’ (28 November 2019) <<https://papers.ssrn.com/abstract=3494877>> accessed 8 June 2023

Amnesty International, ‘Open Letter to the Chief Prosecutor of the International Criminal Court: Comments on the Concept of the Interests of Justice’

—, ‘Uganda: First Ever Arrest Warrants by International Criminal Court - a First Step towards Addressing Impunity’ (14 October 2005)

Anderson J, ‘Episode 13 – Double Standards with Carla Ferstman’ (*asymmetrical haircuts*, 16 November 2019) <<https://www.asymmetricalhaircuts.com/episodes/episode-13-double-standards-with-carla-ferstman/>> accessed 16 June 2023

Anderson JH, ‘ICC Investigations: What Prosecutor Bensouda Leaves Behind’ (*JusticeInfo.net*, 26 January 2021) <<https://www.justiceinfo.net/en/68812-icc-investigations-what-prosecutor-bensouda-leaves-behind.html>> accessed 11 June 2023

Apuuli KP, ‘The Government of Uganda, the ICC Arrest Warrants for the LRA Leaders and the Juba Peace Talks: 2006-2008’ (4 December 2013) <<https://papers.ssrn.com/abstract=2363595>> accessed 9 June 2023

Arbour L, ‘The Need for an Independent and Effective Prosecutor in the Permanent International Criminal Court Discussion’ (1999) 17 *Windsor Yearbook of Access to Justice* 207 <<https://heinonline.org/HOL/P?h=hein.journals/windyrbaj17&i=212>> accessed 8 June 2023

Arcarazo DA, Buchan R and Ureña R, ‘Beyond Justice, Beyond Peace? Colombia, the Interests of Justice, and the Limits of International Criminal Law’ (2015) 26 *Criminal Law Forum* 291 <<http://link.springer.com/10.1007/s10609-015-9248-1>> accessed 15 June 2023

Badagard L and Klamberg M, 'The Gatekeeper of the ICC - Prosecutorial Strategies for Selecting Situations and Cases at the International Criminal Court' [2016] SSRN Electronic Journal <<https://www.ssrn.com/abstract=2784470>> accessed 11 April 2023

Bais D, 'The Raison D'Etre of Non-Ratification of the Rome Statute by Asian States' (28 April 2012) <<https://papers.ssrn.com/abstract=2149964>> accessed 16 June 2023

Bass GJ, 'Jus Post Bellum' (2004) 32 *Philosophy & Public Affairs* 384 <<https://www.jstor.org/stable/3557994>> accessed 5 June 2023

Batesmith A, 'International Prosecutors as Cause Lawyers' (2021) 19 *Journal of International Criminal Justice* 803 <<https://doi.org/10.1093/jicj/mqab068>> accessed 5 June 2023

Beaumont P, "'I Was so Scared': The Ukrainian Children Taken to Russia for Financial Gain" *The Guardian* (29 May 2023) <<https://www.theguardian.com/world/2023/may/29/i-was-so-scared-the-ukrainian-children-taken-to-russia-for-financial-gain>> accessed 16 June 2023

Bitti G, 'The Interests of Justice- Where Does That Come from? Part I' (*EJIL: Talk!*, 13 August 2019) <<https://www.ejiltalk.org/the-interests-of-justice-where-does-that-come-from-part-i/>> accessed 4 June 2023

Blumenson ED, 'The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court' (2 November 2005) <<https://papers.ssrn.com/abstract=834004>> accessed 28 April 2023

'British Human Rights Lawyer Elected Chief Prosecutor of the International Criminal Court | UN News' (12 February 2021) <<https://news.un.org/en/story/2021/02/1084582>> accessed 10 June 2023

Brubacher MR, 'Prosecutorial Discretion within the International Criminal Court' (2004) 2 *Journal of International Criminal Justice* 71

——, 'Prosecutorial Discretion within the International Criminal Court' (2004) 2 *Journal of International Criminal Justice* 71 <<https://doi.org/10.1093/jicj/2.1.71>> accessed 2 June 2023

Brubacher MR, 'Prosecutorial Discretion within the International Criminal Court'

'CAR Special Criminal Court (SCC) Now Fully Operational' (*United Nations Peacekeeping*) <<https://peacekeeping.un.org/en/car-special-criminal-court-scc-now-fully-operational>> accessed 15 June 2023

Carla Ferstman, Thomas Obel Hansen, and Noora Arajärvi, 'The UK Military In Iraq: Efforts and Prospects For Accountability For International Crimes Allegations?' (2018) <https://www1.essex.ac.uk/hrc/documents/THE_UK_MILITARY_IN_IRAQ_1Oct2018.pdf> accessed 30 May 2023

'Cases | International Criminal Court' <<https://www.icc-cpi.int/cases>> accessed 24 April 2023

Cassese, *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2002) <<http://opil.ouplaw.com/view/10.1093/law/9780198298625.001.0001/law-9780198298625>> accessed 9 June 2023

‘Central African Republic’ (*International Criminal Court*) <<https://www.icc-cpi.int/car>> accessed 2 June 2023

‘Central African Republic: First Trial at the Special Criminal Court’ (*Human Rights Watch*, 12 April 2022) <<https://www.hrw.org/news/2022/04/12/central-african-republic-first-trial-special-criminal-court>> accessed 2 June 2023

‘Central African Republic II’ (*International Criminal Court*) <<https://www.icc-cpi.int/carII>> accessed 2 June 2023

‘Central Mediterranean: Deadliest First Quarter for Migrant Deaths in Six Years | UN News’ (12 April 2023) <<https://news.un.org/en/story/2023/04/1135577>> accessed 16 June 2023

Clark P, *Distant Justice: The Impact of the International Criminal Court on African Politics* (Cambridge University Press 2018) <<https://www.cambridge.org/core/books/distant-justice/FD4410B6160CD17836297D9503A219DD>> accessed 16 June 2023

Clarke, ‘The Rule of Law Through Its Economies of Appearances: The Making of the African Warlord’ (2011) 18 *Indiana Journal of Global Legal Studies* 7 <<https://muse.jhu.edu/article/445802>> accessed 16 June 2023

‘C.N.121.2017.TREATIES-XVIII.10 (Depositary Notification)’ <<https://treaties.un.org/doc/publication/CN/2017/CN.121.2017-Eng.pdf>> accessed 5 June 2023

‘C.N.805.2016.TREATIES-XVIII.10 (Depositary Notification)’ <<https://treaties.un.org/doc/publication/cn/2016/cn.805.2016-eng.pdf>> accessed 5 June 2023

‘C.N.862.2016.TREATIES-XVIII.10 (Depositary Notification)’ <<https://treaties.un.org/doc/publication/cn/2016/cn.862.2016-eng.pdf>> accessed 5 June 2023

‘Colombia’ (*International Criminal Court*) <<https://www.icc-cpi.int/colombia>> accessed 31 May 2023

‘Combined Statement Calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression Against Ukraine’ <<https://gordonandsarahbrown.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration.pdf>> accessed 16 June 2023

‘Committee on Human Rights’ (*European Parliament Multimedia Centre*) <https://multimedia.europarl.europa.eu/fr/webstreaming/droi-committee-meeting_20200529-1100-COMMITTEE-DROI> accessed 1 June 2023

Côté L, ‘6 Independence and Impartiality’ in Luc Reydam, Jan Wouters and Cedric Ryngaert (eds), *International Prosecutors* (Oxford University Press 2012) <<https://doi.org/10.1093/acprof:oso/9780199554294.003.0006>> accessed 5 June 2023

‘Creating a Special Tribunal for Aggression Against Ukraine Is a Bad Idea’ (*Opinio Juris*, 7 March 2022) <<http://opiniojuris.org/2022/03/07/creating-a-special-tribunal-for-aggression-against-ukraine-is-a-bad-idea/>> accessed 16 June 2023

Danner AM, ‘Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court’ (2003) 97 *American Journal of International Law* 510

<https://www.cambridge.org/core/product/identifier/S0002930000041191/type/journal_article> accessed 8 June 2023

Davis C, 'Political Considerations in Prosecutorial Discretion at the International Criminal Court' (2015) 15 *International Criminal Law Review* 170
<<https://heinonline.org/HOL/P?h=hein.journals/intcrimlr15&i=174>> accessed 4 June 2023

Davis, Kenneth Culp, *Discretionary Justice A Preliminary Inquiry* (University of Illinois Press 1976)

'Decision on the International Criminal Court Doc. EX.CL/1006(XXX), Assembly of the Union, Twenty-Eighth Ordinary Session' (African Union 2017)
<https://au.int/sites/default/files/decisions/32520-sc19553_e_original_-_assembly_decisions_621-641_-_xxviii.pdf> accessed 10 June 2023

'Department Press Briefing – September 27, 2021' (*United States Department of State*)
<<https://www.state.gov/briefings/departments-press-briefing-september-27-2021-2/>> accessed 11 June 2023

Dworkin R, *Taking Rights Seriously* (A&C Black 2013)

Elderfield J, 'Uncertain Future for the ICC's Investigation into the CIA Torture Program' (*Just Security*, 12 November 2021) <<https://www.justsecurity.org/79136/uncertain-future-for-the-iccs-investigation-into-the-cia-torture-program/>> accessed 11 June 2023

'Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court' (*United States Department of State*) <<https://www.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court/>> accessed 11 June 2023

'Endless Tragedies in the Mediterranean Sea' (*Human Rights Watch*, 13 September 2022)
<<https://www.hrw.org/news/2022/09/13/endless-tragedies-mediterranean-sea>> accessed 16 June 2023

Fatou Bensouda, "'Without Fear or Favour": Reflections on My Term as Prosecutor of the International Criminal Court'

Flacks M, 'The ICC Wants Putin. Now What?' <<https://www.csis.org/analysis/icc-wants-putin-now-what>> accessed 15 June 2023

Ford S, 'How Much Money Does the ICC Need?' (12 April 2015)
<<https://papers.ssrn.com/abstract=3371046>> accessed 16 June 2023

—, 'Funding the ICC for Its Third Decade' [2023] *SSRN Electronic Journal*
<<https://www.ssrn.com/abstract=4323894>> accessed 11 June 2023

Gioia F, *The International Criminal Court and National Jurisdictions* (Mauro Politi ed, 0 edn, Routledge 2016) <<https://www.taylorfrancis.com/books/9781351887571>> accessed 8 June 2023

Goldstone R, 'Dealing with the Past: Peace and Justice in the Former Yugoslavia' (2011) 2 *Global Policy* 329 <<https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1758-5899.2011.00080.x>> accessed 9 June 2023

Goldstone RJ, 'Peace versus Justice Address' (2005) 6 Nevada Law Journal 421 <<https://heinonline.org/HOL/P?h=hein.journals/nevlj6&i=429>> accessed 9 June 2023

Greenawalt AL, 'Justice Without Politics? Prosecutorial Discretion and The International Criminal Court' (2007) 39 N.Y.U. J. Int'l L. & Pol

'Guidelines on the Role of Prosecutors.' <<http://digitallibrary.un.org/record/93805>>

Guilfoyle D, 'Reforming the International Criminal Court: Is It Time for the Assembly of State Parties to Be the Adults in the Room?' (*EJIL: Talk!*, 8 May 2019) <<https://www.ejiltalk.org/reforming-the-international-criminal-court-is-it-time-for-the-assembly-of-state-parties-to-be-the-adults-in-the-room/>> accessed 16 June 2023

Gupta A, "'The Interests of Justice' – The ICC and the Case of Afghanistan | OHRH" <<https://ohrh.law.ox.ac.uk/the-interests-of-justice-the-icc-and-the-case-of-afghanistan/>> accessed 4 June 2023

Hansler J, 'US Announces It Supports Creation of Special Tribunal to Prosecute Russia for "crime of Aggression" in Ukraine | CNN Politics' (*CNN*, 28 March 2023) <<https://www.cnn.com/2023/03/28/politics/us-support-special-tribunal-crime-of-aggression/index.html>> accessed 16 June 2023

Hart HLA, 'Discretion Essay' (2013) 127 Harvard Law Review 652 <<https://heinonline.org/HOL/P?h=hein.journals/hlr127&i=664>> accessed 5 June 2023

<https://www.facebook.com/middleeastmonitor>, 'How Far Can the ICC Go in Seeking out Israel for Its Crimes in Palestine?' (*Middle East Monitor*, 8 December 2022) <<https://www.middleeastmonitor.com/20221208-how-far-can-the-icc-go-in-seeking-out-israel-for-its-crimes-in-palestine/>> accessed 15 June 2023

'Human Rights Watch Briefing Note for the Twenty-First Session of the International Criminal Court Assembly of States Parties' (*Human Rights Watch*, 22 November 2022) <<https://www.hrw.org/news/2022/11/22/human-rights-watch-briefing-note-twenty-first-session-international-criminal-court>> accessed 11 June 2023

'ICC: Afghanistan Inquiry Can Resume' (*Human Rights Watch*, 31 October 2022) <<https://www.hrw.org/news/2022/10/31/icc-afghanistan-inquiry-can-resume>> accessed 12 June 2023

'ICC President Promotes Universal Ratification of the Rome Statute at International Conference of Parliamentarians in Buenos Aires' (*International Criminal Court*) <<https://www.icc-cpi.int/news/icc-president-promotes-universal-ratification-rome-statute-international-conference>> accessed 10 June 2023

'ICC Prosecutor Underlines Commitment to Support the Special Criminal Court of the Central African Republic Following Address by Deputy Prosecutor, Mr Mame Mandiaye Niang at Opening of First Trial in Bangui' (*International Criminal Court*) <<https://www.icc-cpi.int/news/icc-prosecutor-underlines-commitment-support-special-criminal-court-central-african-republic>> accessed 15 June 2023

‘ICC Starts Next Chapter in Colombia’ (*Human Rights Watch*, 16 December 2021) <<https://www.hrw.org/news/2021/12/16/icc-starts-next-chapter-colombia>> accessed 15 June 2023

‘ICC’s Toughest Trial: Africa vs. “Infamous Caucasian Court”’ *Reuters* (28 October 2016) <<https://www.reuters.com/article/us-africa-icc-idUSKCN12S1U3>> accessed 10 June 2023

‘Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report’ (2020) <https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP19/IER-Final-Report-ENG.pdf> accessed 2 June 2023

‘International Criminal Court’ <<https://www.icc-cpi.int/>> accessed 2 June 2023

‘International Criminal Court Prosecutor on Gabon: “The Legal Criteria for This Court to Investigate Have Not Been Met”’ (*International Criminal Court*) <<https://www.icc-cpi.int/news/international-criminal-court-prosecutor-gabon-legal-criteria-court-investigate-have-not-been>> accessed 16 June 2023

‘Israel “will Not Co-Operate” with ICC War Crimes Investigation’ *BBC News* (9 April 2021) <<https://www.bbc.com/news/world-middle-east-56687437>> accessed 15 June 2023

Karim A.A. Khan KC, ‘Statement by the ICC Prosecutor Mr. Karim A.A. Khan KC to the Assembly at the First Plenary Meeting’ <<https://asp.icc-cpi.int/sites/asp/files/2022-12/ASP21-STMT-PROS-ENG.pdf>> accessed 25 May 2023

Kendall S and Nouwen S, ‘Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood’ (2013) 76 *Law and Contemporary Problems* 235 <<https://www.jstor.org/stable/24244678>> accessed 16 June 2023

Kendi S, ‘Karim Khan’s First Speech as ICC Prosecutor’ (*JFJ - Journalists for Justice*, 16 June 2021) <<https://jfjustice.net/karim-khans-first-speech-as-icc-prosecutor/>> accessed 2 June 2023

Klabbers J, ‘Friedrich Kratochwil. The Status of Law in World Society: Meditations on the Role and Rule of Law’ (2014) 25 *European Journal of International Law* 1195 <<https://doi.org/10.1093/ejil/chu082>> accessed 8 June 2023

Lacey N, ‘The Path Not Taken: HLA Hart’s Harvard Essay on Discretion Essay’ (2013) 127 *Harvard Law Review* 636 <<https://heinonline.org/HOL/P?h=hein.journals/hlr127&i=648>> accessed 5 June 2023

‘Limits to Prosecutorial Discretion: The ICC Prosecutor’s Deprioritisation Decision in Afghanistan’ (*Opinio Juris*, 26 November 2021) <<http://opiniojuris.org/2021/11/26/limits-to-prosecutorial-discretion-the-icc-prosecutors-deprioritisation-decision-in-afghanistan/>> accessed 11 June 2023

Linderfalk U, ‘Why Should We Distinguish Between the Exercise of Discretion and Interpretation?’ (16 January 2019) <<https://papers.ssrn.com/abstract=3316813>> accessed 4 June 2023

Luban D, ‘The “Interests of Justice” at the ICC: A Continuing Mystery’ (*Just Security*, 17 March 2020) <<https://www.justsecurity.org/69188/the-interests-of-justice-at-the-icc-a-continuing-mystery/>> accessed 4 June 2023

McEvoy K and McConnachie K, 'Victimology in Transitional Justice: Victimhood, Innocence and Hierarchy' (2012) 9 *European Journal of Criminology* 527 <<https://doi.org/10.1177/1477370812454204>> accessed 8 June 2023

'Mediterranean | Missing Migrants Project' <<https://missingmigrants.iom.int/region/mediterranean>> accessed 16 June 2023

Mégret F, 'In Whose Name? The ICC and the Search for Constituency' in Carsten Stahn, Christian De Vos and Sara Kendall (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press 2015) <<https://www.cambridge.org/core/books/contested-justice/in-whose-name/647FD02936B376A6D0C2B77874BDF810>> accessed 16 June 2023

——, 'What Sort of Global Justice Is "International Criminal Justice"?' (2015) 13 *Journal of International Criminal Justice* 77 <<https://doi.org/10.1093/jicj/mqu080>> accessed 10 June 2023

'Memorandum of Understanding Between The Republic of Guinea and The Office of the Prosecutor of the International Criminal Court' <<https://www.icc-cpi.int/sites/default/files/2022-09/2022-09-29-mou-icc-guinea-ns-eng.pdf>> accessed 15 June 2023

Moore J (ed), *Hard Choices: Moral Dilemmas in Humanitarian Intervention* (Rowman & Littlefield 1998)

Moreno-Ocampo L, 'The International Criminal Court: Seeking Global Justice' 40

Nagel T, 'The Problem of Global Justice' (2005) 33 *Philosophy & Public Affairs* 113 <<https://www.jstor.org/stable/3558011>> accessed 13 June 2023

Nations U, 'UN Charter' (*United Nations*) <<https://www.un.org/en/about-us/un-charter>> accessed 8 November 2022

Nault DM, 'Africa, the International Criminal Court, and Human Rights' in Derrick M Nault (ed), *Africa and the Shaping of International Human Rights* (Oxford University Press 2020) <<https://doi.org/10.1093/oso/9780198859628.003.0006>> accessed 10 June 2023

'Never Two Without Three: On the – To Be Reopened – ICC Preliminary Examination in Iraq' (*Opinio Juris*, 9 July 2021) <<http://opiniojuris.org/2021/07/09/never-two-without-three-on-the-to-be-reopened-icc-preliminary-examination-in-iraq/>> accessed 16 June 2023

News ABC, 'Millions in Extra Funding Pledged for ICC Work in Ukraine' (*ABC News*) <<https://abcnews.go.com/International/wireStory/countries-urged-rally-court-probes-ukraine-97988612>> accessed 31 May 2023

Nonet P and Selznick P, *Law and Society in Transition: Toward Responsive Law* (Octagon Books 1978)

Ocampo LGM, 'Statement Made by Mr. Luis Moreno-Ocampo at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court'

Office of the Prosecutor, 'Statement by the Chief Prosecutor on the Uganda Arrest Warrants' <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/3255817D-FD00-4072-9F58-FDB869F9B7CF/143834/LMO_20051014_English1.pdf> accessed 27 February 2023

—, 'Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court at the Informal Meeting of Legal Advisors of Ministries of Foreign Affairs' <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/9D70039E-4BEC-4F32-9D4A-CEA8B6799E37/143836/LMO_20051024_English.pdf> accessed 27 February 2023

—, 'Report on Preliminary Examination Activities 2011' (2011) <<https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/63682F4E-49C8-445D-8C13-F310A4F3AEC2/284116/OTPreportonPreliminaryExaminations13December2011.pdf>> accessed 27 May 2023

—, 'Report on Preliminary Examination Activities 2012' (2012) <<https://www.legal-tools.org/doc/0b1cfc/pdf>> accessed 27 May 2023

—, 'Report on Preliminary Examination Activities 2015' (2015)

—, 'Report on Preliminary Examination Activities 2016' (2016)

—, 'Report on Preliminary Examination Activities 2017' (2017)

—, 'Report on Preliminary Examination Activities 2018' (2018)

—, 'Report on Preliminary Examination Activities 2019' (2019)

—, 'Report on Preliminary Examination Activities 2020' (2020)

'Office of the Prosecutor, International Criminal Court "[Draft] Strategic Plan for 2023-2025"' (*Human Rights Watch*, 31 January 2023) <<https://www.hrw.org/news/2023/01/31/office-prosecutor-international-criminal-court-draft-strategic-plan-2023-2025>> accessed 11 June 2023

Olasolo H, 'The Prosecutor of the ICC before the Initiation of Investigations: A Quasi-Judicial or a Political Body' (2003) 3 *International Criminal Law Review* 87 <<https://heinonline.org/HOL/P?h=hein.journals/intcrimrb3&i=93>> accessed 10 June 2023

Parmentier S, 'Global Justice in the Aftermath of Mass Violence. The Role of the International Criminal Court in Dealing with Political Crimes' (2003) 41 *International Annals of Criminology* 203 <<https://heinonline.org/HOL/P?h=hein.journals/iancrml41&i=203>> accessed 13 June 2023

'Peace Agreement between the Gouvernement of Sierra Leone and the Revolutionary United Front (RUF) (Lomé Peace Agreement) | UN Peacemaker' <<https://peacemaker.un.org/sierraleone-lome-agreement99>> accessed 10 June 2023

'Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone' <https://peacemaker.un.org/sites/peacemaker.un.org/files/SL_990707_LomePeaceAgreement.pdf> accessed 10 June 2023

Press Release, ‘Communications Recieved By The Office of the Prosecutor of the ICC’ (16 July 2003) <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/9B5B8D79-C9C2-4515-906E-125113CE6064/277680/16_july___english1.pdf> accessed 9 June 2023

Pues AH, *Prosecutorial Discretion at the International Criminal Court* (Hart 2020)

Re D, ‘The Special Tribunal for Lebanon and National Reconciliation’

‘Report on Preliminary Examination Activities (2017) - Afghanistan’ (Office of the Prosecutor 2017) <https://www.icc-cpi.int/sites/default/files/itemsDocuments/2017-PE-rep/2017-otp-rep-PE-Afghanistan_ENG.pdf> accessed 27 May 2023

Reydams L and others (eds), ‘1 Introduction’, *International Prosecutors* (Oxford University Press 2012) <<https://doi.org/10.1093/acprof:oso/9780199554294.003.0001>> accessed 5 June 2023

—— (eds), ‘2 The Politics of Establishing International Criminal Tribunals’, *International Prosecutors* (Oxford University Press 2012) <<https://doi.org/10.1093/acprof:oso/9780199554294.003.0002>> accessed 5 June 2023

Reydams L and Odermatt J, ‘3 Mandates’ in Luc Reydams, Jan Wouters and Cedric Ryngaert (eds), *International Prosecutors* (Oxford University Press 2012) <<https://doi.org/10.1093/acprof:oso/9780199554294.003.0003>> accessed 5 June 2023

Robinson D, ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’ (2003) 14 *European Journal of International Law* 481 <<https://academic.oup.com/ejil/article-lookup/doi/10.1093/ejil/14.3.481>> accessed 26 April 2023

Roche D, ‘Truth Commission Amnesties and the International Criminal Court’ (2005) 45 *The British Journal of Criminology* 565 <<https://www.jstor.org/stable/23639255>> accessed 26 April 2023

Rodman KA, ‘Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court’ (2009) 22 *Leiden Journal of International Law* 99 <<https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/is-peace-in-the-interests-of-justice-the-case-for-broad-prosecutorial-discretion-at-the-international-criminal-court/C94B0BB6052B0459923026EC57FE64C6>> accessed 27 February 2023

Rodman KA and Booth P, ‘Manipulated Commitments: The International Criminal Court in Uganda’ (2013) 35 *Human Rights Quarterly* 271 <<https://www.jstor.org/stable/24518017>> accessed 11 April 2023

Roth A, ‘Russia Issues Arrest Order for British ICC Prosecutor after Putin Warrant’ *The Guardian* (19 May 2023) <<https://www.theguardian.com/law/2023/may/19/russia-arrest-order-international-criminal-court-prosecutor-karim-khan>> accessed 16 June 2023

Rules of Procedure and Evidence (International Criminal Court 2019) <<https://www.icc-cpi.int/sites/default/files/Publications/Rules-of-Procedure-and-Evidence.pdf>> accessed 27 February 2023

‘Russian War Crimes in Ukraine: EU Supports the International Criminal Court Investigation with €7.25 Million - Ukraine | ReliefWeb’ (9 June 2022) <<https://reliefweb.int/report/ukraine/russian-war-crimes-ukraine-eu-supports-international-criminal-court-investigation-eu725-million>> accessed 31 May 2023

Sadat LN, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (Transnational Publishers 2002)

Schabas WA, ‘Complementarity in Practice’: Some Uncomplimentary Thoughts’ (2008) 19 *Criminal Law Forum* 5 <<http://link.springer.com/10.1007/s10609-007-9054-5>> accessed 9 June 2023

Schabas WA, ‘Prosecutorial Discretion v. Judicial Activism at the International Criminal Court’ (2008) 6 *Journal of International Criminal Justice* 731 <<https://academic.oup.com/jicj/article-lookup/doi/10.1093/jicj/mqn045>> accessed 30 January 2023

Schabas WA, ‘Chapter 14. Prosecutorial Discretion And Gravity’ in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill | Nijhoff 2009) <https://brill.com/view/book/edcoll/9789004180758/Bej.9789004166554.i-774_016.xml> accessed 9 June 2023

Scharf MP, ‘The Amnesty Exception to the Jurisdiction of the International Criminal Court’ (1999) <<https://papers.ssrn.com/abstract=3850925>> accessed 28 April 2023

Schwöbel-Patel C (ed), ‘Introduction’, *Marketing Global Justice: The Political Economy of International Criminal Law* (Cambridge University Press 2021) <<https://www.cambridge.org/core/books/marketing-global-justice/introduction/50A51DC464A498D7F8CE0CCF81F00910>> accessed 25 May 2023

——, *Marketing Global Justice: The Political Economy of International Criminal Law* (1st edn, Cambridge University Press 2021) <<https://www.cambridge.org/core/product/identifier/9781108697651/type/book>> accessed 30 January 2023

‘Secretary-General Commends Central African Republic for Adopting Peace, Reconciliation Pact at Bangui National Forum | UN Press’ <<https://press.un.org/en/2015/sgsm16739.doc.htm>> accessed 15 June 2023

Sen A, ‘The International Criminal Court Needs Fixing’ (*Atlantic Council*, 24 April 2019) <<https://www.atlanticcouncil.org/blogs/new-atlanticist/the-international-criminal-court-needs-fixing/>> accessed 14 June 2023

Shackle S, ‘Why We May Never Know If British Troops Committed War Crimes in Iraq’ *The Guardian* (7 June 2018) <<https://www.theguardian.com/news/2018/jun/07/british-troops-war-crimes-iraq-historic-allegations-team>> accessed 16 June 2023

‘Situation in Colombia - Interim Report’

‘Situation in Iraq/UK, Final Report’ <<https://www.icc-cpi.int/sites/default/files/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf>> accessed 15 June 2023

‘Situation in the Plurinational State of Bolivia, Final Report’ <<https://www.icc-cpi.int/sites/default/files/2022-06/2022-02-14-otp-report-bolivia-eng.pdf>> accessed 16 June 2023

‘Situation in Ukraine: ICC Judges Issue Arrest Warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova’ (*International Criminal Court*) <<https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>> accessed 5 June 2023

‘Situations under Investigation’ (*International Criminal Court*) <<https://www.icc-cpi.int/situations-under-investigations>> accessed 24 April 2023

‘South Africa Plans Law Change over Putin ICC Arrest Warrant’ *BBC News* (30 May 2023) <<https://www.bbc.com/news/world-africa-65759630>> accessed 10 June 2023

‘Special Tribunal for Lebanon’ <<https://www.stl-tsl.org/en/home>> accessed 15 June 2023

‘Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors’ <[https://www.iap-association.org/getattachment/Resources-Documentation/IAP-Standards-\(1\)/English.pdf.aspx](https://www.iap-association.org/getattachment/Resources-Documentation/IAP-Standards-(1)/English.pdf.aspx)> accessed 9 June 2023

‘Statement by ICC Prosecutor Karim A.A. Khan KC Regarding the Opening of the Trial Related to Events of 28 September 2009 in Guinea, Signature of Agreement with Transitional Government on Complementarity and Closure of the Preliminary Examination’ (*International Criminal Court*) <<https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-regarding-opening-trial-related-events-28-september>> accessed 15 June 2023

‘Statement of ICC Prosecutor, Fatou Bensouda, Following the Appeals Chamber’s Decision Authorising an Investigation into the Situation in Afghanistan: “Today Is an Important Day for the Cause of International Criminal Justice”’ (*International Criminal Court*) <<https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-following-appeals-chambers-decision-authorising>> accessed 30 May 2023

‘Statement of ICC Prosecutor, Fatou Bensouda, Respecting an Investigation of the Situation in Palestine’ (*International Criminal Court*) <<https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-respecting-investigation-situation-palestine>> accessed 11 June 2023

‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, Ahead of Elections in the Central African Republic: “The Peaceful Course of Elections in the Central African Republic Is Essential to Prevent Cycles of Violence.”’ (*International Criminal Court*) <<https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-fatou-bensouda-ahead-elections-central>> accessed 16 June 2023

‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, Regarding the Recent Pre-Election Violence in Burundi’ (*International Criminal Court*) <<https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-fatou-bensouda-regarding-recent-pre-election>> accessed 16 June 2023

‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, Regarding the Worsening Situation in Gaza’ (*International Criminal Court*) <<https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-fatou-bensouda-regarding-worsening-situation-gaza>> accessed 16 June 2023

[cpi.int/news/statement-prosecutor-international-criminal-court-fatou-bensouda-regarding-worsening-situation](https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-fatou-bensouda-regarding-worsening-situation)> accessed 16 June 2023

‘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’ (*International Criminal Court*) <<https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-following-application>> accessed 11 June 2023

‘Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (International Tribunal for the Former Yugoslavia)’ (*OHCHR*) <<https://www.ohchr.org/en/instruments-mechanisms/instruments/statute-international-tribunal-prosecution-persons-responsible>> accessed 10 April 2023

Stolk S, ‘A Sophisticated Beast? On the Construction of an “Ideal” Perpetrator in the Opening Statements of International Criminal Trials’ (2018) 29 *European Journal of International Law* 677 <<https://doi.org/10.1093/ejil/chy041>> accessed 16 June 2023

‘Stop Ecocide International’ <<https://www.stopecocide.earth/>> accessed 16 June 2023

‘Suing EU Officials at the ICC’ (*front-lex*) <<https://www.front-lex.eu/icc-case>> accessed 31 May 2023

‘Swearing-in Ceremony: Speech of New ICC Prosecutor Karim Asad Ahmad Khan QC, 16 June 2021 - YouTube’ <https://www.youtube.com/watch?v=tDldr2ma1S0&ab_channel=IntlCriminalCourt> accessed 2 June 2023

Sy AC and A, ‘Five Takeaways from the Bangui Forum for National Reconciliation in the Central African Republic’ (*Brookings*, 30 November 1AD) <<https://www.brookings.edu/blog/africa-in-focus/2015/05/15/five-takeaways-from-the-bangui-forum-for-national-reconciliation-in-the-central-african-republic/>> accessed 15 June 2023

‘The Dilemma on the Special Tribunal for Lebanon | Finnish Institute in the Middle East’ <<https://www.fime.fi/en/the-dilemma-on-the-special-tribunal-for-lebanon/>> accessed 15 June 2023

‘The ICC, British War Crimes in Iraq and a Very British Tradition’ (*Opinio Juris*, 11 December 2020) <<http://opiniojuris.org/2020/12/11/the-icc-british-war-crimes-in-iraq-and-a-very-british-tradition/>> accessed 31 May 2023

‘The Meaning of “the Interests of Justice” in Article 53 of the Rome Statute’ <<https://www.hrw.org/news/2005/06/01/meaning-interests-justice-article-53-rome-statute>> accessed 27 February 2023

The Office of Public Counsel for Victims, ‘Representing Victims before the International Criminal Court, A Manual for Legal Representatives’ <<https://www.icc-cpi.int/sites/default/files/manual-victims-legal-representatives-fifth-edition-rev1.pdf>> accessed 16 June 2023

The Office of the Prosecutor, ‘Letter from Luis Moreno-Ocampo, Chief Prosecutor of the International Criminal Court to the Senders of Article 15 Communications Regarding the Situation in Iraq.’ (9 February 2006) <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf> accessed 30 May 2023

—, ‘Report on the Activities Performed During the First Three Years (June 2003 – June 2006)’ (2006) <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/D76A5D89-FB64-47A9-9821-725747378AB2/143680/OTP_3yearreport20060914_English.pdf> accessed 8 June 2023

—, ‘Report on Prosecutorial Strategy’ <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf> accessed 27 February 2023

—, ‘Policy Paper on the Interests of Justice’ <<https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPIInterestsOfJustice.pdf>> accessed 27 February 2023

—, ‘Policy Paper on Preliminary Examination’ <https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf> accessed 26 May 2023

—, ‘Policy Paper on Case Selection and Prioritisation’ <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf> accessed 9 June 2023

—, ‘Final Report on Situation In Iraq/UK’ (2020) <<https://www.icc-cpi.int/sites/default/files/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf>> accessed 30 May 2023

—, ‘Annual Report of the Office of the Prosecutor – 2022’ (2022) <<https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-05-annual-report-of-the-office-of-the-prosecutor.pdf>> accessed 30 May 2023

‘The Role of Public Prosecution in the Criminal Justice System, Recommendation Rec (2000)19 Adopted by the Committee of Ministers of the Council of Europe on 6 October 2000 and Explanatory Memorandum’ <<https://rm.coe.int/16804be55a>> accessed 9 June 2023

‘The Significance of the ICC Appeals Chamber’s Ruling in the Afghanistan Situation’ (*Opinio Juris*, 10 March 2020) <<http://opiniojuris.org/2020/03/10/the-significance-of-the-icc-appeals-chambers-ruling-in-the-afghanistan-situation/>> accessed 11 June 2023

‘The United States and International Criminal Justice: A Complex and Challenging Relationship’ (*Parliamentarians for Global Action - Mobilizing Legislators as Champions for Human Rights, Democracy and a Sustainable World.*) <<https://www.pgaction.org/ilhr/rome-statute/united-states-and-international-criminal-justice.html>> accessed 16 June 2023

‘The United States Opposes the ICC Investigation into the Palestinian Situation’ (*United States Department of State*) <<https://www.state.gov/the-united-states-opposes-the-icc-investigation-into-the-palestinian-situation/>> accessed 2 June 2023

Trahan J, ‘Why a “Hybrid” Ukrainian Tribunal on the Crime of Aggression Is Not the Answer’ (*Just Security*, 6 February 2023) <<https://www.justsecurity.org/85019/why-hybrid-ukrainian-tribunal-on-crime-of-aggression-is-not-the-answer/>> accessed 16 June 2023

‘Ukraine War: The Mothers Going to Get Their Children Back from Russia’ *BBC News* (31 May 2023) <<https://www.bbc.com/news/world-europe-65641304>> accessed 16 June 2023

‘United Kingdom: ICC Prosecutor Ends Scrutiny of Iraq Abuses’ (*Human Rights Watch*, 10 December 2020) <<https://www.hrw.org/news/2020/12/10/united-kingdom-icc-prosecutor-ends-scrutiny-iraq-abuses>> accessed 31 May 2023

United Kingdom of Great Britain and Northern Ireland, United States of America, France and Union of Soviet Socialist Republics, ‘Charter of the International Military Tribunal - Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (“London Agreement”)’ <<https://www.refworld.org/docid/3ae6b39614.html>> accessed 24 February 2023

United Nations Security Council, ‘S/RES/1422’ <<http://unscr.com/files/2002/01422.pdf>> accessed 11 April 2023

——, ‘S/RES/1487 (2003)’ <<http://unscr.com/files/2003/01487.pdf>> accessed 11 April 2023

——, ‘S/RES/1593 (2005)’ <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/292/73/PDF/N0529273.pdf?OpenElement>> accessed 11 April 2023

Varaki M, ‘Revisiting the “Interests of Justice” Policy Paper’ (2017) 15 *Journal of International Criminal Justice* 455

Vasiliev S, ‘Not Just Another “Crisis”: Could the Blocking of the Afghanistan Investigation Spell the End of the ICC? (Part I)’ (*EJIL: Talk!*, 19 April 2019) <<https://www.ejiltalk.org/not-just-another-crisis-could-the-blocking-of-the-afghanistan-investigation-spell-the-end-of-the-icc-part-i/>> accessed 16 June 2023

——, ‘Aggression against Ukraine: Avenues for Accountability for Core Crimes’ (*EJIL: Talk!*, 3 March 2022) <<https://www.ejiltalk.org/aggression-against-ukraine-avenues-for-accountability-for-core-crimes/>> accessed 16 June 2023

‘Venezuela II’ (*International Criminal Court*) <<https://www.icc-cpi.int/venezuela-ii>> accessed 16 June 2023

‘Victims Could Lose out with States’ Double-Standard on International Criminal Court Resources | Coalition for the International Criminal Court’ <https://coalitionfortheicc.org/news/20220330/OpenLetter_ICCresources> accessed 11 June 2023

Walzer M, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (Basic Books 2015)

Weisbord N, 'Opinion | When Peace and Justice Clash' *The New York Times* (29 April 2005) <<https://www.nytimes.com/2005/04/29/opinion/when-peace-and-justice-clash.html>> accessed 9 June 2023

Williams PR and Scharf MP, *Peace with Justice?: War Crimes and Accountability in the Former Yugoslavia* (Rowman & Littlefield 2002)

Wintour P, 'British Barrister Karim Khan Elected ICC's New Chief Prosecutor' *The Guardian* (12 February 2021) <<https://www.theguardian.com/law/2021/feb/12/karim-khan-international-criminal-court-prosecutor>> accessed 10 June 2023

Wintour P, Bowcott O and Borger J, 'US Revokes ICC Prosecutor's Visa over Afghanistan Inquiry' *The Guardian* (5 April 2019) <<https://www.theguardian.com/law/2019/apr/05/us-revokes-visa-of-international-criminal-courts-top-prosecutor>> accessed 16 June 2023

Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan [2019]

Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya

Request for authorisation of an investigation pursuant to article 15, Situation in Islamic Republic of Afghanistan

Situation in the Islamic Republic of Afghanistan, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan [2020] The Appeals Chamber ICC-02/17 OA4

Situation in the Democratic Republic of the Congo, Decision on Applications for Participation in the Proceedings of VPRS-1, VPRS-2, VPRS-3, VPRS-4, VPRS-5, VPRS-6 [2006]

Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo, Decision on the Prosecutor's Application for a warrant of arrest Article 58 [2006]

Agreement for and Statute of the Special Court for Sierra Leone, 6 January 2002 2002

Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea

Rome Statute of the International Criminal Court

Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994

Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 1993

