



A Critique of the Concerns on the *Proprio Motu* Powers of the ICC Prosecutor

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Abstract

During the Rome Diplomatic Conference of Plenipotentiaries where the Rome Statute of the International Criminal Court (ICC) was drafted, the ICC Prosecutor's powers were a matter of dispute. It was particularly the Prosecutor's authority to investigate complaints without any referral from a State Party or the Security Council which led to serious debates among participating States. Though there was wide support for the empowerment of the Prosecutor to activate the trigger mechanism of the ICC *proprio motu* (on his/her own initiative), there was also strong opposition. Some States described the prosecutorial powers granted to the Prosecutor as 'unacceptable' due to fears such as facing politically motivated prosecutions. Though the previous two prosecutorial terms showed that fears of politicized prosecutions were far-fetched, the process of selecting the third Prosecutor of the ICC for a nine-year term commencing 16 June 2021 once again put a spotlight on the prosecutorial powers as well as on the challenges the new Prosecutor would face. The present study will first draw attention to the judicial scrutiny of the chambers of the ICC and the filtering mechanism of the Rome Statute in an attempt to allay fears that the Prosecutor's powers may lead to politicized prosecutions. The study will then explain, in light of recent developments, why the ICC Prosecutor's power to act *proprio motu* is crucial for the effective operation of the Court. In so doing, the study will mainly benefit from primary sources such as the Rome Statute of the International Criminal Court, Official Records of the Rome Conference, Reports of the Office of the Prosecutor on Preliminary Examination Activities, Decisions of the Pre-Trial Chambers, as well as the comments made by scholars thereon.

Keywords

International Criminal Court, Rome Statute, ICC, ICC Prosecutor, Powers of the ICC Prosecutor, Fatou Bensouda, Karim Khan

Uluslararası Ceza Divanı Savcısının *Re'sen* Kullandığı Yetkilere Dair İtirazların Eleştirel Bir Değerlendirmesi

Öz

Uluslararası Ceza Divanını kuran Roma Statüsünün görüşülüp oynandığı Roma Diplomatik Konferansında, Divan Savcısının yetkileri, en önemli ihtilaf konularından birini teşkil etmişti. Özellikle de savcının *re'sen* (bir taraf devlet başvurusu ya da Güvenlik Konseyi kararı olmaksızın) soruşturma başlatabilme yetkisi konferansa katılan devletler arasında ciddi fikir ayrılıklarının doğmasına neden olmuştu. Bazı devletler, Uluslararası Ceza Divanı Savcısına tanınan yetkilerin politik motivasyonlu yargılamalara yol açabileceği gibi korkular dolayısıyla, bu yetkileri 'kabul edilemez' olarak nitelendirmişlerdi. Her ne kadar Uluslararası Ceza Divanının kuruluşundan bu yana geçen iki savcılık dönemi politik motivasyonlu yargılama gibi korkuların yersiz olduğunu göstermiş olsa da, 16 Haziran 2021'den başlayarak dokuz yıllık bir dönem için Divanın yeni (üçüncü) savcısının seçilmesi süreci, Divan Savcısının yetkileri konusunu tekrar gündeme getirmiştir. Bu çalışma, Divan Savcısının yetkilerini sınırlayan ve kararlarını denetlenebilir kılan Roma Statüsü tedbirlerine dikkat çekerek, devletlerin siyasi motivasyonlu suçlamalarla karşı karşıya kalmak gibi endişelerinin giderilmesine katkı sunmayı amaçlamaktadır.

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Çalışma aynı zamanda, Divan Savcısının re'sen soruşturma başlatabilme yetkisinin Divanın etkin ve verimli işleyişi için neden elzem olduğunu güncel gelişmeler ışığında açıklamayı hedeflemektedir. Çalışmada, ağırlıklı olarak Uluslararası Ceza Mahkemesini Kuran Roma Statüsü, Roma Diplomatik Konferansı Resmi Kayıtları, Savcılık Bürosu tarafından yayımlanan Ön İnceleme Faaliyet Raporları, Ön İnceleme Daireleri Kararları gibi birincil kaynaklardan faydalanılmış olmakla beraber, başka yazarların görüş ve değerlendirmelerine de yer verilmiştir.

Anahtar Kelimeler

Uluslararası Ceza Divanı, Roma Statüsü, Uluslararası Ceza Mahkemesi, UCD, UCM, Uluslararası Ceza Divanı Savcısı, Uluslararası Ceza Divanı Savcısının Yetkileri, Fatou Bensouda, Karim Khan

Extended Summary

It is the task of the ICC Prosecutor to conduct an initial examination of the available information to determine whether a given situation meets the threshold to warrant a formal ICC investigation. This preliminary examination process may be initiated by a) State Party referral; b) United Nations Security Council referral; or c) the ICC Prosecutor acting *proprio motu* (without a referral from a State Party or the Security Council). The focus of this study is the Prosecutor's authority to open a preliminary examination into a situation and to seek the initiation of an investigation based on information on crimes that fall within the jurisdiction of the ICC.

This study will first suggest that prosecutorial powers, including the authority to investigate crimes without a referral from a State Party or the Security Council, are not placed in the hands of the ICC Prosecutor without judicial checks. Article 15 of the Rome Statute provides some procedural safeguards such as the requirement to seek authorization from the Pre-Trial Chamber. The judicial scrutiny of the chambers of the Court ensures that the decisions of the ICC Prosecutor are subject to the high threshold criteria set out in the Rome Statute. Safeguards set out in the Rome Statute make it nearly impossible for unfounded or politically motivated accusations to reach the trial stage.

The study will then draw attention to the political restraints placed on the ICC Prosecutor by the States whose cooperation is crucial in terms of gathering evidence, arrest of suspects, and accessing witnesses and defendants. As the effective functioning of the Court relies heavily on cooperation with the members of the international community, any reluctance on the part of the States to cooperate with the Office of the Prosecutor limits the ability of the Prosecutor to bring charges against the perpetrators. Consequently, the study will submit that the legal and political restraints placed on the Prosecutor should allay States' fears about frivolous or political complaints. In this regard, the challenges the new ICC Prosecutor Karim Khan is facing (or is likely to face) will be studied accordingly.

This study will claim that the ICC Prosecutor's ability to initiate investigations *proprio motu* is in fact a requisite to ensure that the Court is truly effective and free

from political interference. The prosecution of the most serious crimes committed in six situations, into which a formal ICC investigation was initiated by the ICC Prosecutor without any referral from a State Party or the Security Council, was possible thanks to the Prosecutor's authority to act *proprio motu*. Furthermore, the Prosecutor's authority to investigate crimes on her own initiative has been instrumental in encouraging national prosecutions. The procedure of examination of national proceedings by a Prosecutor who has the power to investigate complaints *proprio motu* often serves as an incentive for national authorities to investigate crimes more carefully and competently.

Finally, this study will argue that the ICC Prosecutor's authority to decide whether or not there is a reasonable basis to proceed with an investigation, in fact, serves as an early filtering mechanism against politically motivated referrals and against referrals that fail to meet the high threshold of the Rome Statute. The role given to the Prosecutor under the Rome Statute thus prevents any politically motivated State Party or Security Council referrals from turning into formal investigations.

Introduction

In order for a case to be considered as meeting the legal criteria to warrant a formal ICC investigation, it must 1) fall within the Court's jurisdiction -which requires consideration of the subject matter, temporal, and either territorial or personal jurisdiction-;¹ 2) 'be admissible in terms of complementarity and gravity' criteria;² and 3) 'serve the interests of justice.'³ It is the task of the Prosecutor to conduct an initial examination of the available information to determine whether a given situation meets these legal criteria; and thus whether or not 'there is a reasonable basis to proceed with an investigation' in a given situation.⁴ This initial process, in which the available evidence and information are analyzed by the Prosecutor with a view to determining whether they constitute reasonable grounds to initiate a formal investigation, is called 'preliminary examination'.⁵

Pursuant to Article 13 of the Rome Statute, a preliminary examination process may be initiated by a) State Party referral;⁶ b) United Nations Security Council referral;⁷ or c) the Prosecutor of the ICC acting *proprio motu* based on the information on the alleged crimes that fall within the jurisdiction of the Court.⁸ That is to say, the jurisdiction of the ICC may be triggered not only as a result of a referral of a situation to the ICC by a State Party or the Security Council, but also by the Prosecutor *proprio motu*. The focus of this study is the Prosecutor's authority to open a preliminary examination into a situation and to seek the initiation of an investigation without a referral from a State Party or the Security Council. In other words, this study does not focus on the process of 'case selection'⁹ for investigation and prosecution, but on the authority to trigger this process.

During the Rome negotiations, the ICC Prosecutor's right to investigate complaints without any referral from a State Party or from the Security Council was a matter of dispute. While more than 85 States made statements in favor of the Prosecutor having

¹ See 'Preconditions to the exercise of jurisdiction' under article 12 of the Rome Statute: Rome Statute of the International Criminal Court (17 July 1998) art 12, U.N. Doc. A/CONF.183/9 [hereinafter Rome Statute].

² International Criminal Court - Office of the Prosecutor, 'Policy Paper on Case Selection and Prioritisation' (15 Sept 2016) 9, para 24 [hereinafter the OTP Policy Paper].

³ Rome Statute (n 1) Art 53 (1) (c).

⁴ *ibid* Art 15 (4).

⁵ *ibid* Art 15 (6).

⁶ *ibid* Art 13 (a).

⁷ *ibid* Art 13 (b).

⁸ *ibid* Art 13 (c).

⁹ The OTP Policy Paper (n 2) 1.

the power to activate the trigger mechanism,¹⁰ around 30 States expressly opposed such power.¹¹ Moreover, three of the P5 members of the Security Council (namely the United States, China and Russia) were, and still are, among the opposing States. There were also some hesitant States, such as Jamaica¹² or Slovakia,¹³ which doubted whether the ICC Prosecutor's power to act *proprio motu* would yield the anticipated benefits, yet they were 'prepared to join in any consensus on the issue.'¹⁴

Among those that opposed the Prosecutor's right to activate the trigger mechanism of the Rome Statute, some States, such as Israel, believed that the ICC Prosecutor, if entitled to the right to act *proprio motu*, would be overburdened by frivolous or political complaints, which could 'adversely affect the Prosecutor's independence and standing.'¹⁵ Representatives of Turkey, another opposing state, claimed that '[t]he right to lodge a complaint should be reserved for States and the Security Council' because, they believed, granting the ICC Prosecutor the authority to initiate an investigation on his own initiative would risk 'submerging him with information concerning charges of a political, rather than a juridical nature.'¹⁶ The Turkish delegation at the Rome Conference, therefore, considered the prosecutorial authority granted to the ICC Prosecutor to be 'unacceptable.'¹⁷ Similarly, Malaysia feared 'the danger of ... possible accusations of bias.' Representatives of some states, such as Japan, drew attention to the need for a 'proper balance' between the ICC's jurisdictional powers and the States Parties' legitimate interests regarding the trigger mechanism of the Court's activities.¹⁸

This study will first point out that the filtering mechanism, judicial checks, and high threshold of the Rome Statute should allay the opposing States' fears over politicized prosecution because these limitations on the prosecutorial powers avert

¹⁰ Portugal, Italy, Togo, Sierra Leone, the Philippines, Namibia, Guinea, Sierra Leone, Hungary, the Netherlands, Samoa, Niger, Malta, Belarus, Cyprus, Lesotho, Thailand, Jordan, Mexico, Costa Rica, Venezuela, Ireland, Senegal, Czech Republic, Romania, Australia, Uganda, New Zealand, Belgium, Trinidad and Tobago, Netherlands, Norway, South Africa, Brazil, Denmark, Madagascar, Andorra, Germany, Sweden, Slovenia, Greece, Canada, Chile, Switzerland, Burkina Faso, Namibia, Poland, Argentina, Liechtenstein, Gabon, Mali, Guinea-Bissau, Austria, Ukraine, Cote d'Ivoire, Benin, Finland, Djibouti, Spain, Botswana, Togo, Ecuador, Kuwait, Congo, Armenia, Ethiopia, San Marino, Croatia, Hungary, Croatia, Lithuania, the Republic of Korea, Mozambique, Estonia, Swaziland, Peru, Solomon Islands, Angola, Bosnia and Herzegovina, Egypt, Tanzania, Lithuania, Kyrgyzstan, The Former Yugoslav Republic of Macedonia (with its new name North Macedonia), Morocco. See generally, Official Records of the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int'l Criminal Court, 7th plen. mtg., U.N. Doc. A/CONE 183/SR.7 [hereinafter Official Records of the Rome Conference].

¹¹ The United States, Turkey, Cuba, China, Japan, Vietnam, Russia, Algeria, Israel, Bangladesh, India, Malaysia, Indonesia, Uruguay, Iraq, Yemen, Kenya, Libya, Nigeria, Oman, Pakistan, Qatar, Saudi Arabia, the United Arab Emirates, Tunisia, Sudan, Iran, Sri Lanka. See generally *ibid.*

¹² *ibid* 306, para 15.

¹³ *ibid* 308, para 47.

¹⁴ *ibid* 306, para 15.

¹⁵ *ibid* 201, para 111.

¹⁶ *ibid* 124, para 44.

¹⁷ *ibid* 211, para 3.

¹⁸ *ibid* 67, para 46.

the possibility of the Prosecutor bringing arbitrary charges. The judicial scrutiny of the chambers of the Court ensures that the decisions of the ICC Prosecutor are subject to the high threshold criteria set out in the Rome Statute. The study will then draw attention to the political restraints placed on the Office of the Prosecutor (OTP) by the States whose cooperation is needed in order to access the defendants and the evidence. It will submit that the legal and political restraints placed on the Prosecutor should allay States' fears about frivolous or political complaints.

This study will then explain why the Prosecutor's ability to initiate investigations *proprio motu* is essential for the effective functioning of the ICC. It will argue that the Prosecutor's authority to act *proprio motu* is in fact a requisite to ensure that the Court is truly effective and free from political interference. The study will further argue that the Prosecutor's authority to investigate crimes on her own motion has been instrumental in encouraging national prosecutions. Referring to the Prosecutor's recent decisions to decline to initiate an investigation, this study will finally argue that, in contrast to the concerns that the powers of the ICC Prosecutor could result in politicized prosecutions, the role given to the Prosecutor under the Rome Statute actually serves as an early filtering mechanism against politically motivated referrals and against referrals that do not meet the high threshold of the Rome Statute.

I. States' Concerns on the Prosecutor's Powers *versus* Rome Statute's Sufficient Safeguards

According to Article 13 of the Rome Statute, an ICC investigation could be triggered either by a State Party or Security Council referral, or by the Prosecutor *proprio motu*:

"The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15."¹⁹

Accordingly, the ICC Prosecutor can commence an investigation *proprio motu* only "in accordance with article 15" of the Rome Statute,²⁰ which provides some

¹⁹ Rome Statute (n 1) Art 13.

²⁰ *ibid* Art 13 (c).

procedural safeguards such as the requirement to seek authorization from the Pre-Trial Chamber.²¹ Unlike the trigger mechanisms of a State Party or Security Council referral, Article 15 of the Statute requires the Prosecutor to request authorization from the Pre-Trial Chamber in order to initiate a formal investigation *proprio motu*.²² The Prosecutor needs to provide his/her analysis of the seriousness of the information collected from reliable sources, and convince the Pre-Trial Chamber that “a reasonable basis to proceed with an investigation” does exist.²³ The Pre-Trial Chamber will examine the request and the supporting material, and reject the request for authorization if the situation in question does not appear “to fall within the jurisdiction of the Court.”²⁴

The Pre-Trial Chamber II’s rejection of the Prosecutor’s request for the authorization of an investigation into the situation in Afghanistan on 12 April 2019 is an example showing that the Prosecutor’s *proprio motu* powers are subject to the judicial scrutiny of the chambers of the Court. The rejection decision, which will be discussed further below, proves that in contrast to the claims brought by some States -such as Sudan- during the Rome Conference,²⁵ the role assigned to the ICC Prosecutor by the Rome Statute is not beyond the control of the chambers of the Court. As clearly stated in Article 15(3) of the Rome Statute, the Pre-Trial Chamber must consent to an investigation when the jurisdiction of the Court is exercised by the Prosecutor *proprio motu*.

The judicial scrutiny of the chambers of the Court ensures that the decisions of the ICC Prosecutor are subject to the high threshold criteria set out in the Rome Statute. The Prosecutor will not seek authorization to proceed with an investigation and the Pre-Trial Chamber will not grant such authorization if the situation in question does not appear to 1) fall within the Court’s jurisdiction -which requires consideration of the subject matter,²⁶ temporal,²⁷ and either territorial or personal jurisdiction²⁸-; 2) be admissible in terms of complementarity²⁹ and gravity³⁰ criteria; and 3) ‘serve the interests of justice.’³¹ In fact, the safeguards set out in the Rome Statute, such as the complementarity principle and high gravity threshold, constitute the main restraints

²¹ *ibid* Art 15 (c).

²² *ibid* Art 15 (3). During the Rome negotiations, the proposal requiring the Prosecutor to seek the authorization of the Pre-Trial Chamber if s/he concludes that ‘there is a reasonable basis to proceed with an investigation’ was introduced by Argentina and Germany. See, Official Records of the Rome Conference (n 10) 183, para 38.

²³ Rome Statute (n 1) Art 15 (4).

²⁴ *ibid* Art 15 (4).

²⁵ Official Records of the Rome Conference (n 10)126, para 77.

²⁶ Rome Statute (n 1) Art 5.

²⁷ *ibid* Art 11.

²⁸ *ibid* Art 12 (2).

²⁹ *ibid* Art 17 (1) (a).

³⁰ *ibid* Art 17 (1) (d).

³¹ *ibid* Art 53 (1) (c).

on the discretion of the Prosecutor. The Pre-Trial Chamber will authorize the commencement of an investigation only if the crimes in question do appear to be “of sufficient gravity to justify further action by the Court”³² and only if national courts appear to be “unwilling or unable genuinely” to prosecute the crimes in question.³³ Furthermore, the Pre-Trial Chamber’s ruling to authorize an investigation can be appealed to the Appeals Chamber, and admissibility of the case can be challenged by relevant states on the grounds that they are investigating or have investigated the same crimes in question.³⁴

As of December 31, 2020, the OTP has received 14,881 communications on crimes allegedly within the jurisdiction of the Court, calling the Prosecutor to seek an investigation on his/her own initiative.³⁵ However, the number of the situations, into which a formal ICC investigation has been initiated by the Prosecutor *proprio motu*, remained only six: the situations in Kenya (2010), Côte d’Ivoire (2013), Georgia (2016), Burundi (2017), Myanmar/Bangladesh (2019), and Afghanistan (2020).³⁶ The overwhelming majority of the communications received by the Office of the Prosecutor are determined to fall manifestly outside the jurisdiction of the ICC, which proves the ICC Prosecutor’s cautiousness and prudence in selecting cases. The safeguards/high thresholds set out in the Rome Statute ensure that unfounded or politically motivated accusations will not reach the trial stage.

Depriving the Prosecutor of the authority to act *proprio motu* could, in fact, affect his/her independence adversely. An ICC Prosecutor without the power to initiate investigations *proprio motu* would need to convince States Parties or the members of the Security Council to refer cases to the Court, as a result of which some concessions or guarantees could be sought from the Prosecutor. A member of the Security Council, for example, could attempt to influence or direct the Prosecutor on determining the specific crimes to be investigated or specific individuals to be indicted in exchange for its support for the referral of a situation to the Court. Of course, the filtering mechanism of the ICC would not allow such attempts to yield results, but the confinement of the role of the ICC Prosecutor to receiving complaints from the

³² *ibid* Art 17 (1) (d).

³³ *ibid* Art 17 (1) (a).

³⁴ *ibid* Art 18 (4).

³⁵ As the reports published in 2019 and 2020 have not declared the up-to-date total number of communications, the current total number has been calculated by addition of the communications received in the last two years to the then-current total number declared in the 2018 report. International Criminal Court - Office of the Prosecutor, ‘Report on Preliminary Examination Activities 2018’ (5 December 2018) 9, para 18, available at <<https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf>>accessed 1 March 2021; International Criminal Court - Office of the Prosecutor, ‘Report on Preliminary Examination Activities 2019’ (5 December 2019) 8, para 23, available at <<https://www.icc-cpi.int/itemsDocuments/191205-rep-otp-PE.pdf>>accessed 1 March 2021; International Criminal Court - Office of the Prosecutor, ‘Report on Preliminary Examination Activities 2020’ (14 December 2020) 10, para 30, available at <<https://www.icc-cpi.int/itemsDocuments/2020-PE/2020-pe-report-eng.pdf>>accessed 10 March 2021.

³⁶ See generally International Criminal Court, ‘Situations under investigation’, <<https://www.icc-cpi.int/pages/situation.aspx>> accessed 1 March 2021.

States Parties or from the Security Council would make the Prosecutor ‘dependent’ on the consent of the States and could consequently undermine the effectiveness and credibility of the Court.

Another Rome Statute based safeguard on the powers of the ICC Prosecutor is the right of the Security Council to defer the commencement of an investigation for a period of 12 months under Article 16 of the Statute.³⁷ Moreover, the ICC Prosecutor’s subjection to the managerial oversight by the Assembly of States Parties under Article 112(2)(b) of the Rome Statute makes the overall “institutional” restraints on the Prosecutor of the ICC exceed those on the prosecutors of *ad hoc* tribunals such as the International Criminal Tribunal for the Former Yugoslavia.³⁸

The ICC prosecutors are elected by secret ballots of States Parties with equally weighted votes. States’ fear of politicized prosecution is less meaningful when considering the judicial checks in the Rome Statute and the democratic structure of the Assembly of States Parties. As noted by the Prosecutors of the ICC on many occasions, the ICC will use its limited resources to address only “the most serious crimes of international concern” when the national authorities are unable or unwilling to conduct effective prosecutions, and the OTP will not act based on mere “speculation or suspicion.”³⁹

A. The Situation in Afghanistan: The Most Recent Example of the Strict Scrutiny by the Chambers of the Court

The Pre-Trial Chamber’s rejection, on 12 April 2019, of the Prosecutor’s request for the authorization of an investigation into the situation in Afghanistan⁴⁰ (hereinafter the ‘Request’ or the ‘Request for Authorization’) is a clear example showing that the Prosecutor’s *proprio motu* powers are not beyond the control of the Chambers of the Court. The request was rejected by the Pre-Trial Chamber II on the ground that such investigation “at this stage would not serve the interests of justice.”⁴¹ Though this decision was amended by the Appeals Chamber, which “decided unanimously to authorise the Prosecutor to commence an investigation into” the Afghanistan situation on 5 March 2020,⁴² it is a reminder that chambers of the Court have the final say on whether there is a reasonable basis to proceed with an investigation.

³⁷ Rome Statute (n 1) Art 16.

³⁸ Mark D. Kielsgard, *Reluctant Engagement: U.S. Policy and the International Criminal Court* (Koninklijke Brill NV 2010) 125.

³⁹ International Criminal Court - Office of the Prosecutor, ‘Report on Preliminary Examination Activities 2014’ (2 December 2014) 56, para 236.

⁴⁰ International Criminal Court - Pre-Trial Chamber II, ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan’ (12 Apr. 2019) 3, para 1, available at <https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF> accessed 1 December 2019 [hereinafter the Pre-Trial Chamber II’s Decision on the Request].

⁴¹ *ibid* 32, para 97.

⁴² International Criminal Court, ‘Afghanistan: ICC Appeals Chamber authorises the opening of an investigation’, (5 March 2020), available at <www.icc-cpi.int/Pages/item.aspx?name=pr1516> accessed 10 March 2021.

The Request for Authorization was submitted on 20 November 2017, nearly eleven years after the opening of the preliminary examination in 2006.⁴³ The Request addressed the crimes allegedly committed in the situation in Afghanistan since 1 May 2003 (date of the entry into force of the Rome Statute for Afghanistan) in four categories separately: 1) alleged crimes by the Taliban and other anti-government armed groups⁴⁴ 2) alleged crimes by the Afghan National Security Forces⁴⁵ 3) alleged crimes by the US Forces and the CIA⁴⁶ 4) “other acts” by members of the other international forces deployed in Afghanistan.⁴⁷ The Request, while submitting that there was a reasonable basis to believe that crimes falling within the jurisdiction of the Court had been committed by the Taliban and other armed groups,⁴⁸ by the Afghan Forces⁴⁹ and by the US armed forces and the CIA,⁵⁰ noted that the information available was not sufficient to make a determination “at this stage” as to whether or not there were reasonable grounds to believe that members of other international armed forces had committed a crime within the jurisdiction of the Court.⁵¹

In its rejection decision, the Pre-Trial Chamber II concluded that though “there is a reasonable basis to believe that the contextual elements of both crimes against humanity and war crimes are satisfied in respect of the alleged events”,⁵² an investigation into the situation in Afghanistan would not, for the moment, be in the interests of justice⁵³ due to relevant circumstances that “make such investigation not feasible and inevitably doomed to failure.”⁵⁴ These relevant circumstances were summarized as: 1) the significant time elapsed between the commission of alleged crimes and the submission of the Request in 2017; 2) the lack of cooperation by the most relevant national authorities in respect of surrender of suspects and collection of evidence; 3) low possibility that relevant evidence and suspects would still be available after an eleven-year-long preliminary examination.⁵⁵ The Chamber’s rejection decision drew attention to the fact that the limited resources of the Court require it to focus only on situations where prospects for successful prosecutions appear promising.⁵⁶

⁴³ The Pre-Trial Chamber II’s Decision on the Request (n 41) 3, para 5.

⁴⁴ *ibid* 6.

⁴⁵ *ibid* 7.

⁴⁶ *ibid* 8.

⁴⁷ *ibid* 9.

⁴⁸ *ibid* 7, para 20.

⁴⁹ *ibid* 8, para 22.

⁵⁰ *ibid* 9, para 24.

⁵¹ *ibid* 9, para 25.

⁵² *ibid* 22, para 66.

⁵³ *ibid* 32.

⁵⁴ *ibid* 29, para 90.

⁵⁵ *ibid* 29, para 91.

⁵⁶ *ibid* 30, para 95.

The Appeals Chamber, however, found that when deciding on the Prosecutor's request for authorization to open an investigation, the Pre-Trial Chamber erred in considering the interests of justice factor: the Pre-Trial Chamber should have determined only whether or not there was a reasonable factual basis to believe that crimes within the jurisdiction of the Court had been committed and whether or not potential case(s) that would arise appeared to fall within the Court's jurisdiction.⁵⁷ The Appeals Chamber also warned that the Rome Statute did not require the Prosecutor to "affirmatively determine that an investigation would be in the interests of justice, as suggested by the Pre-Trial Chamber", because "article 53(1) of the Statute is formulated in the negative"⁵⁸; the Prosecutor would seek to initiate an investigation unless she determined that there were "substantial reasons to believe that an investigation would not serve the interests of justice."⁵⁹ The Appeals Chamber's unanimous judgment to amend the Pre-Trial Chamber's decision not to authorize an investigation into the situation in Afghanistan did not change the fact that the Prosecutor's decisions and acts were subject to the strict judicial scrutiny of the chambers of the Court.

II. Political Restraints on the ICC Prosecutor

There are also political restraints placed on the ICC Prosecutor by the States whose cooperation is crucial in terms of gathering evidence, arresting suspects, and accessing the witnesses and defendants. As the effective functioning of the Court relies heavily on cooperation with the members of the international community, any reluctance on the part of the States to cooperate with the Office of the Prosecutor limits the ability of the Prosecutor to bring charges against the perpetrators. For example, in the case against Uhuru Muigai Kenyatta, then ICC Prosecutor Fatou Bensouda found herself obligated to withdraw the charges against Kenyatta, due to insufficient evidence, which was mainly caused by the "failure of the Government of Kenya to cooperate fully and effectively."⁶⁰ The Prosecutor Bensouda stressed that her actions could only be "guided by the law and the evidence," and that it was her professional responsibility "to withdraw the charges against the accused" if there is no "reasonable prospect of conviction at trial based on the evidence" available.⁶¹

⁵⁷ International Criminal Court – The Appeals Chamber, 'Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan' (5 March 2020) 15, para 34, available at <www.icc-cpi.int/CourtRecords/CR2020_00828.PDF> accessed 10 March 2020. [hereinafter the Appeals Chamber's Judgment on the Appeal].

⁵⁸ *ibid* 22, para 49.

⁵⁹ Rome Statute (n 1) Art 53(1).

⁶⁰ International Criminal Court, 'Press Release - Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr. Uhuru Muigai Kenyatta', (12 December 2014), available at <www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-05-12-2014-2.aspx> accessed 1 December 2019.

⁶¹ *ibid*.

Karim Khan (United Kingdom), who was elected by the Assembly of State Parties as the new prosecutor of the ICC, replaced his predecessor Fatou Bensouda (Gambia) on 16 June 2021 for the new prosecutorial term of 9 years.⁶² Though the new Prosecutor is left with well-established policies and manuals⁶³ for the investigation of the most serious crimes of international concern and a well-established office that has accrued the experience of two prosecutorial terms in building cases seeking to establish individual criminal responsibility for the atrocity crimes, he is nevertheless facing significant challenges such as the possibility of a mass withdrawal by African member states or criticisms over the low number of prosecutions and convictions.⁶⁴ There are concerns that if the new Prosecutor fails to chart a path that will enable the Court to meet those challenges, “the institution may never recover.”⁶⁵ The OTP is expected to improve the quality of its investigations and human resources and enhance its relationship with the judges of the Court to contribute to the efforts⁶⁶ aimed at improving the efficiency of the Court’s judicial work and expediting proceedings.

Some see the election of Karim Khan, a British barrister, to the position of Prosecutor of the ICC “as a diplomatic win for the UK after Brexit.”⁶⁷ Though this view is problematic especially given that the ICC Prosecutor can only represent the interests of justice and of his mandate of independently and impartiality selecting situations for investigation, I believe that the OTP may, nevertheless, enjoy some advantages of being headed by a Prosecutor whose country of nationality is a major global player, especially if that is going to promote greater and continuous support of the UK. The United Kingdom’s continuous, stronger support for the efforts of the OTP to bring the perpetrators of the most serious crimes to justice could absorb the negative effects of the hostile campaigns against the ICC such as the United States’ imposition of sanctions in 2020 on court officials engaged in efforts to investigate the situation in Afghanistan.⁶⁸ Revocation of the ICC Prosecutor’s US travel visa by the White House is an example of how hostile states can get in the face of formal investigation efforts. Greater British political support for the activities of the OTP could also decrease the number of such hostile acts.

⁶² International Criminal Court, ‘Election of Prosecutor (2020)’, (12 February 2020), available at <https://asp.icc-cpi.int/en_menus/asp/elections/prosecutor/Pages/Prosecutor2020.aspx> accessed 10 March 2021.

⁶³ The International Federation for Human Rights (FIDH), ‘The Office of the Prosecutor of the ICC - 9 Years On Analysis of the Prosecutorial Strategy and Policies of the Office of the Prosecutor (2003-2011) Recommendations to the Next ICC Prosecutor’ (December 2011) 29, available at <www.fidh.org/IMG/pdf/cpiproc579ang.pdf> accessed 1 March 2021.

⁶⁴ Milena Sterio, ‘The International Criminal Court: Current Challenges and Prospect of Future Success’ (2020) 52 (1) Case Western Reserve Journal of International Law 468.

⁶⁵ Alex Whiting, ‘A Program for the Next ICC Prosecutor’ (2020) 52(1) Case Western Reserve Journal of International Law 480.

⁶⁶ International Criminal Court, ‘Press Release - ICC Judges Agree on Measures to Improve Efficiency of Criminal Process’, (22 June 2015), available at <www.icc-cpi.int/Pages/item.aspx?name=pr1121&ln=en> accessed 10 March 2021.

⁶⁷ BBC NEWS, ‘Karim Khan: UK lawyer elected chief prosecutor at ICC’, <www.bbc.com/news/uk-56051110> accessed 10 March 2021.

⁶⁸ Human Rights Watch, ‘US Sanctions on the International Criminal Court’ (14 December 2020), <www.hrw.org/news/2020/12/14/us-sanctions-international-criminal-court> accessed 10 March 2021.

In order to deal with current and future challenges and conduct his office's investigations effectively, the new Prosecutor needs, as did his predecessor, the cooperation and support not only of states but also -to a lesser extent- of non/inter/supra-governmental organizations.⁶⁹ Given the financial constraints and the limited resources of the OTP to gather evidence and intelligence, the support of states and non-governmental organizations is crucial for the effective functioning of the Court, and the lack of support of some opposing global powers (including three of the P5) constitutes a serious restraint on the powers of the ICC Prosecutor.

III. The Role of the Prosecutorial Powers in the Effective Functioning of the ICC

The prosecution of the most serious crimes committed in six situations, into which a formal ICC investigation was initiated by the ICC Prosecutor *proprio motu*, was possible thanks to the Prosecutor's authority to act *proprio motu*. The *proprio motu* power of the ICC Prosecutor, therefore, is of great importance for the effectiveness and credibility of the Court. It would be unrealistic to expect that States Parties or the members of the Security Council would always refer cases to the ICC without taking into account their political agendas. As demonstrated by the Security Council's failure to adopt a draft resolution to refer the situation in Syria to the ICC in May 2014,⁷⁰ States often put their own interests above international justice and common interests. Neither Syria nor any other State involved in the Syrian conflict is a party to the Rome Statute. Thus, under current conditions, the only way the Prosecutor is authorized to investigate war crimes and crimes against humanity allegedly committed within Syrian borders is by a Security Council referral.⁷¹ Yet, heinous crimes committed against civilians since the beginning of the Syrian conflict in March 2011 have not

⁶⁹ Whiting (n 66) 484; see Zoe Pearson, 'Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law' (2006) 39 (2) Cornell International Law Journal 243-245.

⁷⁰ UN Security Council, 'Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution', UN doc. SC/11407 (22 May 2014) available at <<http://www.un.org/News/Press/docs/2014/sc11407.doc.htm>> accessed 1 December 2019; see also Şahin Eray Kırdım, 'A Neo-Realist Case Study of U.N.-Authorized Humanitarian Interventions in The Post-Cold War World' (2017) 19 (2) Gazi Üniversitesi İktisadi ve İdari Bilimler Fakültesi Dergisi 632.

⁷¹ Relying on the Pre-Trial Chamber's recent conclusion that ICC has jurisdiction over the alleged deportation of the Rohingya refugees from Myanmar -a non-State Party- to Bangladesh -a State Party-, a communication was presented to the Court in March 2019 making a similar argument for the Syrian refugees who have fled to neighbouring Jordan -a State Party, as is Bangladesh-. See The Guardian, 'Syrian refugees launch legal bid to try Assad for crimes against humanity', <<https://www.theguardian.com/law/2019/mar/07/syrian-refugees-launch-legal-bid-to-try-assad-for-crimes-against-humanity>> accessed 1 December 2019.

Pursuant to Article 7(2)(d) of the Rome Statute, in order for an act to constitute the crime of deportation, deportees must be deported 'by expulsion or other coercive acts.' See Rome Statute (n 1) Art 7(2)(d). This element of deportation, Pre-Trial Chamber III explains, is met when deportees are removed physically or when they are obliged 'to leave the area where they were lawfully present' as a result of coercive acts. See International Criminal Court - Pre-Trial Chamber III, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar' (14 November 2019) 23, para 52, available at <https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF> accessed 1 December 2019.

Though the accusations in the communication seem to fall within the jurisdiction of the Court, it remains to be answered whether they could be considered as constituting the elements of the specific crime of deportation against the Syrian refugees who fled to Jordan and whether they could be supported with clear evidence.

been able to be brought before the ICC due to the veto power of the permanent members which mostly act to secure their own political partisan interests.

The 2014 draft resolution referring the situation in Syria to the ICC was vetoed by China as well as Russia, a permanent member of the Security Council and a strong supporter of the Syrian regime. Though the UN Secretary-General Antonio Guterres urged in 2015 and 2018⁷² that the situation in Syria be referred to the ICC, a new attempt for a Security Council referral is highly likely to face a similar fate in the foreseeable future. Russia alone has, as of 2019, vetoed 13 resolutions relating to the conflict in Syria.⁷³ The Security Council cannot even condemn the Syrian regime for its violations of war due to the veto power of Russia whose attitudes in the Council are often guided by *raison d'état*. Similarly, in situations where a State Party (on whose territory heinous crimes have been committed) is not likely to trigger the jurisdiction of the ICC, a Prosecutor without the authority to act *proprio motu* would be subordinated to the veto power of each of the P5. Moreover, even the motives of those States that campaign for a Security Council referral are not always clear as they could be solely intending to use the Court, via the Security Council, as a forum for putting pressure on States that would oppose such referral.

Like the Security Council's permanent members, which hold the veto power, the State Parties (that are not members of the Security Council) also typically prioritize acting in accordance with their national interests or sometimes solely at the impulse of idiosyncratic preferences of the decision-makers. It would be unrealistic to expect that the head of a State Party who has ordered the commission of the most serious crimes covered in the Rome Statute would be keen on triggering an investigation that could result in him or her standing trial in The Hague. For example, Syrian President Bashar al-Assad, who (after more than 10 years of a civil war that has left hundreds of thousands of people dead and millions of civilians displaced⁷⁴) still considers himself irreplaceable, would not be willing to trigger an ICC investigation even if Syria was a State Party. Thus, an ICC investigation into the serious crimes committed in Syria would not be likely without the Prosecutor's power to act *proprio motu*, even if Syria had already joined the Court. Given that States' policies toward the ICC are usually driven by national interests or by personal preferences of the decision-makers, the ICC Prosecutor's authority to initiate investigations *proprio motu* is crucial for the

⁷² DW, 'Syria Ceasefire Starts Near Damascus as UN Calls for ICC Referral Over Aid', <<https://www.dw.com/en/syria-ceasefire-starts-near-damascus-as-un-calls-for-icc-referral-over-aid/a-42328500>> accessed 1 Dec. 2019.

⁷³ Reuters, 'Russia casts 13th veto of U.N. Security Council action during Syrian war', <<https://www.reuters.com/article/us-syria-security-un/russia-casts-13th-veto-of-un-security-council-action-during-syrian-war-idUSKBN1W42CJ>> accessed 1 Dec. 2019.

⁷⁴ According to the UN High Commissioner for Refugees, the number of Syrians displaced internally and across borders by the Syrian civil war has mounted to nearly 12 million. For the up-to-date figures on the number of Syrians who have fled the country see Operational Portal Refugee Situations, 'Total Persons of Concern', <<https://data2.unhcr.org/en/situations/syria>> accessed 1 December 2019. For the current figures on the number of internally displaced Syrians see UN Refugee Agency, 'Internally Displaced People', <www.unhcr.org/sy/internally-displaced-people> accessed 1 December 2019.

credibility and effectiveness of the ICC in addressing the crimes that fall within its jurisdiction.

IV. The Prosecutor's Powers as an Incentive for Domestic Prosecutions

Together with the ICC's complementarity principle, which requires the Court to defer to 'genuine' national proceedings, the Prosecutor's authority to investigate crimes without a referral from a State Party or the Security Council has been instrumental in encouraging national prosecutions. The Preamble and Article 1 of the Rome Statute emphasize that the ICC "shall be complementary to national criminal jurisdictions."⁷⁵ Accordingly, as detailed in Article 17 of the Rome Statute, the ICC can only act when national jurisdictions are either "unwilling or unable" to genuinely investigate or prosecute the crimes in question.⁷⁶ Before seeking the authorization of the Pre-Trial Chamber to commence a formal ICC investigation, the OTP conducts a preliminary examination of situations to determine whether the situations in question "meet the legal criteria, [including the 'complementarity' criteria], to proceed with an investigation".⁷⁷ The Prosecutor will not seek to commence an investigation if the national authorities are deemed able and willing to investigate and prosecute. Examination of national proceedings by the Prosecutor who has the power to investigate complaints *proprio motu* sometimes serves as an incentive for national authorities to investigate crimes more carefully and competently.

During preliminary examinations, the OTP gathers and assesses "information relating to the status and progress of national proceedings carried out" by the national authorities.⁷⁸ For this purpose, the Prosecutor meets with senior officials from the judiciary and the executive, representatives of non-governmental organizations and civil society.⁷⁹ The Prosecutor also communicates with national governments, through reports or formal visitations to support national efforts to fight against impunity. Such activities of the Prosecutor contribute to the efforts to spur States to improve their domestic criminal system and to deter them from committing, abetting, or funding serious crimes in the future. In the situation regarding Colombia, for example, the Prosecutor's activities prompted the Colombian authorities to revise the "Justice and Peace Law", which had been adopted by the Congress of Colombia in 2005 to facilitate the demobilization of paramilitary groups in Colombia, so as to ensure greater accountability for the perpetrators of the acts amounting to ICC crimes.⁸⁰

⁷⁵ Rome Statute (n 1) Art 1.

⁷⁶ *ibid* Art 17(1) (a).

⁷⁷ Report on Preliminary Examination Activities 2018 (n 35) 32, para 117.

⁷⁸ *ibid* 42, para 160.

⁷⁹ See for example *ibid* 42, para 161.

⁸⁰ William W. Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' (2008) 49 (1) *HILJ* 53, 90.

A letter sent by the Office of the Prosecutor with a reminder that the Office was monitoring the process of adopting a Justice and Peace Law⁸¹ was even discussed in the Congress.⁸² Blocking an ICC prosecution was one of greatest motivating factors for the Colombian government to revise the Justice and Peace Law to provide greater accountability for the perpetrator of the ICC crimes. In this sense, the Prosecutor's authority to either proceed with a formal investigation or to defer to domestic accountability processes encourages States to carry out genuine national proceedings addressing ICC crimes and deter them from committing these crimes in the future.⁸³

V. The Prosecutor's Role as Filtering Mechanism

It should be noted that the preliminary examination activities of the OTP are conducted in the same manner "irrespective of whether the Office receives a referral from a State Party or the Security Council," or whether the Prosecutor acts *proprio motu*.⁸⁴ The Prosecutor, having reviewed all available information relevant to a situation referred to him/her, may conclude that information available does not provide reasonable grounds to proceed with an investigation. This authority of the Prosecutor to decide as to whether or not there is a reasonable basis to proceed with an investigation serves as an early filtering mechanism against politically motivated referrals or against referrals that fail to meet the high threshold of the Rome Statute.

Of course, the Prosecutor's decision not to proceed is subject to judicial review and can be requested to be reviewed by the Pre-Trial Chamber under Article 53(3) (a), as was done by the Union of Comoros in the situation on Registered Vessels of Comoros, Greece, and Cambodia in January 2015.⁸⁵ In any event, in contrast to some concerns that the powers of the Prosecutor could result in politicized prosecutions, the role given to the Prosecutor under the Rome Statute actually prevents any politically motivated State Party or Security Council referrals from turning into formal investigations. The most recent example, in which the Prosecutor declined to initiate an investigation, was the situation in the Gabonese Republic, which was referred to the OTP by the Gabonese Republic itself. The Prosecutor announced her decision to close the preliminary examination into the situation in the Gabonese Republic in September 2018 for lack of subject-matter jurisdiction.⁸⁶

⁸¹ Alejandro Chehtman, 'The Impact of the ICC in Colombia: Positive Complementarity on Trial' (2011) Domac Project under the Seventh Framework Programme for EU Research (FP7), DOMAC/17 21.

⁸² Marieke I. Wierda, 'The Local Impact of a Global Court: Assessing the Impact of the International Criminal Court in Situation Countries' (2019) (Ph.D. Thesis, University of Leiden) 172.

⁸³ For more detailed information on the deterrent effects of the preliminary examinations see Şehmus Kurtuluş, 'Reassessment of Turkey's Objections to the Exclusion of Terrorism from the Rome Statute' (2019) 16 (64) Uluslararası İlişkiler-International Relations 145, 158.

⁸⁴ International Criminal Court - Office of the Prosecutor, 'Report on Preliminary Examination Activities 2013' (November 2013) 4, para 10.

⁸⁵ International Criminal Court - Pre-Trial Chamber I, 'Application for Review pursuant to Article 53 (3) (a) of the Prosecutor's Decision of 6 November 2014 not to initiate an investigation in the Situation' (29 Jan 2015) 3, para 1.

⁸⁶ Report on Preliminary Examination Activities 2018 (n 35) 71, para 290.

Conclusion

The prosecutorial powers, including the authority to investigate crimes without a referral from a State Party or the Security Council, are not placed in the hands of the ICC Prosecutor without judicial checks. Article 15 of the Rome Statute provides some procedural safeguards such as the requirement to seek authorization from the Pre-Trial Chamber. The strict judicial scrutiny of the chambers of the Court ensures that the decisions of the ICC Prosecutor are subject to the safeguards set out in the Rome Statute. In fact, the high threshold criteria set out in the Rome Statute make it nearly impossible for unfounded or politically motivated accusations to reach the trial stage.

There are also political restraints placed on the ICC Prosecutor by the States, whose cooperation is crucial in terms of gathering evidence, arresting suspects, and accessing the witnesses and defendants. As the effective functioning of the Court relies heavily on cooperation with the members of the international community, any reluctance on the part of the States to cooperate with the Office of the Prosecutor limits the ability of the ICC Prosecutor to bring charges against the perpetrators. Therefore, this study concludes that the legal and political restraints placed on the Prosecutor should allay States' fears about frivolous or political complaints.

This study has shown that the Prosecutor's ability to initiate investigations on her/his own initiative is vital to ensure that the Court is truly effective and free from political interference. The prosecution of the most serious crimes committed in six situations, into which a formal ICC investigation was initiated by the ICC Prosecutor without any referral from a State Party or the Security Council, was possible thanks to the Prosecutor's authority to act *proprio motu*. Furthermore, this study suggests that the Prosecutor's authority to investigate crimes on her own initiative has been instrumental in encouraging national prosecutions. The procedure of examination of national proceedings by a Prosecutor who has the power to investigate complaints *proprio motu* often serves as an incentive for national authorities to investigate crimes more carefully and competently. The study also suggests that the ICC Prosecutor's authority to make a determination as to whether there is a reasonable basis to proceed with an investigation, in fact, serves as an early filtering mechanism against politically motivated referrals or against referrals that do not meet the high threshold of the Rome Statute. The role given to the Prosecutor under the Rome Statute prevents the politically motivated State Party or Security Council referrals from turning into formal investigations.

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Bibliography

- BBC NEWS, 'Karim Khan: UK lawyer elected chief prosecutor at ICC', <www.bbc.com/news/uk-56051110> accessed 10 March 2021.
- Burke-White WW, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' (2008) 49 (1) *Harvard International Law Journal* 53-108.
- Chehtman A, 'The Impact of the ICC in Colombia: Positive Complementarity on Trial' (2011) Domac Project under the Seventh Framework Programme for EU Research (FP7), DOMAC/17.
- DW, 'Syria Ceasefire Starts Near Damascus as UN Calls for ICC Referral Over Aid', <<https://www.dw.com/en/syria-ceasefire-starts-near-damascus-as-un-calls-for-icc-referral-over-aid/a-42328500>> accessed 1 Dec. 2019.
- Human Rights Watch, 'US Sanctions on the International Criminal Court' (14 December 2020), <www.hrw.org/news/2020/12/14/us-sanctions-international-criminal-court> accessed 10 March 2021.
- International Criminal Court, 'Afghanistan: ICC Appeals Chamber authorises the opening of an investigation', (5 March 2020), available at <www.icc-cpi.int/Pages/item.aspx?name=pr1516> accessed 10 March 2021.
- International Criminal Court, 'Election of Prosecutor (2020)', (12 February 2020), available at <https://asp.icc-cpi.int/en_menus/asp/elections/prosecutor/Pages/Prosecutor2020.aspx> accessed 10 March 2021.
- International Criminal Court - Office of the Prosecutor, 'Policy Paper on Case Selection and Prioritisation' (15 Sept 2016).
- International Criminal Court - Office of the Prosecutor, 'Report on Preliminary Examination Activities 2020' (14 December 2020), available at <<https://www.icc-cpi.int/itemsDocuments/2020-PE/2020-pe-report-eng.pdf>> accessed 10 March 2021
- International Criminal Court - Office of the Prosecutor, 'Report on Preliminary Examination Activities 2019' (5 December 2019), available at <<https://www.icc-cpi.int/itemsDocuments/191205-rep-otp-PE.pdf>> accessed 10 March 2021.
- International Criminal Court - Office of the Prosecutor, 'Report on Preliminary Examination Activities 2018' (5 December 2018), available at <<https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf>> accessed 1 December 2019.
- International Criminal Court - Office of the Prosecutor, 'Report on Preliminary Examination Activities 2014' (2 December 2014).
- International Criminal Court - Office of the Prosecutor, 'Report on Preliminary Examination Activities 2013' (November 2013).
- International Criminal Court, 'Paper on Some Policy Issues Before the Office of the Prosecutor' (September 2003).
- International Criminal Court, 'Press Release - ICC Judges Agree on Measures to Improve Efficiency of Criminal Process', (22 June 2015), available at <www.icc-cpi.int/Pages/item.aspx?name=pr1121&ln=en> accessed 10 March 2021.

- International Criminal Court, 'Press Release - Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr. Uhuru Muigai Kenyatta', (12 December 2014), available at <www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-05-12-2014-2.aspx> accessed 1 December 2019.
- International Criminal Court – The Appeals Chamber, 'Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan' (5 March 2020) available at <www.icc-cpi.int/CourtRecords/CR2020_00828.PDF> accessed 10 March 2020.
- International Criminal Court –The Pre-Trial Chamber I, 'Application for Review pursuant to Article 53(3)(a) of the Prosecutor's Decision of 6 November 2014 not to initiate an investigation in the Situation' (29 Jan 2015).
- International Criminal Court –The Pre-Trial Chamber II, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan' (12 April 2019) 3, para 1, available at <https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF> accessed 1 December 2019.
- International Criminal Court –The Pre-Trial Chamber III, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar' (14 November 2019) available at <https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF> accessed 1 December 2019.
- International Criminal Court, 'Situations under investigation', <<https://www.icc-cpi.int/pages/situation.aspx>> accessed 10 March 2021.
- Kırdım ŞE, 'A Neo-Realist Case Study of U.N.-Authorized Humanitarian Interventions in The Post-Cold War World' (2017) 19 (2) Gazi Üniversitesi İktisadi ve İdari Bilimler Fakültesi Dergisi 615-632.
- Kielsgard MD., 'Reluctant Engagement: U.S. Policy and the International Criminal Court' (Koninklijke Brill NV 2010).
- Kurtuluş Ş, 'Reassessment of Turkey's Objections to the Exclusion of Terrorism from the Rome Statute' (2019) 16 (64) International Relations 145-161.
- Official Records of the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int'l Criminal Court, 7th plen. mtg, U.N. Doc. A/CONE 183/SR.7
- Operational Portal Refugee Situations, 'Total Persons of Concern', <<https://data2.unhcr.org/en/situations/syria>>accessed 1 December 2019.
- Pearson Z, 'Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law' (2006) 39 (2) Cornell International Law Journal 243-284.
- Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (17 July 1998).
- Reuters, 'Russia casts 13th veto of U.N. Security Council action during Syrian war', <<https://www.reuters.com/article/us-syria-security-un/russia-casts-13th-veto-of-un-security-council-action-during-syrian-war-idUSKBN1W42CJ>> accessed 1 Dec. 2019.
- Sterio M, 'The International Criminal Court: Current Challenges and Prospect of Future Success' (2020) 52 (1) Case Western Reserve Journal of International Law 467-478.
- The Guardian, 'Syrian refugees launch legal bid to try Assad for crimes against humanity', <<https://www.theguardian.com/law/2019/mar/07/syrian-refugees-launch-legal-bid-to-try-assad-for-crimes-against-humanity>> accessed 1 December 2019.

The International Federation for Human Rights (FIDH), 'The Office of the Prosecutor of the ICC - 9 Years On Analysis of the Prosecutorial Strategy and Policies of the Office of the Prosecutor (2003-2011) Recommendations to the Next ICC Prosecutor' (December 2011), available at <www.fidh.org/IMG/pdf/cpiproc579ang.pdf> accessed 1 March 2021.

UN Refugee Agency, 'Internally Displace People', <www.unhcr.org/sy/internally-displaced-people> accessed 1 December 2019.

UN Security Council, 'Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution', UN doc. SC/11407 (22 May 2014).

Whiting A, 'A Program for the Next ICC Prosecutor' (2020) 52(1) Case Western Reserve Journal of International Law 479-489.

Wierda MI, 'The Local Impact of A Global Court: Assessing the Impact of the International Criminal Court in Situation Countries' (2019) (Ph.D. Thesis, University of Leiden).