

## Prioritizing the Taliban at the ICC: Is the Court Able to Curb Political Prosecutions?

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# Prioritizing the Taliban at the ICC: Is the Court Able to Curb Political Prosecutions?

KATE LEISNER<sup>†</sup>

## I. INTRODUCTION

America's disastrous war in Afghanistan may be over, but the path toward accountability has just begun. In 2020, the International Criminal Court (ICC) authorized the Chief Prosecutor to examine war crimes and crimes against humanity allegedly committed by the United States, the former Afghan government, and the Taliban.<sup>1</sup> The investigation was put on hold for over a year to allow the former Afghan government to submit a request for state deferral.<sup>2</sup> But in August 2021, the United States withdrew from Afghanistan and the former government gave way to the Taliban in a matter of days.<sup>3</sup> In light of the new situation, ICC Prosecutor Karim A. Khan filed an application to reopen the investigation immediately.<sup>4</sup> Contrary to the original investigation's comprehensive scope, Khan announced he would focus on the Taliban and "deprioritize other aspects of this investigation."<sup>5</sup> This new approach has been hugely controversial, with many claiming that the ICC prosecutor is handing "the US, the UK, and their allies a get out of jail free card" and that the investigation

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1. Situation in the Islamic Republic of Afghanistan, ICC-02/17-7, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan (Mar. 5, 2020), [https://www.icc-cpi.int/CourtRecords/CR2020\\_00828.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_00828.PDF) [hereinafter, "Appeals Decision"].

2. 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 (Sep. 27, 2021), <https://www.icc-cpi.int/Pages/item.aspx?name=2021-09-27-otp-statement-afghanistan> [hereinafter, "Statement of the Prosecutor"].

3. Scott Reinhard and David Zucchino, *20 Years of Defense, Erased by the Taliban in a Few Months*, N.Y. TIMES (Aug. 14, 2021), <https://www.nytimes.com/interactive/2021/08/14/world/asia/afghanistan-maps-taliban.html>.

4. Statement of the Prosecutor, *supra* note 2.

5. *Id.*

has become politicized.<sup>6</sup> This poses a pressing question—can the Court restrain a political prosecutor?

Decades before the Afghanistan investigation, the drafters of the Rome Statute of the International Criminal Court (the Rome Statute) anticipated this situation and ensured that prosecutorial discretion would be subject to judicial oversight.<sup>7</sup> However, scholars have pointed out that “[m]any of the triggers and modalities of review are ambiguous or open to interpretation” which “blurs the limits of prosecutorial accountability” and judicial review.<sup>8</sup> Writing in 2009, Jan Wouters, Sten Verhoeven, and Bruno Demeyere felt hopeful about the relationship between the prosecutor and the chambers, arguing that “the Office of the Prosecutor’s independence is thoroughly subject to the Pre-Trial Chamber’s oversight” and that “[t]he Prosecutor cannot and will not become the unaccountable organ some were fearing” because “[t]here are simply too many checks and balances.”<sup>9</sup> Other scholars such as Margaret M. deGuzman point to the Rome Statute’s inclusion of Article 53 as one of those checks and balances.<sup>10</sup> Under this article, investigations should serve the “interests of justice.”<sup>11</sup> According to deGuzman, while investigations “are a matter of the prosecutor’s discretion, the judges will have the last word in some cases, such as when they disagree with the prosecutor about the interests of justice.”<sup>12</sup> The problem though, as deGuzman readily admits, is that “interests of justice” is a vague term,<sup>13</sup> and the Court has had few occasions to review situations under Article 53(c).

Unlike the position taken by Wouters, Vergoeven, and Demeyere, this note warns that the judiciary may not have proper oversight of the prosecutor after all. In drawing this conclusion, this

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6. Alice Speri, *How the U.S. Derailed an Effort to Prosecute its Crimes in Afghanistan*, THE INTERCEPT (October 5, 2021), <https://theintercept.com/2021/10/05/afghanistan-icc-war-crimes/>.

7. CARSTEN STAHN, THE EMERGING PRACTICE OF THE INT’L CRIM. CT., 247, 265 (Carsten Stahn & Goran Sluiter, eds., 2009).

8. *Id.* at 265.

9. JAN WOUTERS, STEN VERHOEVEN, & BRUNO DEMEYERE, THE LEGAL REGIME OF THE INTERNATIONAL CRIMINAL COURT, 345, 385 (Jose Doria, Hans-Peter Gasser & M. Cherif Bassiouni, eds., 2009).

10. Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT’L L. 265, 275 (2012).

11. Rome Statute of the Int’l Crim. Ct., art. 53(1)(c), 21 UNTS 90, 17 July 1998, entry into force (Jul. 1, 2002 [hereinafter, “Rome Statute”]).

12. deGuzman, *supra* note 10, at 275.

13. *Id.*

note relies on the “interests of justice” as a stopgap for political prosecutions. Moreover, this note is the first to argue that the Court’s recent decisions on the Afghanistan investigation have finally provided some jurisprudence on the meaning of the interests of justice, as well as its place within *proprio motu* investigations. By mapping that jurisprudence onto the new geopolitical reality in Afghanistan—and Khan’s request to deprioritize American perpetrators—this note reveals that the Court may have made a huge miscalculation. Namely, by denying the Pre-Trial Chamber’s ability to assess *proprio motu* requests under Article 53(C) (i.e., the interests of justice) in 2020, the Court has paved a path for unchecked prosecutorial discretion in such cases.

Part II reviews the scope of the original application to investigate crimes committed in Afghanistan.<sup>14</sup> It then traces the procedural history of the case, starting with the Pre-Trial Chamber’s (PTC) decision to deny the investigation and the Prosecutor’s appeal to the Appeals Chamber (AC).<sup>15</sup> This part also addresses the ICC’s deferral to the former Afghan government and briefly looks at responses from the United States.<sup>16</sup> Also herein is a review of recent leadership changes in Afghanistan and at the ICC.<sup>17</sup> It concludes by laying out the relevant provisions of the Rome Statute—i.e., Article 15 concerning *proprio motu* investigations,<sup>18</sup> Articles 17 and 18 concerning state deferral,<sup>19</sup> and Article 53 on the interests of justice.<sup>20</sup>

Part III assesses Article 53 jurisprudence, finding that this clause must be interpreted in light of the overall object and purpose of the Statute.<sup>21</sup> Moreover, it also invokes a three-factor balancing test relying on the particular circumstances of the accused, the gravity of the crime, and the interests of the victims.<sup>22</sup> It then applies this analysis to Khan’s modified approach to the Afghanistan investigation and

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14. *See infra* Part II.A.

15. *Id.*

16. *Id.*

17. *See infra* Part II.B.

18. *See infra* Part II.C.i.

19. *See infra* Part II.C.ii.

20. *See infra* Part II.C.iii.

21. *See infra* Part III.A.

22. *Id.*

determines that it does not serve the interests of justice.<sup>23</sup> This section also assesses the impacts of the AC’s 2020 decision on *proprio motu* investigations<sup>24</sup> and frames the broader principles of prosecutorial discretion and judicial oversight at the ICC.<sup>25</sup> Part IV concludes by asserting that the ICC has eroded the balance between the prosecutor and the chambers.<sup>26</sup> With a sense of foreboding, it offers some thoughts on how this might lead to more political prosecutions—unless the ICC finds another solution to restrain the Court’s Chief Prosecutor.<sup>27</sup>

## II. BACKGROUND

### A. *Initial Scope of the Investigation and Deferral*

Ten years after the ICC began a preliminary examination into the situation in Afghanistan—and fourteen years after the former Afghan government acceded to the Rome Statute—former ICC Prosecutor Fatou Bensouda requested authorization to investigate alleged crimes committed in relation to the war in Afghanistan.<sup>28</sup> While slow moving, the former Prosecutor’s request is impressively broad. It asserts that there is “a reasonable basis to believe that members of the Taliban and affiliated armed groups are responsible for alleged crimes committed within the context of the situation, constituting crimes against humanity and war crimes.”<sup>29</sup> According to her request, evidence also suggests that the former Afghan National Security Forces and the Afghan National Police as well as members of the United States armed forces and the Central Intelligence Agency (CIA) committed war crimes.<sup>30</sup> As such, Bensouda requested to investigate *all* sides of an armed conflict rather than choosing only one or two entities to examine.<sup>31</sup> Moreover, the investigation concerns

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23. See *infra* Part III.A.i–iii.

24. See *infra* Part III.B.

25. See *infra* Part III.C.

26. See *infra* Part IV.

27. *Id.*

28. Situation in the Islamic Republic of Afghanistan, ICC-02/17-7, Request for authorisation of an investigation pursuant to article 15 (Nov. 20, 2017), [https://www.icc-cpi.int/CourtRecords/CR2017\\_06891.PDF](https://www.icc-cpi.int/CourtRecords/CR2017_06891.PDF) [hereinafter, “Request to Investigate”].

29. *Id.* para. 4.

30. *Id.*

31. Randle DeFalco, *Int’l Criminal Court’s Afghanistan Decision Expands Prosecutor’s Power: What to Expect Next*, JUST SECURITY (Mar. 6, 2020),

crimes committed not only in Afghanistan but also in Lithuania, Poland, and Romania.<sup>32</sup>, whose governments all consented to the Rome Statute and whose territory was leveraged for clandestine U.S. operations.<sup>33</sup> The investigation also encompasses a huge swath of time, starting in 2003, the year Afghanistan acceded to the ICC, and leading up to present day.<sup>34</sup>

Bensouda's investigation was launched *proprio motu*, i.e., on her own initiative.<sup>35</sup> Under the Rome Statute, the Court's PTC must authorize the Prosecutor's *proprio motu* request before she can officially open the investigation.<sup>36</sup> While the PTC rejected the investigation, the AC amended the decision and allowed the investigation to move forward.<sup>37</sup> The AC's decision had barely been handed down when the former Afghan government asked the ICC to defer its investigation.<sup>38</sup> On March 26, 2020, Afghanistan wrote to the ICC stating that "the Government is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts allegedly committed within the authorised parameters of the Situation in Afghanistan."<sup>39</sup> The Court granted deferral but requested specific information and documentation on the Afghan investigation by June 12, 2020.<sup>40</sup> Afghanistan met its deadline, but the ICC

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<https://www.justsecurity.org/69059/icc-appeals-chambers-afghanistan-decision-limits-judicial-review-of-prosecutorial-discretion/>.

32. Request to Investigate, *supra* note 28, para. 49.

33. *Id.*

34. *Id.*

35. Randle DeFalco, *Int'l Criminal Court's Afghanistan Decision Expands Prosecutor's Power: What to Expect Next*, JUST SECURITY (Mar. 6, 2020), <https://www.justsecurity.org/69059/icc-appeals-chambers-afghanistan-decision-limits-judicial-review-of-prosecutorial-discretion/>.

36. Rome Statute, *supra* note 11, art. 15(1).

37. Appeals Decision, *supra* note 1, at 3.

38. Situation in the Islamic Republic of Afghanistan, ICC-02/17-7, Notification to the Pre-Trial Chamber of the Islamic Republic of Afghanistan's letter concerning article 18(2) of the Statute, para. 1 (Apr. 15, 2020), [https://www.icc-cpi.int/CourtRecords/CR2020\\_01537.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_01537.PDF).

39. Situation in the Islamic Republic of Afghanistan, ICC-02/17-7, Deferral Request made by the Government of the Islamic Republic of Afghanistan pursuant to Article 18(2) of the Rome Statute, Annex 1 (Apr. 16, 2020), [https://www.icc-cpi.int/RelatedRecords/CR2020\\_01538.PDF](https://www.icc-cpi.int/RelatedRecords/CR2020_01538.PDF).

40. Situation in the Islamic Republic of Afghanistan, ICC-02/17-7, Notification on status of the Islamic Republic of Afghanistan's article 18(2) deferral request, para. 1 (Apr. 16, 2021), [https://www.icc-cpi.int/CourtRecords/CR2021\\_03504.PDF](https://www.icc-cpi.int/CourtRecords/CR2021_03504.PDF).

requested clarifications and additional documents and the two went back and forth for over a year.<sup>41</sup>

While Afghanistan pledged investigation, America pledged intransigence. The United States has long reviled the ICC's examination into the American interrogation program, with former National Security Advisor John Bolton calling it an "unjust prosecution by [an] illegitimate court."<sup>42</sup> On September 2, 2020, former U.S. President Donald Trump went one step further and imposed sanctions and visa restrictions on Bensouda and another prosecutorial official for investigating the United States.<sup>43</sup> America's policy prompted sixty seven ICC member states to issue a joint statement reaffirming their commitment to international law.<sup>44</sup> While the Biden administration reversed the Trump-era sanctions and restrictions, Secretary of State Anthony J. Blinken has maintained that the United States continues "to disagree strongly with the ICC's actions relating to the Afghanistan [. . .] situation."<sup>45</sup>

#### *B. A New Government and a New Prosecutor*

On August 30, 2021, after twenty years and billions of dollars, the United States removed its troops from Afghanistan, leaving a devastating vacuum in its wake.<sup>46</sup> While the Taliban had previously committed to working with the Afghan government upon U.S. departure and distancing itself from terrorist organizations, this never materialized.<sup>47</sup> Instead, the Taliban, which had been training,

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41. *Id.* para. 2.

42. Owen Bowcott, Oliver Holmes, and Erin Durkin, *John Bolton threatens war crimes court with sanctions in virulent attack*, THE GUARDIAN (Sep. 10, 2018), <https://www.theguardian.com/us-news/2018/sep/10/john-bolton-castigate-icc-washington-speech>.

43. *US Sanctions on the International Criminal Court*, HUM. RTS. WATCH (Dec. 14, 2020), <https://www.hrw.org/news/2020/12/14/us-sanctions-international-criminal-court>.

44. *ICC: Member Countries Rally Around Court*, HUM. RTS. WATCH (June 23, 2020), <https://www.hrw.org/news/2020/06/23/icc-member-countries-rally-around-court>.

45. Press Release, Antony J. Blinken, Secretary of State, U.S. Department of State, *Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court* (Apr. 2, 2021), <https://www.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court/>.

46. David Zucchino, *The U.S. War in Afghanistan: How It Started, and How It Ended*, N.Y. Times (Oct. 7, 2021), <https://www.nytimes.com/article/afghanistan-war-us.html>.

47. *Id.*

recruiting, and coordinating along the Pakistan border since the American invasion, swooped in and began dominating regions of the country before the United States had even completed its withdrawal.<sup>48</sup> On August 15, 2021, former Afghan President Ashraf Ghan fled the country, and the Taliban took over the presidential palace.<sup>49</sup> The Taliban replaced the democratically-elected president with Hibatullah Akhundzada, the Supreme Commander of the newly named Islamic Emirate of Afghanistan.<sup>50</sup> Leading Taliban members were appointed to the Supreme Commander's cabinet and judicial posts.<sup>51</sup> Moreover, the new government released thousands of prisoners from their cells<sup>52</sup> and replaced the former legal system with Shariah law.<sup>53</sup>

Journalists, international organizations, and civilians soon began accusing the Taliban of war crimes and crimes against humanity. From May to June 2021—just two months following President Biden's announcement of U.S. withdrawal—the UN documented 2,392 civilian casualties—nearly as many as were killed in the four preceding months and “the highest on record for those two months since [the United Nations Assistance Mission in Afghanistan] began systematic documentation in 2009.”<sup>54</sup> In the first half of 2021, approximately sixty four percent of all casualties were attributed to the Taliban, ISIL-KP, and other anti-government groups;<sup>55</sup> therefore, organizations like Amnesty International confirmed that the Taliban were actively violating the ICC Rome Statute.<sup>56</sup> For instance, in early

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48. *Id.*

49. Ali M Latifi, *Afghan President Ghani flees country as Taliban enters Kabul*, AL JAZEERA (Aug. 15, 2021), <https://www.aljazeera.com/news/2021/8/15/afghan-president-ghani-flees-country-as-taliban-surrounds-kabul>.

50. *Afghanistan: Who's who in the Taliban leadership*, BBC (Sep. 7, 2021), <https://www.bbc.com/news/world-asia-58235639>.

51. Rebecca Wright, Anna Coren, & Abdul Basir Bina, *Afghanistan's women judges are in hiding, fearing reprisal attacks from men they jailed*, CNN (Sep. 19, 2021), <https://www.cnn.com/2021/09/19/asia/afghanistan-women-judges-hnk-dst-intl/index.html>.

52. *Id.*

53. Daniel Victor, *What is Shariah law, and what does it mean for Afghan women under the Taliban?*, N.Y. TIMES (Aug. 19, 2021), <https://www.nytimes.com/article/shariah-law-afghanistan-women.html>.

54. U.N. ASSISTANCE MISSION IN AFG., *Afghanistan 2021 Midyear Update on Protection of Civilians in Armed Conflict* (July 2021), [https://unama.unmissions.org/sites/default/files/unama\\_poc\\_midyear\\_report\\_2021\\_26\\_july.pdf](https://unama.unmissions.org/sites/default/files/unama_poc_midyear_report_2021_26_july.pdf).

55. *Id.*

56. *Afghanistan: Taliban responsible for brutal massacre of Hazara men – new investigation*, AMNESTY INT'L (Aug. 19, 2021),



July the Taliban murdered nine civilians.<sup>57</sup> Six of the men were shot execution-style and three tortured to death, including one man whose arm muscles were cut off.<sup>58</sup>

Coinciding with this massive transition in the middle east, Fatou Bensouda's nine-year term as ICC Chief Prosecutor expired, and Karim Khan assumed the position on February 12, 2021.<sup>59</sup> On September 27, 2021, Kahn requested that the PTC reopen the investigation immediately and announced he would prioritize the Taliban and the Islamic State–Khorasan Province (IS–K) over other actors.<sup>60</sup> With the former government ousted, Khan said deferral was no longer appropriate.<sup>61</sup> Moreover, Khan was willing to move forward without ever engaging the new authorities.<sup>62</sup> While the Taliban will likely not investigate war crimes and crimes against humanity, the PTC chastised Khan for jumping to conclusions, stating that “statements or assumptions of political nature have no place in a Court of law” and that the situation in Afghanistan is a “complex matter of international and constitutional law, as such not suitable to be addressed, or trivialised, by way of general, sweeping and unsubstantiated assertions.”<sup>63</sup> Instead, the PTC promised to uphold the principles of complementarity and state deferral, beginning with an assessment of the relevant Afghan authorities to engage.<sup>64</sup>

### C. Key Provisions of the Rome Statute

#### i. Article 15: *Proprio Motu* Investigations

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<https://www.amnesty.org/en/latest/news/2021/08/afghanistan-taliban-responsible-for-brutal-massacre-of-hazara-men-new-investigation/>.

57. *Id.*

58. *Id.*

59. Karim A.A. Khan QC, ICC, <https://www.icc-cpi.int/about/otp/who-s-who/Pages/karim-khan.aspx> (last visited Dec. 27, 2021).

60. Statement of the Prosecutor, *supra* note 2.

61. Situation in the Islamic Republic of Afghanistan, ICC-02/17-7, Decision setting the procedure pursuant to rule 55(1) of the Rules of Procedure and Evidence following the Prosecutor's 'Request to authorise resumption of investigation under article 18(2) of the Statute,' para. 17 (Oct. 8, 2021), [https://www.icc-cpi.int/CourtRecords/CR2021\\_08805.PDF](https://www.icc-cpi.int/CourtRecords/CR2021_08805.PDF) [hereinafter, "Decision on Resumption"].

62. Statement of the Prosecutor, *supra* note 2.

63. Decision on Resumption, *supra* note 61, para. 18.

64. *Id.* para. 19.

As mentioned, the Afghanistan investigation request was made *proprio motu*.<sup>65</sup> Under Article 15(1) of the Rome Statute, a prosecutor may initiate an investigation on her own initiative, or *proprio motu*, rather than at the request of the UN or a state party.<sup>66</sup> Article 15(3) requires the PTC to review such an investigation, stating that: “If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected.”<sup>67</sup> Further, Article 15(4) outlines the parameters of PTC review: “If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation.”<sup>68</sup> When Bensouda filed her request, she triggered PTC review. While the PTC denied the investigation,<sup>69</sup> Bensouda appealed to the AC, and they amended that decision and approved the investigation to move forward.<sup>70</sup>

ii. *Article 53: Interests of Justice*

The disagreement between the PTC and the AC over Afghanistan concerned a provision in Article 53, according to which:

“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. In deciding whether to initiate an investigation, the Prosecutor shall consider whether [ . . . ] (c) [t]aking 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*” (emphasis added).<sup>71</sup>

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65. Request to Investigate, *supra* note 28.

66. Rome Statute, *supra* note 11, art. 15(1).

67. *Id.* art. 15(3).

68. *Id.* art. 15(4).

69. Situation in the Islamic Republic of Afghanistan, ICC-02/17-7, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan [hereinafter “Pre-Trial Decision”] (Apr. 12, 2019), [https://www.icc-cpi.int/CourtRecords/CR2019\\_02068.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF).

70. Appeals Decision, *supra* note 1.

71. Rome Statute, *supra* note 11, art. 53(1).

The PTC held that an investigation into Afghanistan would not serve the interests of justice, and they rejected the application.<sup>72</sup> The AC, however, found that the PTC had no authority to review a *proprio motu* application under Article 53. Instead, the AC argued, the PTC should only review *proprio motu* cases under the elements listed in Article 15, i.e., reasonability and jurisdiction.<sup>73</sup>

iii. *Articles 17 and 18: State Deferral*

Even if the Court approves a *proprio motu* investigation, it may still be subject to deferral. As a court of last resort, the ICC provides state parties an opportunity to conduct the investigations themselves.<sup>74</sup> Under Article 17(1)(a), only if “the State is unwilling or unable genuinely to carry out the investigation or prosecution” can the ICC move forward.<sup>75</sup> Article 18(2) says that “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 [A]rticle 5.”<sup>76</sup> The former Afghan government asked the ICC for time to compile its case for state deferral, which the Prosecutor granted.<sup>77</sup> However, under Article 18(3), the ICC may review and rescind its deferral: “The Prosecutor’s deferral to a State’s investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State’s unwillingness or inability genuinely to carry out the investigation.”<sup>78</sup> When the Prosecutor requests a reopening of an investigation under Article 18, rule 55(1) provides that the PTC “shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings.”<sup>79</sup>

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72. Pre-Trial Decision, *supra* note 69.

73. Appeals Decision, *supra* note 1, para. 34.

74. Jan Wouters, Sten Verhoeven & Bruno Demeyere, *supra* note 9, at 385.

75. Rome Statute, *supra* note 11, art. 17.

76. *Id.* art. 18(2).

77. Situation in the Islamic Republic of Afghanistan, ICC-02/17-7, Notification on status of the Islamic Republic of Afghanistan’s article 18(2) deferral request, para. 1 (Apr. 16, 2021), [https://www.icc-cpi.int/CourtRecords/CR2021\\_03504.PDF](https://www.icc-cpi.int/CourtRecords/CR2021_03504.PDF) [hereinafter, “Notification on Status”].

78. Rome Statute, *supra* note 11, art. 18(3).

79. International Criminal Court, *Rules of Procedure and Evidence*, ICC-ASP/1/3, R. 55(1) (2013).

Thus, Khan's request to reopen the investigation requires some sort of guidance from the PTC. Khan, however, urged the Court to fast track its assessment without deciding "the particular standard of review which might be applicable."<sup>80</sup> But the Court has never had to closely interpret state deferral under Article 18.<sup>81</sup> More importantly, this is the first time the Prosecutor has ever asked the PTC to reopen an investigation under Article 18(2).<sup>82</sup> Instead of caving to Khan, the PTC asked for more information,<sup>83</sup> signaling that it will not be rushed. As of the writing of this paper, the PTC has not announced the standard of review and procedure to be followed regarding Khan's request.

### III. ANALYSIS

By announcing that he would deprioritize the United States in the Afghanistan investigation, Khan has made huge political waves. However, political consequences do not necessarily render an investigation illegitimate; judicial decisions often affect the political landscape.<sup>84</sup> Rather, Khan's approach needs to be analyzed under the requirements of the Rome Statute. Specifically, the interests of justice. For reasons to be discussed, Khan's approach undermines interests of justice. Nonetheless, the Court may have unwittingly removed its ability to say so, since its mode of review has been substantially curtailed by the AC's decision last year.<sup>85</sup> Under that ruling, the PTC can only refuse *proprio motu* investigations based on reasonability and jurisdiction, not whether interests of justice are served.<sup>86</sup> Positioning the Court's recent jurisprudence on interests of justice against new geopolitics reveals the dangers of such unchecked prosecutorial discretion.

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80. Situation in the Islamic Republic of Afghanistan, ICC-02/17-7, Request to authorise resumption of investigation under article 18(2) of the Statute, para. 9, (Sep. 27, 2021), [https://www.icc-cpi.int/CourtRecords/CR2021\\_08317.PDF](https://www.icc-cpi.int/CourtRecords/CR2021_08317.PDF).

81. Clélia Makaia, *Afghanistan's request for deferral: A procedural dead end*, LEIDEN L. BLOG (Mar. 18, 2021), <https://leidenlawblog.nl/articles/afghanistans-request-for-deferral-a-procedural-dead-end>.

82. Notification on Status, *supra* note 77.

83. Decision on Resumption, *supra* note 61, para. 19.

84. Talita De Souza Dias, *Interests of justice: Defining the scope of Prosecutorial discretion in Article 53(1)(c) and (2)(c) of the Rome Statute of the International Criminal Court*, 30 LEIDEN J. OF INT'L. L., 731, 742 (2017).

85. *See infra* Part III.B.

86. Appeals Decision, *supra* note 1, para. 37–8.

### A. Applying the Interests of Justice Test

The Rome Statute does not define what it means to “serve the interests of justice,”<sup>87</sup> and ICC Prosecutors have never exercised their Article 53(1)(c) powers.<sup>88</sup> But in 2007, the Office of the Prosecutor (OTP) provided some clarity with its *Policy Paper on the Interests of Justice*.<sup>89</sup> Here, the OTP stated that the interests of justice refers to the object and purpose of the Rome Statute.<sup>90</sup> As stated in the statute’s preamble, the goal of the ICC is to “put an end to impunity for the perpetrators of [the most serious crimes of concern to the international community] and thus to contribute to the prevention of such crimes.”<sup>91</sup> However, the paper clarifies that the ICC is first and foremost a court of law, not a peace and security broker.<sup>92</sup> The paper states, “there is a difference between the concepts of the interests of justice and the interests of peace and the latter falls within the mandate of institutions other than the Office of the Prosecutor.”<sup>93</sup> Moreover, the OTC stated that “there is a presumption in favour 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.”<sup>94</sup> Therefore, if admissibility and jurisdiction are satisfied, the Prosecutor *should* move forward with an investigation.<sup>95</sup>

In addition to these general principles, the OTP defines three “explicit factors to be considered” in an Article 53(1)(c) analysis: the particular circumstances of the accused, the gravity of the crime, and the interests of the victims.<sup>96</sup> These considerations create a balancing test, with no one single issue being dispositive.<sup>97</sup> Lastly, the OTP has

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87. *Policy Paper on the Interests of Justice*, International Criminal Court 2 (Sep. 2007), <https://www.icc-cpi.int/nr/rdonlyres/772c95c9-f54d-4321-bf09-73422bb23528/143640/iccotpinterestsofjustice.pdf> [hereinafter, “Policy Paper”].

88. Maria Varaki, *Revisiting the ‘Interests of Justice’ Policy Paper*, 15 J INT’L CRIM. JUST., 455, 465 (2017).

89. Policy Paper, *supra* note 87.

90. *Id.* at 4.

91. Rome Statute, *supra* note 11, preamble.

92. Policy Paper, *supra* note 87, at 1.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 4–9.

97. *Id.* at 2.

stated that “the ‘interests of victims’ includes the victims’ interest in seeing justice done.”<sup>98</sup>

*i. The Object and Purpose of the Rome Statute*

The Rome Statute states that the ICC aims to “put an end to impunity for the perpetrators of [the most serious crimes of concern to the international community].”<sup>99</sup> Article 5 of the Rome Statute defines the most serious crimes falling under the Court’s purview, which includes war crimes.<sup>100</sup> Additionally, the Court defaults to investigation whenever admissibility and jurisdiction are present.<sup>101</sup> On the other hand, “not initiating an investigation or proceeding from investigation to trial would be in principle at odds with the object and purpose of the Rome Statute, as set forth in its preamble.”<sup>102</sup> Bensouda established a reasonable basis to charge the United States and the former Afghan government with war crimes.<sup>103</sup> As such, investigating the United States and former Afghan government fits within the Court’s purpose of ending impunity for international crimes. By putting these violations on the backburner, Khan is defaulting to inactivity which undermines the object and purpose of the Rome Statute.

Additionally, the Rome Statute seeks to deter serious international crimes.<sup>104</sup> However, “the broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions.”<sup>105</sup> In other words, peace and security are byproducts of the ultimate goal of ending impunity, not the goal itself.<sup>106</sup> Besides, even if the Court wanted to curtail ongoing conflict, it could not. The ICC’s enforcement mechanisms are notoriously ineffective, and the Court’s heavy machinery painfully

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98. *Id.* at 5.

99. Rome Statute, *supra* note 11, preamble.

100. *Id.* art. 5.

101. Policy Paper, *supra* note 87, at 1.

102. HUM. RTS. WATCH, *Human Rights Watch Policy Paper: The Meaning of ‘the Interests of Justice’ in Article 53 of the Rome Statute*, 6 (June 2005), <https://www.hrw.org/legacy/campaigns/icc/docs/ij070505.pdf>.

103. Request to Investigate, *supra* note 28, para. 4.

104. Rome Statute, *supra* note 11, preamble.

105. Policy Paper, *supra* note 87, at 9.

106. *Id.*

prolongs the entire process.<sup>107</sup> Unlike state courts, which can obtain immediate relief through injunctions or by detaining suspects while investigations or litigation are pending,<sup>108</sup> the ICC relies on state parties who may be reluctant to police another state's citizens.<sup>109</sup> But more importantly, the ICC relies on other entities, most notably the United Nations Security Council, to promote peace and security.<sup>110</sup> In his request to reopen the investigation, Khan focuses on the Taliban's current conduct,<sup>111</sup> conflating the mission of the ICC with those of other entities. He stated:

“The gravity, scale and *continuing* nature of alleged crimes by the Taliban and the Islamic State, which include allegations of indiscriminate attacks on civilians, targeted extrajudicial executions, persecution of women and girls, crimes against children and other crimes affecting the civilian population at large, demand focus and proper resources from my Office, if we are to construct credible cases capable of being proved beyond reasonable doubt in the courtroom” (emphasis added).<sup>112</sup>

Khan then condemns IS–K's attack on the Hamid Karzai International Airport in Kabul on August 26, 2021, and reminds audiences that the United Nations General Assembly has “deemed that the terrorist activities of the Islamic State constitute a global threat to international *peace and security*” (emphasis added).<sup>113</sup> While the Taliban and IS–K's recent actions may, in fact, amount to international crimes within the Court's jurisdiction,<sup>114</sup> concerns over peace and security should not

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107. Gwen P. Barnes, Note, *The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar al Bashir*, 34 *FORDHAM INT'L L.J.* 1584, 1607 (2011).

108. *How the Court Works*, ICC, <https://www.icc-cpi.int/about/how-the-court-works#:~:text=an%20arrest%20warrant%3A%20the%20ICC,arrest%20warrant%20may%20be%20issued> (last visited Nov. 24, 2021).

109. HUM. RTS. WATCH, *Summary of the Key Provisions of the ICC* (Dec. 1, 1998), <https://www.hrw.org/news/1998/12/01/summary-key-provisions-icc-statute#>.

110. *Policy Paper on Preliminary Examinations*, ICC, para. 69 (Nov. 2013), [https://www.icc-cpi.int/iccdocs/otp/OTP-Policy\\_Paper\\_Preliminary\\_Examinations\\_2013-ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf) [hereinafter, “Preliminary Examinations”].

111. Statement of the Prosecutor, *supra* note 2.

112. *Id.*

113. *Id.*

114. AMNESTY INT'L, *Afghanistan: Taliban responsible for brutal massacre of Hazara men – new investigation* (Aug. 19, 2021),

be the primary focus of the ICC.<sup>115</sup> On the other hand, if the Prosecutor were concerned about “preserving evidence of crimes within the jurisdiction of the Court,” then he could, under Article 18(6), seek authority from the PTC “to pursue necessary investigative steps for the purpose of preserving evidence.”<sup>116</sup> But Khan has never voiced concerns about preserving evidence nor has he invoked Article 18(6).

Additionally, Khan’s statement that this approach will help “construct credible cases”<sup>117</sup> seems dishonest when positioned against the previous Prosecutor’s request for an investigation, which already established the foundation for a credible case.<sup>118</sup> Prosecutor Bensouda amassed plenty of evidence regarding the Taliban’s crimes in her initial request.<sup>119</sup> She committed over thirty six pages of her report to discussing Taliban crimes, more space than any of the other alleged parties.<sup>120</sup> Moreover, as she noted, the Taliban have publicly claimed responsibility for many of their most awful acts, leaving no ambiguity around culpability.<sup>121</sup> This appears to be a strategic decision to garner influence and control, and the Taliban may continue similar tactics in the future. Additionally, the UN,<sup>122</sup> Human Rights Watch,<sup>123</sup> and Amnesty International<sup>124</sup> have been extensively reporting on the situation.

ii. *The Balancing Test*

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<https://www.amnesty.org/en/latest/news/2021/08/afghanistan-taliban-responsible-for-brutal-massacre-of-hazara-men-new-investigation/>.

115. Policy Paper, *supra* note 87, at 9.

116. Decision on Resumption, *supra* note 61.

117. Statement of the Prosecutor, *supra* note 2.

118. Julian Elderfield, *Uncertain Future for the ICC’s Investigation into the CIA Torture Program*, JUST SECURITY (Nov. 12, 2021), <https://www.justsecurity.org/79136/uncertain-future-for-the-iccs-investigation-into-the-cia-torture-program/>

119. Request to Investigate, *supra* note 28, at 41–77.

120. *Id.*

121. *Id.* para. 88.

122. *See generally* U.N. ASSISTANCE MISSION IN AFG., <https://unama.unmissions.org/> (last visited December 27, 2021).

123. *See generally* HUM. RTS. WATCH, <https://www.hrw.org/asia/afghanistan> (last visited December 27, 2021).

124. *See generally* AMNESTY INT’L, <https://www.amnesty.org/en/location/asia-and-the-pacific/south-asia/afghanistan/> (last visited December 27, 2021).



When assessing the interests of justice, three factors are relevant: the particular circumstances of the accused, the gravity of the crime, and the interests of the victims.<sup>125</sup> The first factor ensures the Court is mindful of the unique situation of the alleged perpetrators.<sup>126</sup> For instance, their role in the crimes and whether they are terminally ill or have themselves “been the subject of abuse amounting to serious human rights violations.”<sup>127</sup> According to the OTP, “international justice may not be served by the prosecution” of such an individual.<sup>128</sup> However, this element requires identifying the accused,<sup>129</sup> which is difficult during preliminary phases because the Court is still investigating situations rather than individual actors or cases.<sup>130</sup> Perhaps for these reasons, Bensouda never addressed the particular circumstances of the accused in her request to investigate, nor did the PTC or AC. American perpetrators likely weren’t subject to human rights abuses, but when it comes to the former Afghan government, this may require a case-by-case evaluation. Moreover, it is impossible to determine the physical health of yet unnamed perpetrators. Consequently, this factor is indeterminate, although there is no reason to assume this factor goes against the interests of justice. The second factor concerns the gravity of the crimes.<sup>131</sup> Gravity is determined by assessing “the scale, nature, manner of commission of the crimes, and their impact.”<sup>132</sup> The PTC found that all the crimes were sufficiently grave, pointing briefly to civilian casualties.<sup>133</sup> In her request to open an investigation, Bensouda provided much more information related to the gravity of the crimes committed by the United States armed forces and the CIA as well as members of the Afghan National Security Forces and the Afghan National Police.<sup>134</sup> Both governments are accused of war crimes as defined in Article 8(2)(c)(i) of the Rome Statute.<sup>135</sup> According to that Article, “violence

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125. Policy Paper, *supra* note 87, at 4–9.

126. *Id.* at 6–7.

127. *Id.*

128. *Id.*

129. De Souza Dias, *supra* note 84, at 731.

130. David Luban, *The “Interests of Justice” at the ICC: A Continuing Mystery*, JUST SECURITY (Mar. 17, 2020), <https://www.justsecurity.org/69188/the-interests-of-justice-at-the-icc-a-continuing-mystery/>.

131. Policy Paper, *supra* note 87, at 4–5.

132. Preliminary Examinations, *supra* note 110, para. 61.

133. Pre-Trial Decision, *supra* note 69, para. 65–66.

134. Request to Investigate, *supra* note 28, at 78–125.

135. *Id.* para. 163, para. 191.

to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture” is an international crime within the jurisdiction of the Court.<sup>136</sup> Bensouda’s request also alleges the United States and former Afghan government are responsible for violations of personal dignity (Article 8(2)(c)(ii)) as well as rape and other forms of sexual violence (Article 8(2)(c)(vi)).<sup>137</sup>

The request further alleges that these violations were neither spontaneous nor isolated.<sup>138</sup> Rather, the United States deliberately developed and implemented a plan to secure intelligence through “aggressive techniques.”<sup>139</sup> The chapeau of the Rome Statute’s war crimes section states that the Court has jurisdiction over crimes “committed pursuant to a plan or policy or as part of the large scale commission of such crimes.”<sup>140</sup> While scale is not dispositive of jurisdiction, this “makes clear the objective is to prioritize the most serious crimes that demand international prosecution.”<sup>141</sup>

Specifically, allegations against the CIA include excessively forced rectal rehydration and feeding, waterboarding, prolonged and severe isolation, and sleep deprivation.<sup>142</sup> Moreover, U.S. investigations even found that senior officials throughout the government helped develop these techniques, demonstrating an official American policy.<sup>143</sup> Also, these tactics “were applied cumulatively and repeatedly to detainees over extended periods of time, causing severe physical or mental pain or suffering.”<sup>144</sup> For instance, one victim was waterboarded 183 times.<sup>145</sup> Another victim was prevented from sleeping for 180 hours.<sup>146</sup> In a declassified letter to his lawyer, detainee Ammar al-Baluchi, who was eventually

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136. Rome Statute, *supra* note 11, art. 8(2)(c)(i).

137. Request to Investigate, *supra* note 28, para. 161, para. 187.

138. *Id.* para. 184, para. 218–19.

139. *Id.* para. 219.

140. Rome Statute, *supra* note 11, art. 8(1).

141. *Summary of the Key Provisions of the ICC Statute*, HUM. RTS. WATCH (Dec. 1, 1998), <https://www.hrw.org/news/1998/12/01/summary-key-provisions-icc-statute#>.

142. Request to Investigate, *supra* note 28, para. 193, para. 357.

143. *Id.* para. 219.

144. *Id.* para. 196.

145. *Id.* para. 203.

146. *Id.* para. 357.

transferred to Guantanamo Bay,<sup>147</sup> explained how interrogation techniques were used in tandem:

“There were [twenty] or more elements at play [. . .]. I wasn’t just being suspending to the ceiling (sic). I was naked, starved, dehydrated, cold hooded, verbally threatened, in [p]ain from the beating and water-drowning as my [h]ead [was] smashed by hitting [it] against the wall for [d]ozen[s] and [d]ozen[s] of times [. . .] my ears were exploding from the [b]lasting harsh music (which is still stuck in my [h]ead) [and I was] sleep deprived for weeks [. . .]. I was shacking (sic) and trembling [. . .]. My legs barely supported my weight as my [h]ands were pulled even higher above my [h]ead.”<sup>148</sup>

In total, Bensouda pointed to fifty four crimes committed by the United States armed forces and twenty four committed by the CIA in relation to the war in Afghanistan.<sup>149</sup> The former Afghan government also allegedly asphyxiated detainees as well as removed finger and toe nails, electrically shocked individuals’ testicles, and deprived many of food and water.<sup>150</sup> According to the United Nations Assistance Mission in Afghanistan (UNAMA), torture was practiced systematically in at least five Afghan facilities.<sup>151</sup> A fact-checking investigation by the former Afghan government found 136 cases of torture out of 284 detainees interviewed—that is forty eight percent of interviewees.<sup>152</sup> After reviewing Bensouda’s request to investigate, it is not surprising that the PTC found that there was a reasonable basis to believe that the alleged crimes were sufficiently grave.<sup>153</sup>

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147. Elderfield, *supra* note 118.

148. The Rendition Project, *Letter from Ammar Al-Baluchl to Attorney James G. Connell, III* (Dec. 5, 2015), <https://www.therenditionproject.org.uk/documents/RDI/151205-Baluchi-Doctors-Dark-Sites-Part-2.pdf>.

149. Saumya Uma, *The Afghan Conflict and the Long Road to International Justice*, THE WIRE (Aug. 23, 2021), <https://thewire.in/world/the-afghan-conflict-and-the-long-road-to-international-justice>.

150. Request to Investigate, *supra* note 28, para. 166–83.

151. UNAMA 2011 Report on Conflict-Related Detainees, AFG-OTP-0001-2893 at 2917.

152. Request to Investigate, *supra* note 28, para. 169 (*citing* Afghanistan Office of the President, President Karzai Orders Investigation into UN Report on Abuse of Detainees in Afghan Detention Facilities, AFG-OTP-0003-0307 (Jan. 22, 2013)).

153. Pre-Trial Decision, *supra* note 69, para. 66.

Lastly, the Court is obligated to consider the interests of the victims.<sup>154</sup> Victims play a central role in ICC investigations<sup>155</sup> and are regularly asked to give “their views, concerns and expectations directly to the ICC judges” through the Victims Participation and Reparations Section of the ICC Registry.<sup>156</sup> The OTP solicits feedback not only from victims, but also community leaders, non-governmental organizations, and state actors.<sup>157</sup> The ICC also strives for balanced and thoughtful evaluations of all victims, which “implies a duty to be respectful of possibly divergent views.”<sup>158</sup> The Afghanistan Independent Human Rights Commission conducted an eight-month consultation with thousands of Afghans and found that “the desire for criminal justice was strong among those surveyed and that many participants considered criminal trials for conflict-related human rights violations a necessity.”<sup>159</sup> Moreover, victims allegedly tortured by the CIA and United States Armed Forces have asserted their interest in a trial every step of the way, with victims filing representation forms with the ICC as early as 2017.<sup>160</sup> Following the PTC’s initial denial of the investigation in 2019, various victim representatives of the U.S. torture program testified in front of the AC, strenuously advocating for the Court to investigate U.S. war crimes.<sup>161</sup> In 2021, when the investigation was still in abeyance pursuant to the former Afghan government’s request for deferral, victims filed applications to the ICC

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154. Policy Paper, *supra* note 87, at 5.

155. *Id.*

156. Saumya Uma, *Victims at the Heart of International Criminal Justice*, THE WIRE (Sep. 9, 2021), <https://thewire.in/rights/victims-at-the-heart-of-international-criminal-justice>.

157. Preliminary Examinations, *supra* note 110, para. 68.

158. Policy Paper, *supra* note 87, at 5.

159. Request to Investigate, *supra* note 28, para. 366–67.

160. Situation in the Islamic Republic of Afghanistan, ICC-02/17, First Registry Transmission of Victims’ Representations Pursuant to the Pre-Trial Chamber’s Order ICC-02/17-6 of 9 November 2017, para. 1 (Dec. 7, 2017), [https://www.icc-cpi.int/CourtRecords/CR2017\\_07125.PDF](https://www.icc-cpi.int/CourtRecords/CR2017_07125.PDF) (*citing* Pre-Trial Chamber III, Order to the Victims Participation and Reparation Section Concerning Victims’ Representations, ICC-02/17, para. 16. (Nov. 9, 2017)).

161. From December 4 to 6, 2019, the AC heard oral submissions related to the Prosecutor’s appeal of the PTC decision. Throughout these arguments, representatives of victims spoke at length about the US torture program’s effects on their clients and advocated for the AC to amend the decision and approve the investigation. *See generally* Situation in the Islamic Republic of Afghanistan, ICC-02/17, Appeals Hearing (Dec. 4, 2019), [https://www.icc-cpi.int/Transcripts/CR2019\\_07359.PDF](https://www.icc-cpi.int/Transcripts/CR2019_07359.PDF); Appeals Hearing (Dec. 5, 2019), [https://www.icc-cpi.int/Transcripts/CR2019\\_07401.PDF](https://www.icc-cpi.int/Transcripts/CR2019_07401.PDF); and Appeals Hearing (Dec. 6, 2019), [https://www.icc-cpi.int/Transcripts/CR2019\\_07403.PDF](https://www.icc-cpi.int/Transcripts/CR2019_07403.PDF).

urging the Court to continue investigating the U.S. interrogation program.<sup>162</sup>

After Khan submitted his request to reopen the investigation, representatives of five victims filed a response with the ICC, stating that they are “deeply concerned about the declaration of the Prosecutor that he will focus his [...] investigation [...] only on crimes allegedly committed by the Taliban and the Islamic State.”<sup>163</sup> Furthermore, they requested that he “also actively investigates other crimes falling in the scope of this investigation, specifically, the alleged crimes committed as part of the CIA and DOD detention interrogation, rendition, and torture program.”<sup>164</sup> The representatives argued that if violations were not equally prioritized, victims would be deprived of “a genuine and effective investigation” and “the right to truth and reparations.”<sup>165</sup> The ICC’s Registry has begun the process of soliciting feedback from victims regarding Khan’s Article 18(2) request to reopen the investigation<sup>166</sup> and they fully expect victims to push back against Khan’s new “strategic” approach to deprioritize the United States and former Afghan government.<sup>167</sup> Contrary to the Court’s mandate of reviewing diverging reviews, Khan’s approach silences two out of the three factions of victims, leaving the investigation wholly one sided.<sup>168</sup>

When assessing factors two and three discussed above, the path most conducive to serving the interests of justice would be an investigation that equally examines the Taliban, the United States, and the former Afghan government.

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162. Situation in the Islamic Republic of Afghanistan, ICC-02/17, Victims’ response to the Prosecutor’s “Notification on status of the Islamic Republic of Afghanistan’s article 18(2) deferral request” and request for compliance with Part 5 of the Statute (Apr. 29, 2021), [https://www.icc-cpi.int/RelatedRecords/CR2021\\_04225.PDF](https://www.icc-cpi.int/RelatedRecords/CR2021_04225.PDF).

163. Situation in the Islamic Republic of Afghanistan, ICC-02/17, Response to the Prosecution’s “Request to authorise resumption of investigation under article 18(2) of the Statute,” Annex A, para. 2 (Oct. 7, 2021), [https://www.icc-cpi.int/RelatedRecords/CR2021\\_08841.PDF](https://www.icc-cpi.int/RelatedRecords/CR2021_08841.PDF).

164. *Id.* para. 4.

165. *Id.* para. 14.

166. Situation in the Islamic Republic of Afghanistan, ICC-02/17, Public redacted version of “Registry Submission Pursuant to Decision ICC-02/17-171 in Relation to Article 18(2) Proceedings” ICC-02/17-172-Conf, para. 1 (Nov. 16, 2021), [https://www.icc-cpi.int/CourtRecords/CR2021\\_10513.PDF](https://www.icc-cpi.int/CourtRecords/CR2021_10513.PDF) [hereinafter, “Registry Submission”].

167. *Id.* para. 24.

168. Policy Paper, *supra* note 87, at 5.

iii. *Concerns Over Feasibility*

In defense of his decision to prioritize the Taliban, Khan said, “I am cognizant of the limited resources available to my Office relative to the scale and nature of crimes within the jurisdiction of the Court that are being or have been committed in various parts of the world.”<sup>169</sup> Admittedly, the ICC is known to move slowly due to a backlog of cases.<sup>170</sup> It took the former Prosecutor ten years to officially request an investigation after launching a preliminary review of the situation in Afghanistan.<sup>171</sup> Moreover, the ICC, and specifically the Office of the Prosecutor, faces financial and administrative hurdles. The ICC’s largest seven funders refuse to increase the Court’s budget beyond inflation, despite an ever-increasing workload.<sup>172</sup> According to a report commissioned by the ICC, the Office of the Prosecutor “does not appear to have the resources required to fulfill all of its functions efficiently.”<sup>173</sup> It is also true that the United States has refused to cooperate with the ICC, and that many of the events under investigation happened almost fifteen years ago.<sup>174</sup>

However, the Rome Statute never mentions feasibility as a factor relevant to opening an investigation.<sup>175</sup> In fact, the OTP cautions against such an interpretation, stating that “[w]eighing feasibility as a separate self-standing factor [...] could prejudice the consistent application of the Statute and might encourage obstructionism to dissuade ICC intervention.”<sup>176</sup> Further, as mentioned, these concerns overlook the fact that the Court has already formed the basis of an investigation into the United States and former Afghan government.<sup>177</sup> The redacted request to investigate is almost 200 pages plus several

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169. Statement of the Prosecutor, *supra* note 2.

170. William A. Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. INT’L CRIM. JUST., 731, 758 (2008).

171. Request to Investigate, *supra* note 28.

172. Richard Dicker, *Time to Step up at the ICC*, HUM. RTS. WATCH (July 27, 2020), <https://www.hrw.org/news/2020/07/27/time-step-icc>.

173. *Independent Expert Review of the International Criminal Court and the Rome Statute System*, para. 154 (Sep. 20, 2020), [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/IER-Final-Report-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf).

174. Elian Peltier & Fatima Faizi, *I.C.C. Allows Afghanistan War Crimes Inquiry to Proceed, Angering U.S.*, N.Y. TIMES (Mar. 5, 2020), <https://www.nytimes.com/2020/03/05/world/europe/afghanistan-war-crimes-icc.html>.

175. Preliminary Examinations, *supra* note 110, para. 70.

176. *Id.*

177. *See generally* Request to Investigate, *supra* note 28.

annexes.<sup>178</sup> The report collects a trove of sources demonstrating culpability, pulling from reports by the Department of Justice, the Office of the Inspector General, the CIA, and numerous United States Senate committees.<sup>179</sup> As many have pointed out, such a compilation is not terribly difficult as “[t]he CIA’s conduct is supported by a wealth of publicly available information,” including the U.S. Senate Select Committee on Intelligence’s December 2014 report on the CIA detention and interrogation program which is based on “six million pages of operational cables, intelligence reports, internal memos, emails, briefing materials, interview transcripts, contracts, and other records.”<sup>180</sup>

The request to investigate also outlines the relevant case law, including previous decisions from the ICC, the International Criminal Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda.<sup>181</sup> It cites the International Committee of the Red Cross<sup>182</sup> and extensive reporting by the UNAMA.<sup>183</sup> It also relies on public statements made by governmental leaders<sup>184</sup> and decisions by U.S. courts.<sup>185</sup> It is impressively thorough. Furthermore, this is only the public version—the unredacted report surely compiles even more pertinent information. Lastly, the ICC’s investigation focuses mainly on the United States interrogation program from 2003 to 2004.<sup>186</sup> Thus, the pool of relevant information and evidence relevant to the United States remains finite, whereas the Taliban’s crimes are ongoing and create an even heavier lift.

No doubt, investigating alleged war crimes and crimes against humanity committed during the armed conflict in Afghanistan since May 1, 2003, by the United States, the former Afghan government, and the Taliban is a big undertaking. However, some of the legwork has already been done.

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178. *Id.*

179. *Id.* at 88–121.

180. Elderfield, *supra* note 118.

181. Request to Investigate, *supra* note 28.

182. *Id.* para. 251.

183. *Id.* para. 255.

184. For instance, the Prosecutor relies on a memo written by Associate Deputy Attorney General David Margolis to argue that the United States breached the Rome Statute. Request to Investigate, *supra* note 28, para. 325–326.

185. Request to Investigate, *supra* note 28, at n.509, 510, 524, 525, 546–548.

186. Request to Investigate, *supra* note 28, para. 189.

*B. Disagreements between the AC and the PTC*

As mentioned, under Article 15(1), the ICC Prosecutor has discretion to investigate on their own initiative.<sup>187</sup> Under Article 53, *proprio motu* investigations require the Prosecutor to assess jurisdiction, admissibility, and the interests of justice.<sup>188</sup> Then, the PTC reviews the request.<sup>189</sup> Some commentators had thought that such a review would entail the same considerations controlling the Prosecutor—i.e., jurisdiction, admissibility, and the interests of justice.<sup>190</sup> However, the Prosecutor has only launched a handful of *proprio motu* investigations, and never had the PTC refused an investigation on the grounds of not serving the interests of justice<sup>191</sup> until, of course, the investigation in Afghanistan.<sup>192</sup>

In its decision on the request to investigate the situation in Afghanistan, the PTC interpreted itself as “a specific, fundamental and decisive filtering role.”<sup>193</sup> In the same vein, it argued, Article 53(1)(c) was not only a factor for the Prosecutor to weigh, but that it was also available to the Chamber itself.<sup>194</sup> The PTC stated:

“Article 53 of the Statute makes the investigation's consistency with the interests of justice a statutory legal parameter governing the exercise of the prosecutorial discretion; as such, it follows that it also falls within the scope of the scrutiny mandated to the Chamber over that discretion for the purposes of the determinations under [A]rticle 15.”<sup>195</sup>

The PTC then recalled the factors inherent in such an analysis “including in relation to the gravity of the alleged conducts, the potential victims' interests and the likelihood that investigation be

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187. Rome Statute, *supra* note 11, art. 15(1).

188. *Id.* art. 53(1).

189. *Id.* art. 15(3).

190. Yarak, *supra* note 88.

191. *Id.*

192. Pre-Trial Decision, *supra* note 69.

193. *Id.* para. 30.

194. *Id.* para. 88.

195. *Id.*



feasible and meaningful under the relevant circumstances.”<sup>196</sup> However, the PTC never actually analyzed the interests of the victims or the gravity of the crime.<sup>197</sup> Instead, it focused almost entirely on feasibility—specifically, the time elapsed between alleged crimes and the investigation; the level of cooperation from parties under investigation; and the availability of evidence and suspects.<sup>198</sup> While acknowledging that jurisdiction and admissibility were met, the PTC nevertheless rejected the request because the situation was overly complex and would require substantial time and resources from the Court.<sup>199</sup>

This was a misreading of the Article 53(1)(c) analysis.<sup>200</sup> The PTC boiled down the interests of justice to a common denominator rather than applying a balancing test, as required by the OTP policy paper.<sup>201</sup> The Chamber says little about the interests of victims, other than speculating that victims *may* become frustrated at a lengthy trial process.<sup>202</sup> Additionally, the gravity of the crimes is mainly addressed in terms of admissibility—not as a factor of the interests of justice.<sup>203</sup> The PTC even acknowledges that “the gravity threshold under [A]rticle 17(1)(d) is met in respect of all the ‘categories’ of crimes for which the Prosecution requests authorisation to investigate.”<sup>204</sup> Instead of balancing gravity and the interests of victims, the PTC focuses almost exclusively on feasibility.<sup>205</sup> But as mentioned, feasibility is not even “a separate factor under the Statute” for “determining whether to open an investigation.”<sup>206</sup> Moreover, the PTC does not reference the object and purpose of the Rome Statute. Unsurprisingly, the Prosecutor appealed to the AC, who rightly concluded that “the Pre-Trial Chamber did not properly assess the interests of justice.”<sup>207</sup>

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196. *Id.* para. 35.

197. Appeals Decision, *supra* note 1, para. 49.

198. Pre-Trial Decision, *supra* note 69, para. 91.

199. *Id.* para. 96.

200. Appeals Decision, *supra* note 1, para. 49.

201. Policy Paper, *supra* note 87, at 2.

202. Pre-Trial Decision, *supra* note 69, para. 96.

203. *Id.* para. 80–86.

204. *Id.* para. 86.

205. *Id.* at para. 87–96.

206. Preliminary Examinations, *supra* note 110, at para. 70.

207. Appeals Decision, *supra* note 1, para. 49.

While that was sufficient to overturn the decision, the AC did not stop there. Rather, the judges said that the PTC should not have referenced the interests of justice at all in its decision to deny the investigation.<sup>208</sup> The AC pointed to Article 15(4) of the Rome Statute, which says that the PTC should approve *proprio motu* investigations if there is a reasonable basis for the accusations and the issue falls within the Court's jurisdiction.<sup>209</sup> Accordingly, the AC found that concerns over justice "are not relevant for the purposes of the pre-trial chamber's decision."<sup>210</sup> It concluded that the PTC's *proprio motu* review should not include an assessment of the interests of justice.<sup>211</sup> While the AC could have amended the decision based on the fact that the PTC had not applied the interests of justice properly, it instead removed interests of justice as an element available to the PTC.<sup>212</sup>

### C. The Future of Prosecutorial Discretion

Nevertheless, when the AC handed down its decision, human rights advocates were largely satisfied with the holding.<sup>213</sup> After all, Bensouda's application was impressive in scope, and for the first time in the ICC's history, the United States might not have been able to evade its reach.<sup>214</sup> But that excitement overlooked important implications for prosecutorial discretion and judicial oversight. Specifically, the holding undermines the Rome Statute's two-pronged system, which seeks to balance prosecutorial discretion with judicial oversight.<sup>215</sup> During negotiations over the Rome Statute, the delegates gave the Prosecutor the ability to launch an investigation on their own initiative, as well as to deny investigations if they found it did not serve the interests of justice.<sup>216</sup> But some of the drafters of the Rome Statute worried that the "Prosecutor could become [...] a 'lone ranger running wild' around the world targeting highly sensitive political

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208. *Id.* para. 37.

209. *Id.* para. 34.

210. *Id.* para. 35.

211. *Id.* para. 37.

212. *Id.* para. 35.

213. *ICC Greenlights Afghanistan Investigation*, HUM. RTS. WATCH (Mar. 5, 2020), <https://www.hrw.org/news/2020/03/05/icc-greenlights-afghanistan-investigation>.

214. Uma, *supra* note 149.

215. Pre-Trial Decision, *supra* note 69, para. 32.

216. Gilbert Bitti, *The Interests of Justice- where does that come from?*, EJIL (Aug. 14, 2019), <https://www.ejiltalk.org/the-interests-of-justice-where-does-that-come-from-part-ii/>.

situations.”<sup>217</sup> State representatives were specifically concerned that “the Prosecutor might open politically motivated investigations by virtue of his *proprio motu* powers.”<sup>218</sup> To avoid such a fate, the drafters agreed that a Prosecutor’s *proprio motu* powers “would be subject to judicial review by a pretrial chamber before the Prosecutor could actually proceed with the investigation.”<sup>219</sup> This delicate balance of prosecutorial discretion and judicial oversight was, in a way, two sides of the same coin.

Now, the Court is chipping away at judicial oversight. According to the Rome Statute, when a Prosecutor refuses an investigation citing interests of justice, they are subject to the PTC’s review under Article 53(3).<sup>220</sup> This requires judicial review when the prosecutor chooses *not* to investigate over interests of justice, but the Article says nothing about the limits of prosecutorial discretion when a prosecutor *does* choose to investigate.<sup>221</sup> Now, we know that the PTC cannot deny an investigation exclusively citing interests of justice,<sup>222</sup> even if the investigation reeks of political motivation. This would have surely alarmed the drafters of the Statute, who were most concerned about an overactive prosecutor, not an underactive one.<sup>223</sup> Khan has stated he will *deprioritize* the United States and former Afghan government in the investigation,<sup>224</sup> not discontinue it. This strategy cleverly evades Article 53(3) review. In other words, judicial oversight is severely hamstrung in Khan’s *proprio motu* investigation into Afghanistan.

While commentators have lamented Khan’s approach to the investigation into Afghanistan, no one has posited theories on how the Court may correct it. Article 54(1)(a) states that the ICC Prosecutor shall “extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this

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217. Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 A.J.I.L. 510, 513 (2003).

218. Stahn, *supra* note 7, at 265.

219. Danner, *supra* note 217, at 513.

220. Rome Statute, *supra* note 11, art. 53(3).

221. *Id.*

222. Appeals Decision, *supra* note 1, para. 37.

223. Carsten Stahn, *supra* note 7, at 270.

224. Statement of the Prosecutor, *supra* note 2.

Statute.”<sup>225</sup> However, Article 15, which instructs the PTC on its reviewal process, does not mention Article 54.<sup>226</sup> Moreover, unlike Article 53(1)(c), the PTC has never invoked Article 54 as grounds for denying an investigation. The only thing standing in Khan’s way is Rule 55(1), which requires the PTC to “decide on the procedure to be followed” and to “take appropriate measures for the proper conduct of the proceedings.”<sup>227</sup> While this will surely create some procedural delays, it is hard to imagine that either chamber would have the opportunity to constrain the prosecutor for any reason other than jurisdiction and admissibility.

Before the AC’s 2020 ruling, the PTC may have been able to leverage Article 53 and find that Khan’s request will not serve the interests of the victims or the object and purpose of the treaty, and therefore, it will not serve the interests of justice. Of course, denying an investigation on this basis is meant to be a last resort,<sup>228</sup> but Khan’s approach is so severely flawed that it requires judicial intervention. This may seem to advocate for the PTC to stop Khan’s investigation wholesale since Articles 53(1)(c) and 53 (2)(c) are meant to deny an investigation, not redefine its scope.<sup>229</sup> But that oversimplifies the options available to the Prosecutor. The PTC could have denied Khan’s request citing interests of justice as it did when it denied Bensouda’s initial request.<sup>230</sup> For reasons already stated, the PTC would have been on solid footing to argue that the balancing test requires investigating all violations in the situation in Afghanistan rather than just those committed by the Taliban.<sup>231</sup> Moreover, the PTC will soon have specific feedback from victims on Khan’s strategy,<sup>232</sup> which will give context—rather than mere speculation—to Khan’s application. Based on this approach, the PTC could have denied the investigation, and then, under Article 15(5), the Prosecutor could revise and resubmit a request for an investigation addressing concerns voiced by the PTC—and without prejudice to the PTC’s prior

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225. Rome Statute, *supra* note 11, art. 54(1)(a).

226. *Id.* art. 15(4).

227. International Criminal Court, *Rules of Procedure and Evidence*, ICC-ASP/1/3, R. 55(1) (2013).

228. Policy Paper, *supra* note 87, at 9.

229. *Id.* at 2.

230. Pre-Trial Decision, *supra* note 69.

231. *See supra* Part III.A.ii.

232. Registry Submission, *supra* note 166, para. 1.

denial.<sup>233</sup> Unfortunately, the AC's prior decision has made this impossible. The PTC can only deny a request on grounds of admissibility and jurisdiction.<sup>234</sup> If those elements are met, Khan is effectively given *carte blanche*.

#### IV. CONCLUSION

Unchecked prosecutorial discretion has been a concern since the drafting of the Rome Statute, with some cautioning that “opportunistic constructions of the ICC Statute driven by the need to generate activity will linger in the future, distorting the proper role of the ICC in the campaign against impunity and the protection of human rights.”<sup>235</sup> With the AC's 2020 ruling on Afghanistan, the Court has continued to chip away at judicial oversight. This may have seemed innocuous at the time, but the outcome is much less palatable when the deck is shuffled and a different type of prosecutor takes over. After all, previous prosecutors, for all their faults, did not make dramatic reversals to an established investigation. While no stranger to criticism, the ICC's first Prosecutor Louis Moreno Ocampo refused to make decisions based on global politics and approached his *proprio motu* powers with restraint.<sup>236</sup> Bensouda, on the other hand, proved methodical and thoughtful, with a penchant for “‘in-depth' and 'open-ended' holistic preliminary examination investigations.”<sup>237</sup> In 2021, Khan became the third prosecutor in the ICC's history.<sup>238</sup> He says he will prioritize efficiency over expansion and courtroom success over drawn-out investigations.<sup>239</sup> While his get-things-done approach breathes fresh life into a notoriously slow-paced court, serving justice is not akin to running a business. If efficiency and feasibility become the mantra of the day, then Khan will continue cowing to ominous foes

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233. Rome Statute, *supra* note 11, art. 15(5).

234. Appeals Decision, *supra* note 1, para. 34.

235. Schabas, *supra* note 170.

236. Douglas Guilfoyle, *Lacking Conviction: Is the International Criminal Court Broken? An Organisational Failure Analysis*, 20 MELBOURNE J. OF INT'L L. 401, 427.

237. *Id.* at 429.

238. *ICC: New Prosecutor Takes Up Mandate*, HUM. RTS. WATCH (Jun. 16, 2021), <https://www.hrw.org/news/2021/06/16/icc-new-prosecutor-takes-mandate#:~:text=Karim%20Khan%2C%20the%20court's%20third,the%20former%20Yugoslav%20and%20Rwanda>.

239. Anthony Deutsch, *New ICC prosecutor vows to take "stronger cases" to trial*, REUTERS (Jun. 16, 2021), <https://www.reuters.com/world/new-icc-prosecutor-vows-take-stronger-cases-trial-2021-06-16/>.

like the United States and selecting easy-to-win battles in third world countries. As such, the Court will continue to suffer from its reputation as a political player.

The Court may yet come up with a solution to address Khan's political investigation. The AC's previous holding concerned an initial request to open an investigation, whereas now the prosecutor requests reopening of an investigation after state deferral. The Court may choose not to rely on the same standards this time around, although that may unearth inconsistencies even more problematic than the issues discussed in this paper. Either way, the PTC cannot review Khan's request under interests of justice. It will be interesting to see what, if anything, remains of judicial oversight in *proprio motu* investigations moving forward.