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THE INTERNATIONAL CRIMINAL COURT'S ARBITRARY EXERCISE OF ITS DUTIES UNDER THE ROME STATUTE TO THE BENEFIT OF WESTERN GLOBAL SUPREMACY

by Azadeh Shahshahani* and
Sofía Verónica Montez**

I. Introduction.

A. *The International Criminal Court and the Rome Statute.*

The International Criminal Court (ICC) is a constituent institution of the United Nations (UN) that investigates and prosecutes perpetrators of genocide, war crimes, crimes against humanity, and the crime of aggression.¹ Established in 1998 by the Rome Statute,² the ICC may open an investigation through referrals by state parties to the Statute; referrals by the UN Security

Council; or the prosecutor's own initiative.³ Additionally, non-party states may extend qualified jurisdiction to the ICC to prosecute cases within their territories, setting the scope of investigations and prosecutions as well as the dates they shall encompass.⁴

The Rome Statute assigns various other duties to the ICC's Office of the Prosecutor (OTP). Article 53(1) generally mandates the OTP to conduct an investigation upon a reasonable basis to believe that a crime is, or has been, committed within the ICC's jurisdiction.⁵ However, this jurisdiction may be proscribed by the Principle of Complementarity, where a state has undertaken its own domestic investigatory and prosecutorial endeavors rendering ICC action redundant.⁶ Moreover, Article 42(1) mandates that the Prosecutor serve independently of "instructions from any external source."⁷

B. *The ICC as a Medium for Geopolitical Power Plays.*

Since the ICC's creation, the United States has sought to stay beyond its reach. In 2002, John Bolton, representing the Bush administration, declared to the UN Secretary General that the United States had "no legal obligations arising from its signature on" the Rome Statute.⁸ President Bush subsequently authorized use of military force to retake any U.S. nationals taken into the ICC's custody and prohibited congressional funding of the ICC.⁹ The United States further threatened to withdraw troops from UN peacekeeping operations in Bosnia unless granted immunity from ICC prosecution,¹⁰ and the Bush administration entered into Bilateral Immunity Agreements (BIAs)¹¹ with over a

3 Rome Statute, *supra* note 1, at art. 13.

4 Rome Statute, *supra* note 1, at art. 12(3).

5 Rome Statute, *supra* note 1, at art. 53(1).

6 Rome Statute, *supra* note 1, at art. 17.

7 Rome Statute, *supra* note 1, at art. 42(1).

8 *U.S. Formally Announces its Intent Not to Ratify the Rome Statute*, AM. BAR ASS'N INT'L CRIM. CT. PROJECT, <https://www.abacc.org/about-the-icc/the-us-icc-relationship/> (last visited Feb. 25, 2023) [hereinafter ABA-ICC].

9 ABA-ICC, *supra* note 8.

10 Edith M. Lederer, *US Vetoes Peacekeeping Extension*, GLOBAL POLICY FORUM (June 30, 2002), <https://archive.globalpolicy.org/security/veto/2002/0630icc.htm>.

11 BIAs are also known as "Section 98 agreements" after Article 98(2) of the Rome Statute, which generally prohibits the ICC from requiring member States to act in ways that violate their international agreements, including BIAs. Rome Statute, *supra* note 1, at

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1 See Rome Statute of the International Criminal Court, arts. 2, 5, July 1, 2002, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; see also *International Criminal Court*, ENCYCLOPEDIA BRITANNICA (last updated Feb. 18, 2023), <https://www.britannica.com/topic/International-Criminal-Court>.

2 Rome Statute, *supra* note 1, at art. 1.

hundred states to prohibit them from surrendering any U.S. citizens to the ICC,¹² earning it criticism from various governments and regional groups, including the European Union and The Southern Common Market (MERCOSUR).¹³

Notably, during discussions in 2010 to add a “crime of aggression” to the list of crimes in the Rome Statute, the United States actively attempted to except its own acts of aggression in Kosovo from the definition.¹⁴ The United States has justified its continued efforts to undermine the ICC by framing any potential actions against U.S. nationals as inherently political.¹⁵

The United States shifted course when the ICC opened an investigation on Darfur, Sudan in 2005.¹⁶ Since then, the United States has supported ICC investigations and prosecutions against its political opponents in Africa.¹⁷ Within a decade, the ICC had conducted eight investigations, all exclusively on African countries, and indicted over a dozen individuals, all of

art. 98(2).

12 See Q&A: *The International Criminal Court and the United States*, HUM. RTS. WATCH (Sept. 2, 2020), <https://www.hrw.org/news/2020/09/02/qa-international-criminal-court-and-united-states>. Importantly, the United States may have relied on power imbalances to persuade other parties to join these agreements given that most of them were aimed at “developing countries dependent on nonmilitary aid, including aid for health, relief, and border security programs.” See also Antoinette Pick-Jones, *Towards Permanently Delegitimizing Article 98 Agreements: Exercising the Jurisdiction of the International Criminal Court Over American Citizens*, 93 N.Y.U. L. REV. 1779, 1803 (2018).

13 *Countries Opposed to Signing a US Bilateral Immunity Agreement (BIA): US Aid Lost in FY04 & FY05 and Threatened in FY06*, COAL. FOR THE INT’L CRIM. CT., https://web.archive.org/web/20181221135105/http://www.iccnw.org/documents/CountriesOpposedBIA_AidLoss_current.pdf (last visited Dec. 21, 2018).

14 See Special briefing by Gordon Duguid, Acting Deputy Department Spokesman, U.S. Department of State, with Harold Hongju Koh, Legal Advisor, U.S. Department of State, and Stephen J. Rapp, Ambassador-at-Large for War Crimes Issues, U.S. Department of State Office of Global Criminal Justice, U.S. Engagement With The International Criminal Court and The Outcome Of The Recently Concluded Review Conference (June 15, 2010), https://web.archive.org/web/20100625225603/http://www.state.gov/s/wci/us_releases/remarks/143178.htm.

15 See *id.*

16 See, e.g., ABA-ICC, *supra* note 8.

17 See ABA-ICC, *supra* note 8.

African heritage.¹⁸

In contrast, powerful countries evade the Court’s watch by leveraging economic relations and vetoing the UN Security Council’s referrals.¹⁹ Tellingly, Iraq acceded to the Rome Statute in 2005 but, facing pressure from U.S. diplomats, later withdrew its accession.²⁰ Similarly, investigations involving Afghanistan, which the United States attacked; Colombia, which was a U.S. ally; and Georgia, where Russia, a permanent member of the UN Security Council like the United States, was involved, have been significantly slower than investigations involving African states.²¹ Though the ICC has recently diversified its caseload,²² its disproportionate focus on the Global South, and specifically African states, is still hailed by the United States and the Western bloc.²³ Plus, in the very few instances where the OTP’s attention was directed at the United States and its allies, the reaction has been markedly different.

II. International Human Rights Law Violations by Western Powers.

A. Afghanistan.

In 2017, then-ICC Prosecutor Fatou Bensouda requested an investigation for war crimes in Afghanistan.²⁴

18 David Bosco, *Why is the International Criminal Court Picking Only on Africa?*, WASH. POST (Mar. 29, 2013), https://www.washingtonpost.com/opinions/why-is-the-international-criminal-court-picking-only-on-africa/2013/03/29/cb9bf5da-96f7-11e2-97cd-3d8c1afe4f0f_story.html.

19 HUM. RTS. WATCH, *supra* note 12.

20 BOSCO, *supra* note 18; IRAQ, COAL. FOR THE INT’L CRIM. CT., <https://www.coalitionfortheicc.org/country/iraq> (last visited Feb. 26, 2023).

21 Anthony Dworkin, *Why America is Facing Off Against the International Criminal Court*, EUROPEAN COUNCIL ON FOREIGN RELS. (Sept. 08, 2020), https://ecfr.eu/article/commentary_why_america_is_facing_off_against_the_international_criminal_cou.

22 See *Cases*, INT’L CRIM. CT., <https://www.icc-cpi.int/cases> (last visited Feb. 28, 2023).

23 For instance, in September 2022, U.S. Secretary of State Antony Blinken celebrated on Twitter “the opening of [the ICC’s] trial proceedings against Mahamat Said Abdel Kani, a former Séléka commander in the Central African Republic.” Antony Blinken (@SecBlinken), TWITTER (Sept. 27, 2022, 1:30 PM), <https://twitter.com/SecBlinken/status/1574813865216708608?s=20&t=ZYjR8H-bCsA3brkwjvwtIlg>.

24 Office of the Prosecutor, International Criminal Court, *Situation in the Islamic Republic of Afghanistan*, 6, PreTrial Chamber III, ICC02/17-7-Red (Nov. 20, 2017).

The ICC Appeals Chamber authorized Bensouda in 2020 to investigate crimes by “the Taliban, Afghan National Security Forces, and United States military and Central Intelligence Agency (CIA) personnel.”²⁵ Though the United States is not a state party to the Statute, Afghanistan has been since 2003,²⁶ giving the OTP jurisdiction over crimes committed within its borders.²⁷ This authorization came after the ICC’s Pre-Trial Chamber II had erroneously denied Bensouda’s request by focusing on the “interests of justice” rather than whether a reasonable factual basis exists to justify the investigation.²⁸

The United States’ response was swift and drastic. Bolton, then-U.S. National Security Advisor, announced that the Trump administration would oppose all ICC efforts to investigate and prosecute citizens and allies of the United States.²⁹ Bensouda later confirmed that her U.S. visa had indeed been revoked.³⁰ President Trump later issued Executive Order No. 13,928, freezing the assets of ICC officials and banning their families from entering the United States.³¹

On April 2021, as Bensouda’s term neared its end,

25 HUM. RTS. WATCH, *supra* note 12.

26 *Afghanistan*, THE INT’L CRIM. CT. PROJECT, <https://www.aba-icc.org/country/afghanistan/> (last updated May 10, 2021).

27 HUM. RTS. WATCH, *supra* note 12 (explaining that while the ICC does have jurisdiction within a state’s borders, it is a “court of last resort,” and may “only exercise its jurisdiction when a country is either unwilling or genuinely unable to investigate these grave crimes” (emphasis added)).

28 *Afghanistan: ICC Appeals Chamber Authorises the Opening of an Investigation*, INT’L CRIM. CT. (Mar. 5, 2020), <https://www.icc-cpi.int/news/afghanistan-icc-appeals-chamber-authorises-opening-investigation> (“Noting that the Pre-Trial Chamber’s decision contained all the necessary factual findings and had confirmed that there is a reasonable basis to consider that crimes within the ICC jurisdiction . . . the Appeals Chamber decided to authorise the opening of an investigation itself, rather than to send the matter back to the Pre-Trial Chamber for a new decision.”).

29 ABA-ICC, *supra* note 8 (“In September 2018, then-National Security Advisor John Bolton announced in a speech that the Trump administration would use ‘any means necessary’ to protect U.S. citizens and allies from ICC investigations and prosecutions”).

30 ABA-ICC, *supra* note 8 (“[Former] US Security of State Michael Pompeo announced ‘a policy of U.S. visa restrictions on those individuals directly responsible for any ICC investigation of U.S. personnel,’ including those who ‘take action to request or further such an investigation’”).

31 Exec. Order No. 13,928, 31 C.F.R. App’x A to Pt. 520 (2020).

President Biden lifted E.O. 13,928 and other Trump-era penalties,³² and Silvia Fernández de Gurmendi, President of the ICC Assembly of State Parties, stated that the Court “stands ready to reengage with the US in the continuation of that tradition based on mutual respect and constructive engagement.”³³ Bensouda’s successor, Karim Khan, would bring a more U.S.-friendly approach to the Office.

B. Palestine.

The UN General Assembly granted Palestine “non-member observer State” status in November 2012.³⁴ The ICC subsequently accepted Palestine’s status and its capacity to delegate jurisdiction to the Court.³⁵ The Palestinian government then filed a declaration recognizing the ICC’s jurisdiction under Article 12(3) over its territories, including East Jerusalem, from June 13, 2014, onward.³⁶

The United States has repeatedly challenged Palestine’s declaration for lacking recognition as a sovereign state,³⁷ even though the United States leads the efforts

32 See Antony J. Blinken, *Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court*, U.S. DEPT. OF STATE, (Apr. 2, 2021), <https://www.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court/#:~:text=Today%2C%20President%20Biden%20revoked%20Executive,in%20connection%20with%20the%20Court.>

33 *The ICC Welcomes the Decision by the US Government Ending Sanctions and Visa Restrictions Against ICC Personnel*, INT’L CRIM. CT., (Apr. 3, 2021), <https://www.icc-cpi.int/news/icc-welcomes-decision-us-government-ending-sanctions-and-visa-restrictions-against-icc>; see also Blinken, *supra* note 32; *USA removes sanctions on ICC officials*, COAL. FOR THE INT’L CRIM. CT. (June 29, 2021), <https://www.coalitionfortheicc.org/news/20210629/usa-removes-sanctions-icc-officials>.

34 G.A. Res. 67/19, Status of Palestine in the United Nations (Nov. 29, 2012).

35 See *Hague-based ICC Accepts Palestine’s Status*, AL JAZEERA (Dec. 09, 2014), <https://www.aljazeera.com/news/2014/12/9/hague-based-icc-accepts-palestines-status>.

36 Mahmoud Abbas, President of the State of Palestine, *Declaration Accepting the Jurisdiction of the International Criminal Court* (Dec. 31, 2014); See *Palestine Declares Acceptance of ICC Jurisdiction Since 13 June 2014*, INT’L CRIM. CT. (Jan. 5, 2015), <https://www.icc-cpi.int/news/palestine-declares-acceptance-icc-jurisdiction-13-june-2014>.

37 Press Release, U.S. Department of State, *Opposing International Criminal Court Attempts to Affirm Territorial Jurisdiction Over the Palestinian Situation* (Feb. 5, 2021).

to block Palestinian attempts at attaining statehood.³⁸ Moreover, the United States contends, the ICC may only exert jurisdiction over states that have consented to it or that have otherwise been referred to the ICC by the UN Security Council, neither of which is the case for Israel.³⁹

Israel has similarly contested the declaration,⁴⁰ with state officials accusing the Court of “acting without authority”⁴¹ and emboldening “terrorist groups” through “pure anti-Semitism.”⁴² The Israeli government outright denied committing any war crimes in what the Public Committee Against Torture in Israel refers to as a “culture of falsehood and cover-up that still exists in the [Israeli] security system.”⁴³

Other states have joined in by threatening to withhold subsidies to the ICC and the Palestinian Occupied Territories.⁴⁴ Stephen Harper, then-Prime Minister of Canada, echoed the position that Palestine is not a state and is therefore incapable of extending jurisdiction to the Court.⁴⁵ When Justin Trudeau succeeded

38 See, e.g., Louis Charbonneau, *Palestinian Statehood Resolution Fails at U.N Council, U.S. Votes Against*, REUTERS (Dec. 30, 2014, 07:18 PM), <https://www.reuters.com/article/us-mideast-palestinians-un/palestinian-statehood-resolution-fails-at-u-n-council-us-votes-against-idUSKBN0K81CR20141231>.

39 Opposing International Criminal Court Attempts to Affirm Territorial Jurisdiction Over the Palestinian Situation, *supra* note 37.

40 Peter Beaumont, *ICC to Investigate Alleged Israeli and Palestinian War Crimes*, THE GUARDIAN (Dec. 20, 2019, 11:07 AM), <https://www.theguardian.com/law/2019/dec/20/icc-to-investigate-alleged-israeli-and-palestinian-war-crimes>.

41 *Israel ‘Will Not Co-operate’ with ICC War Crimes Investigation*, BBC NEWS (Apr. 09, 2021), <https://www.bbc.com/news/world-middle-east-56687437>.

42 Mark Kersten, *This Time, the International Criminal Court is Watching*, AL JAZEERA (May 27, 2021), <https://www.aljazeera.com/opinions/2021/5/27/this-time-the-international-criminal-court-is-watching>.

43 BBC NEWS, *supra* note 41; Lubna Masarwa, *Israeli Anti-torture Body Refers Israel to International Criminal Court*, MIDDLE E. EYE (June 10, 2022, 09:00 AM), <https://www.middleeasteye.net/news/israel-anti-torture-body-refers-international-criminal-court>.

44 Julian Borger, *Hague Court Under Western Pressure Not to Open Gaza War Crimes Inquiry*, THE GUARDIAN (Aug. 18, 2014, 03:00 AM), <https://www.theguardian.com/law/2014/aug/18/hague-court-western-pressure-gaza-inquiry>.

45 Paul Heinbecker, *Canada’s Bluster Over Palestine’s ICC Bid Betrays its Principles*, THE GLOBE AND MAIL (Jan. 28, 2015), <https://www.theglobeandmail.com/opinion/canadas-bluster-over-pales->

Harper, Israeli Prime Minister Benjamin Netanyahu requested he continue opposing any ICC investigations in Palestine.⁴⁶ Trudeau thereafter issued a letter to the ICC affirming such continuation, emphasizing Canada’s anticipated contribution of \$10.6 million to the Court that year.⁴⁷ Other key financial contributors to the ICC, including the United Kingdom and France, have used similar tactics to prevent this probe.⁴⁸

C. Reversal of Investigations on Western Powers at the Direction of Current ICC Prosecutor Karim Khan.

Both the Afghanistan and the Palestine investigations have slowed down significantly since Khan took office. Khan requested the deprioritization of investigations into U.S. actions in Afghanistan probe in September 2021 on the basis of “the limited resources available to” the OTP.⁴⁹ Though Khan has since stated that deprioritization need not suggest a lack of investigation, and though the judges at the ICC’s Pre-Trial Chamber II acknowledge the OTP may define the scope of its operations, they urged that this decision would signal that the OTP is “overlooking crimes allegedly committed by” the United States.⁵⁰ Khan has likewise dedicat-

[tines-icc-bid-betrays-its-principles/article22672289/](https://www.theguardian.com/international-development/2021/sep/27/icc-bid-betrays-its-principles/article22672289/).

46 Steve Sweeney, *Canada Says Palestine Not a State, ICC Can’t Investigate Israeli War Crimes*, PEOPLE’S WORLD (Feb. 27, 2020, 01:31 PM), <https://www.peoplesworld.org/article/canada-says-palestine-not-a-state-icc-cant-investigate-israeli-war-crimes/>.

47 *Id.*

48 Borger, *supra* note 44 (noting that these two states have attempted to persuade Palestine to withdraw its request for an investigation).

49 Statement, ICC Office of the Prosecutor, 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 authorization to resume investigations in the Situation in Afghanistan (Sept. 27, 2021).

50 Ehsan Qaane, *ICC Afghanistan Investigation Re-Authorized: But Will It Cover the CIA, ISKP and the Forces of the Islamic Republic, as Well as the Taliban?*, AFG. ANALYSTS NETWORK (Nov. 11, 2022), <https://www.afghanistan-analysts.org/en/reports/rights-freedom/icc-afghanistan-investigation-re-authorised-but-will-it-cover-the-cia-iskp-and-the-forces-of-the-islamic-republic-as-well-as-the-taliban/>. Amnesty International noted that “the Prosecutor [taking] a decision which aligns with the objectives of those who had sought to infringe his Office’s hard-fought independence, is almost unfathomable.” *Afghanistan: ICC Prosecutors Statement on Afghanistan Jeopardizes His Office’s Legitimacy and Future*, AMNESTY INT’L (Oct. 05, 2021), https://www.amnesty.org/en/documents/ior53/4842/2021/en/?utm_source=annual_report&utm_medium=epub&utm_campaign=2021&utm_ter-

ed minimal attention to the Palestine probe, even as various Israeli officials have expressed certainty that Bensouda would have already taken action had she remained in the OTP.⁵¹

Khan's approach may best be understood as working within the global hegemonic political order.⁵² Great-power politics are useful in examining the ICC's failure to reach states that the United States, Russia, and China—three of the greatest economic powers of today—have a vested interest in exempting.⁵³ However, Khan's encouragement to expedite an investigation against Russia for its crimes in Ukraine in 2022,⁵⁴ after having deprioritized his investigation on the U.S. only five months prior on the basis of "limited resources," indicates a suspect unwillingness to antagonize Western powers.

The "limited resources" argument echoes the rationale of the ICC's Pre-Trial Chamber II when it originally declined Bensouda's request for an investigation in Afghanistan.⁵⁵ Particularly, the Chamber referenced the United States' uncooperativeness and the need to focus on operations with the highest likelihood of success.⁵⁶ For the OTP to suspend an inquiry on the United States' alleged crimes on this basis, then, while seeking an expedited investigation against Russia, another state that is just as likely to spurn the ICC's authority,⁵⁷ is

m=english.

51 Yonah Jeremy Bob, *One Year of Khan: How Does the Probe Against Israel Look? - Analysis*, THE JERUSALEM POST (last updated June 18, 2022, 07:09 PM), <https://www.jpost.com/israel-news/article-709714>.

52 See Photeine Lambridis, *The International Criminal Court and Afghanistan: Leveraging Politics to Bolster Accountability and Enhance Legitimacy*, 54 N.Y.U.J. INT'L L. POL. 1007, 1019–20 (concluding that the ICC may only assert its legitimacy by declining to yield to political pressures).

53 Bosco, *supra* note 18.

54 Statement, ICC Office of the Prosecutor, Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: "I have decided to proceed with opening an investigation" (Feb. 28, 2022).

55 Office of the Prosecutor, International Criminal Court, *Situation in the Islamic Republic of Afghanistan*, 16, Pre-Trial Chamber II, ICC 02/17-33 (Apr. 12, 2019).

56 *Id.* at 29.

57 See, e.g., Shaun Walker & Owen Bowcott, *Russia withdraws signature from international criminal court statute*, THE GUARDIAN (Nov. 16, 2016, 09:14 AM), <https://www.theguardian.com/world/2016/nov/16/russia-withdraws-signature-from-interna>

nothing short of chimeric.

As for the Israel investigation, Khan has expressed his intention to visit Palestine in 2023, but former ICC defense attorney Nick Kaufman noted that an expression of intent is not a binding commitment.⁵⁸ And, the Netanyahu administration recently declared that "the Jewish people have an exclusive and unquestionable right over all areas of the land of Israel,"⁵⁹ indicating that it deems its apartheid regime justified. This reading is corroborated by Israeli Minister of National Security Itamar Ben-Gvir's support for new legislation immunizing Israeli soldiers and police from accountability under the guise of "security."⁶⁰

III. Weaponization of the Court by Western Powers Through the War in Ukraine.

Though Ukraine is not a party to the Rome Statute, it, like Palestine, has invoked Article 12(3) to allow the ICC to investigate crimes committed within its boundaries since early 2014.⁶¹ With this framework in place, President Biden has called for a trial against Russian President Vladimir Putin for the latter's war crimes in Ukraine.⁶²

The Biden administration is undertaking an internal review to reconcile its self-contradictory positions concerning the Afghanistan and the Ukraine investigations.⁶³ On Afghanistan, the United States has consis-

tional-criminal-court-statute (chronicling Russia's withdrawal of its signature on the Rome Statute following its annexation of Crimea in 2016).

58 *International Criminal Court Prosecutor Says He Aims to 'Visit Palestine' in 2023*, THE TIMES OF ISR. (Dec. 7, 2022, 12:38 PM), <https://www.timesofisrael.com/international-criminal-court-prosecutor-says-he-aims-to-visit-palestine-in-2023/> (however, note that one of his goals is to visit).

59 Maureen Clare Murphy, *How Will ICC Respond to Netanyahu's Threats?*, THE ELEC. INTIFADA (Dec. 29, 2022), <https://electronicintifada.net/blogs/maureen-clare-murphy/how-will-icc-respond-netanyahus-threats>.

60 *Id.*

61 Pavlo Klimkin, Minister of Foreign Affairs of the State of Ukraine, *Declaration by Ukraine Lodged Under Article 12(3) of the Rome Statute*, 8 September 2015, 1 (Sept. 08, 2015).

62 *The U.S. Does Not Recognize the Jurisdiction of the International Criminal Court*, NPR (Apr. 16, 2022, 04:54 PM), <https://www.npr.org/2022/04/16/1093212495/the-u-s-does-not-recognize-the-jurisdiction-of-the-international-criminal-court>.

63 Colum Lynch, *America's ICC Animus Gets Tested by Putin's*

tently asserted its officials retain functional immunity for their actions abroad under customary international law.⁶⁴ Such a claim “may implicitly concede the functional immunity of Russian . . . agents who commit crimes” in Ukraine.⁶⁵ This conclusion would undermine the United States’ global policy of unipolarity by extending its longstanding protections from accountability to a rising imperialist competitor.⁶⁶

Alternatively, the United States may argue that the principle of complementarity shields it, but not Russia, from the ICC’s jurisdiction because it has investigated some of its actions in Afghanistan whereas Russia has failed to investigate its own actions in Ukraine.⁶⁷ But, the Afghan government used a similar argument in trying to delay the ICC’s investigation,⁶⁸ and its failure suggests the United States will not succeed on such grounds. Afghanistan’s domestic investigations were deemed not genuine given “[t]he limited number of cases and individuals prosecuted by [the state].”⁶⁹ The United States has likewise conducted dozens of investigations, often with arbitrary limitations, leading to no charges.⁷⁰ Furthermore, though the CIA is on the record for misrepresenting the nature and extent of its torture and other illicit acts in Afghanistan,⁷¹ the feder-

Alleged War Crimes, FOREIGN POL’Y (Mar. 15, 2022, 03:13 PM), <https://foreignpolicy.com/2022/03/15/us-icc-russia-invasion/>.

64 Adil Ahmad Haque, *At a Crossroad: The Int’l Criminal Court’s Afghanistan Probe and the International Law Commission*, JUST SEC. (Apr. 19, 2018), <https://www.justsecurity.org/55111/intl-criminal-courts-afghanistan-probe-international-law-commission/> (noting that this argument contravenes both Article 27(2) of the Rome Statute as well as the United Nation’s 2017 International Law Commission).

65 *Id.*

66 M. Ali Hamza, ‘Wolfowitz Doctrine’ and Ukraine, DAILY ISLAMABAD POST (Mar. 02, 2022), <https://islamabadpost.com.pk/wolfowitz-doctrine-and-ukraine/> (connecting the mandate of the Wolfowitz Doctrine for “a policy of ‘Unilateralism’” to the U.S.’s position on the War in Ukraine).

67 NPR, *supra* note 62; Rome Statute, *supra* note 1, art. 17.

68 M. Homayoon Azizi, Ambassador of the Islamic Republic of Afghanistan in The Netherlands, *The Situation in the Islamic Republic of Afghanistan - Deferral Request made by the Government of the Islamic Republic of Afghanistan pursuant to Article 18(2) of the Rome Statute*, 5 (Mar. 26, 2020).

69 Office of the Prosecutor, International Criminal Court, Situation in the Islamic Republic of Afghanistan, 24, Pre-Trial Chamber II, ICC 02/17-196 (Oct. 31, 2022).

70 HUM. RTS. WATCH, *supra* note 12.

71 See generally S. Rep. No. 113-288 (2014).

al government has neglected its obligation to meaningfully investigate and prosecute the responsible figures.⁷²

And, though the U.S. Department of Defense has allegedly disciplined hundreds of servicemembers—including over 70 investigations “result[ing] in trial by courts-martial,” almost 200 investigations “result[ing] in either nonjudicial punishment or adverse administrative action,” and other investigations “result[ing] in action at a lower level”—⁷³ the leniency of these penalties, the glaring lack of verifiable prosecutions, and the disproportionate focus on low-level officers over higher-ranking decision makers, indicates that the United States, like Afghanistan, is not preempted from an ICC investigation under the principle of complementarity.⁷⁴ Truly, the United States’ reticence to hold itself accountable was what drove Bensouda to open this investigation in 2017.⁷⁵

IV. The Court’s Violation of the Rome Statute Via Preferential Treatment for Western Powers.

Given these facts, the OTP likely abused its discretion by de-prioritizing inquiries into the United States’ crimes in contravention of Article 53(1) of the Rome Statute. To be clear, while the OTP has the power to define the scope of its investigations, the ICC Pre-Trial Chamber II only conceded this point relative to Khan’s assertion of limited resources, an assertion farcical on its face given the expediency the OTP has dedicated to investigating Russia despite a failure to demonstrate doing so will be less resource-intensive than an equivalent probe on the United States. Therefore, this de-prioritization disregards the OTP’s obligation to duly investigate the U.S. upon a reasonable basis to believe that it committed crimes in Afghanistan.

Furthermore, the OTP has neglected its duties under Article 42(1). Even if the OTP has not received direct

72 HUM. RTS. WATCH, *supra* note 12.

73 *One-Year Follow-up Response of the United States of America to Recommendations of the Committee Against Torture on its Combined Third to Fifth Periodic Reports*, U.S. STATE DEP’T (Nov. 27, 2015), <https://2009-2017.state.gov/j/drl/rls/250342.htm>.

74 Jonathan Marcus Harrison, War Crimes and Complementarity at the ICC: How the United States of America and the United Kingdom Have Responded to War Crimes Allegations (Sept. 2021) (Ph.D. dissertation, University of Leeds).

75 ICC02/17-7-Red, *supra* note 24, at 163–64.

instructions from the United States or other external sources, the unwarranted de-prioritization of the investigation on the United States and the inactivity regarding the Israel probe indicates a submission of the Office to extraneous political pressures at the expense of its legitimacy as an independent entity.

V. Conclusion.

The Rome Statute imposes clear responsibilities upon the OTP to guarantee that justice is administered impartially, free from political abuse. And yet, the ICC has demonstrated a consistent pattern of targeting the foes of the Western bloc to a virtually exclusive degree, which has in turn gained it the conditional support of the United States. Though the Court had an opportunity to defend its legitimacy as an impartial arbiter by holding the United States and Israel accountable to the same standards it maintains for their opponents, it ultimately shelved any meaningful action that would antagonize them and focused its ostensibly limited resources against their imperialist rival. Though this probe against Russia may be as merited as the probes on the Western powers, the OTP's expectation that it be prioritized for having a greater likelihood of success is unsound and illustrates a regression of the ICC's jurisprudence to the undisturbed benefit of Western hegemony. This preferential treatment evidences the blatant politization of the ICC in contravention of its duties under the Rome Statute and serves only to subordinate it to the whims of a political order of unilateral Western supremacy over the world stage.